Neutral Citation Number: [2026] EWCA Crim 141

Case No: 202304432 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
His Honour Judge Mark Brown
T20148005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2026

Before :

LADY JUSTICE ANDREWS
MR JUSTICE TURNER
and
THE RECORDER OF CARDIFF
(Her Honour Judge Tracey Lloyd-Clarke)

- -

Between :

THE KING

- and –

AMANDA O'SHAUGHNESSY

- -
- -

Sallie Bennett-Jenkins KC and Annabel Timan (instructed by **EBR Attridge solicitors**) for the **Appellant**
John Benson KC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 27 January 2026

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Approved Judgment

This judgment was handed down remotely at 2pm on 19th February 2026 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. This is a renewed application by Amanda O'Shaughnessy for leave to appeal against her conviction after trial in Liverpool Crown Court of the murder of her partner, David Butterworth, and for leave to adduce fresh evidence in support of the appeal under section 23 of the Criminal Appeal Act 1968. That evidence consists of nearly 900 pages of Social Service records concerning Ms O'Shaughnessy's troubled childhood and adolescence up to the age of 16 (of which there is a helpful agreed chronological summary) and a psychiatric report by a consultant forensic psychiatrist, Professor Andrew Forrester.

2. Mr Butterworth died from a single horizontal knife wound to the right side of his lower back, inflicted by a sharp carving knife pulled from the knife block in the kitchen of the couple's home. The knife entered Mr Butterworth's body under the ninth rib, and penetrated to a depth of just under six inches, damaging the lower part of his right lung and continuing through the abdominal cavity to penetrate his liver.

3. It is not disputed that Mr Butterworth was stabbed by Ms O'Shaughnessy in the course of an argument in the kitchen in the early hours of the morning of 7 December 2014. The prosecution case at trial was that, in anger, Ms O'Shaughnessy inflicted the wound from behind as Mr Butterworth was walking away from her, at least intending to do him serious bodily harm.

4. Ms O'Shaughnessy's principal defence at trial was self-defence. Her secondary defence was an absence of the necessary intent for murder. She portrayed Mr Butterworth as a drunken and abusive partner. Her account of what happened in the lead up to the stabbing was that Mr Butterworth had been drinking whisky for much of the day on 6 December 2014. Following an argument late in the evening, which was recorded by Ms O'Shaughnessy on an iPhone, Mr Butterworth was asked by her to leave the house, and did so.

5. Ms O'Shaughnessy's evidence was that sometime after 12.45am, by which time he had been outside for over an hour, she went out to the car (where he apparently planned to sleep) to tell him to come back inside. She said he was shouting at her, but she let him come back indoors. In re-examination she said she had no reason to lock him out, because he had not been violent. He asked her why she kept throwing him out, and questioned whether he was the father of their child. She told him to fuck off. He then followed her into the kitchen and gripped her round the throat with his left hand, pinning her back against the kitchen unit, and she thought he was going to kill her. She said he was screaming in her face, with her head pushed backwards, and her left hand was trapped behind her. She reached over her shoulder with her right hand and grabbed the first thing which came to hand, which she swung at him. She did not see what she had taken hold of and did not realise that she had stabbed him. Mr Butterworth let go, said "Mandy, no", and walked off. At that point she realised she had a knife in her hand and saw blood on the floor. She dropped the knife in the sink, and ran after Mr Butterworth straight away to see if he was all right, but could not find him.

6. Although it was not raised in the defence case (and indeed would have been inconsistent with it) the trial judge, His Honour Judge Mark Brown, left the partial defence of loss of control to the jury. If that defence is satisfied, a defendant will be guilty of manslaughter rather than murder.

7. Section 54 of the Coroners and Justice Act 2009 provides, so far as relevant, as follows:

> *"Partial defence to murder: loss of control*
>
> 54 (1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—
> (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
> (b) the loss of self-control had a qualifying trigger, and
> (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
>
> (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
>
> (3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
>
> (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
>
> (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1) the jury must assume the defence is satisfied unless the prosecution proves beyond all reasonable doubt that it is not.
>
> …"

8. In this case the "qualifying trigger" for the loss of self-control was Ms O'Shaughnessy's fear of serious violence towards her from Mr Butterworth (section 55(3) of the 2009 Act).

9. The Judge correctly directed the jury that a loss of self-control means being in such a state of emotion or passion that you are unable to control the impulse to act. A considered act of revenge, whether performed calmly or in anger, is not a loss of self-control, it is an act of retribution and a deliberate decision to get your own back. He told them that the first question they had to determine was whether the prosecution had made them sure that Ms O'Shaughnessy did not lose her self-control, in the sense explained. If they thought that she did or may have done, they would next have to consider what caused her to lose her self-control, and whether it was due to a fear of serious violence from Mr Butterworth. The history of the couple's relationship was relevant to the question whether her loss of control was brought about by previous physical abuse culminating in the events at the time of the killing. The loss of self-control did not have to take place suddenly or immediately after the fear of serious violence, but it had to be attributable to that fear.

10. If they were satisfied that if she did lose her self-control, it was not due to fear of serious violence from him, the defence did not apply. If they thought the loss of control was or may have been attributable to that qualifying trigger, they next had to consider what might have been the reaction of a person of Ms O'Shaughnessy's age and sex, with a normal degree of tolerance and self-restraint, placed in the same predicament as her, (by which the judge explained he meant the violence if any she had suffered from her partner up to and including the time of the killing.) If such a person might have lost their self- control and acted as she did, by stabbing her partner with a kitchen knife, she would be guilty of manslaughter. If they were satisfied that such a person would not have lost their self-control and acted as she did, the prosecution would have proved that the defence did not apply. The fact that she was intoxicated at the time was not to be included as a relevant circumstance when they addressed that part of the legal test.

11. Although the defence was left to the jury and no complaint is made (or could be made) about the way in which the judge directed the jury about it in his summing-up, or in the written route to verdict, no expert evidence from a psychiatrist or psychologist was adduced in support, although the defence legal team at trial had obtained reports from Dr Clare Richardson, a consultant forensic psychologist with a doctorate in psychiatry, and Dr Patrick Verstreken, a consultant forensic psychiatrist. Dr Verstreken had briefly considered that defence and dismissed it. Dr Richardson did not address it specifically in her report.

12. The sole ground of appeal is that fresh psychiatric evidence (from Professor Forrester) supporting the defence of loss of control renders the conviction unsafe. Professor Forrester's opinion is that in consequence of her experience of abuse at the hands of her parents and previous partners, Ms O'Shaughnessy suffers from PTSD and from a variant of that condition, complex PTSD, ("CPTSD") which was not an available diagnosis at the time of the trial, and that it was likely that she was suffering from those conditions at the time of the fatal stabbing. In simple terms, CPTSD may arise in consequence of repeatedly experienced trauma such as neglect, violence and sexual abuse, rather than from a single life-threatening or highly traumatic incident, and may develop over a longer period. Symptoms are similar to typical PTSD but may also include shame/guilt, relationship difficulties, disassociation, and destructive or risky behaviour.

13. Professor Forrester's opinion is that any physical violence, sexual assault, or threats to kill her made by the deceased would have exacerbated those conditions by causing her to re-experience trauma similar to that which she had experienced earlier in her life, intensifying the anxiety, hypervigilance and fear that she experienced as part of her PTSD and CPTSD. It was likely that her experience of anxiety and fear, including fear of serious violence, would be felt with greater intensity and speed than it would by others because of these conditions.

14. Evidence relating to a mental health condition of this nature is accepted to be irrelevant and inadmissible as to the question of its impact on the degree of tolerance and self-restraint that would be exercised by the hypothetical normal person (under s.54(1)(c) and (3)), see *R v Rejmanski* [2017] EWCA Crim 2061 at [25] to [29]. In that case, the Court of Appeal rejected the argument that the jury would be entitled to take such a condition into account in so far as it bore on the *defendant's* general capacity for tolerance and self-restraint. However they accepted that it could be

relevant to the gravity of the qualifying trigger, in the sense that it could make a trigger appear more grave or serious than it would to the ordinary person: see also *R v Sargeant* [2019] EWCA Crim 1088.

15. In addition to the expert evidence of Professor Forrester, the applicant seeks to adduce in evidence the social services records which, it is said, demonstrate many years of abuse, psychological, physical and (to a limited extent) sexual, going back to her very early childhood, some of which she had not recollected at the time of her trial. They also record behavioural problems throughout her adolescence, including a pattern of absenteeism from school. It is contended that the records corroborate the history of her childhood which she gave to the two defence experts who were not called at trial, provide greater detail of the abuse which she suffered, and support the expert diagnosis of Professor Forrester.

16. Since she was convicted as long ago as 16 June 2015, Ms O'Shaughnessy required a substantial extension of time for seeking leave to appeal. On 25 July 2025, a different constitution of this Court granted the extension of time, in order that the applications could be determined on their merits. In principle, the admission of fresh evidence is something which should be decided by the court which will receive that evidence, i.e. the Full Court which hears the substantive appeal. The sole ground of appeal depends entirely upon the fresh evidence, if it is admitted. Therefore in July 2025 the Court adjourned the remaining applications to a "rolled-up" hearing, with the substantive appeal to follow if leave were granted, in accordance with the procedure set out in *R v Cross* [2014] EWCA Crim 96.

17. Among other matters, the Court directed that the Respondent serve a report from its own expert consultant forensic psychiatrist, Dr Cumming, and that the experts should prepare a joint statement identifying the areas of agreement and disagreement between them. That has now happened. Dr Cumming agrees with Professor Forrester's opinion that at the time of the offence Ms O'Shaughnessy was suffering from PTSD/CPTSD emanating from a long history of trauma and abusive experiences. The joint statement signed by both experts states that "we agree that [Ms O'Shaughnessy's] perception of threat from the victim was elevated by that diagnosis and that this may allow a defence of loss of control."

18. There are addendum expert reports addressing supplementary questions asked by the Respondent. In the light of these developments, both parties informed the Court that they did not require the experts to attend for cross-examination, as they were content to rely upon their written expert reports. We were content with that approach. We have considered all the material that the applicant wishes to adduce *de bene esse*.

Background

19. Ms O'Shaughnessy was 29 years old at the date of her conviction. She met Mr Butterworth, who was around 10 years older, in 2010 and they soon formed a relationship. Mr Butterworth moved into Ms O'Shaughnessy's home, where she lived with her two children from previous relationships. They went on to have a child together. The relationship was volatile and there were frequent verbal arguments. Friends, relatives and neighbours gave evidence at trial of overhearing or being told of disagreements between the couple and noticing marks or injuries to both parties.

Some of these witnesses reported that excess alcohol consumption (by both parties) was a key factor in those disagreements.

20. On occasions after such arguments Mr Butterworth would ring a friend, John Mills, and ask to stay at his house, or go to stay with his sister, or else he would sleep in the back of his car. The GP records confirmed that over the years Mr Butterworth had had serious alcohol issues, although there were occasions when his intake was moderate. His drinking appears to have got worse after he lost his job (which happened twice during the relationship). Mr Butterworth reported to his GP in June 2014 that he had an alcohol consumption of 63 units per week. However the pathologist who examined his body found no physiological indications of heavy alcohol use. Ms O'Shaughnessy was also drinking alcohol to excess on a regular basis.

21. In the period leading up to the fatal incident, Ms O'Shaughnessy had sent messages to his mother expressing her frustration about Mr Butterworth's drinking and smoking cannabis and suggesting he was on a "downward spiral". However, Mr Mills gave evidence that Ms O'Shaughnessy had told him after an argument a few weeks before the fatal incident that she had "gone for" Mr Butterworth when he had pushed her away, and that Mr Butterworth had never been violent to her. Ms O'Shaughnessy denied that this conversation had taken place.

22. The police were called to the house on eight occasions since December 2010 because of arguments between the couple. One such occasion was on 17 October 2014, when each of the couple told the police they had been assaulted by the other. This incident was relied on at trial by both the defence and the prosecution. PC Oakley attended the address and saw Mr Butterworth outside with a small scratch on the back of his head; he could smell drink on Mr Butterworth's breath and noticed his eyes were glazed. Ms O'Shaughnessy told the officer there had been an argument and that Mr Butterworth had grabbed her by the throat at arm's length. She had struck him on the head with car keys because she was scared. PC Oakley noticed, and recorded, substantial reddening around her neck and what appeared to be grab marks on her upper arms.

23. Mr Butterworth was arrested. He was so intoxicated that the custody sergeant delayed reading him his rights. When he was fit to be interviewed, he said that Ms O'Shaughnessy was in a bad mood and on her second bottle of wine and that she had picked an argument with him. She had slapped him to the face and neck, and he had put his hands up in self-defence. If he had injured her, which he accepted he may have done, he had done so in self-defence. He said that he had stormed out and as he did so, he felt a blow to the back of his head. Mr Butterworth was not charged with any offence. There appears to be little doubt that the relationship deteriorated further after this incident.

24. Late in the evening of 6 December 2014 one of the neighbours heard the couple arguing but then there was a lull. She said this did not concern her because it was a common thing. The recording and a transcript of that argument were put before the jury as part of the prosecution case. It lasted for around half an hour, between 10.45 and 11.15pm. Ms O'Shaughnessy said that she recorded the argument on her phone from around 10 minutes after it began, because she wanted to play it to Mr Butterworth the next day to show him that it was all his fault. Both of them were shouting and swearing at each other.

25. The prosecution relied upon the recording as evidence that the only person threatening violence in the course of the argument was Ms O'Shaughnessy, and that she was the one who appeared to be goading him into a fight, which they submitted was an odd way to behave if he had attacked her only a few weeks before. Indeed at one point, Mr Butterworth could be heard saying that he was not a violent person and that he hated confrontation and animosity, and she did not challenge those statements. The argument ended when one of the children came downstairs and Ms O'Shaughnessy told Mr Butterworth to get out, which he did. She then put the child back to bed.

26. Mr Butterworth was next captured on CCTV heading towards the local shops, and returned carrying a white bag at around 11.52pm. He then got into the car. In the meantime there was CCTV evidence that Ms O'Shaughnessy was in the lounge on the sofa with a laptop, a bottle of wine and a glass. At 11.40 she left the room and when she returned, she was on the phone to her mother. Thereafter she was seen at various times on the sofa drinking wine, or talking on the phone. Her mother said that in the course of that conversation Ms O'Shaughnessy had told her that Mr Butterworth had "kicked off again" and had gone to his car. Ms O'Shaughnessy said she was going to tell him to come back inside the house as he was not well, and it was a freezing night. The phone call lasted for just under an hour. Although there was no evidence as to the exact time that Ms O'Shaughnessy went out to the car, she was last seen in the lounge at around 12.45am.

27. It is not known precisely when the fatal argument and the stabbing occurred, but Mr Butterworth was seen on CCTV outside the house clutching his back at around 1.08am. He was leaning on the cars, and then seen falling to the ground. He managed to make his way to the doorway of a neighbour's house, knocked on the door, and collapsed. The neighbour called the emergency services. Meanwhile, Ms O'Shaughnessy, who was still inside the house, made a 999 call at 1.09am in which she was distressed and hysterical. She told the operator that she had stabbed her partner, and that he had gripped her by the throat, so she got a knife and stabbed him. When the operator asked why, she said it was because he had endangered her life; she did not know she had stabbed him until she saw the blood, and she did not mean to do it.

28. CCTV showed Ms O'Shaughnessy leaving the property at 1.14, that is, six minutes after Mr Butterworth was first seen outside, and after she had made the 999 call, which lasted 4 minutes 12 seconds. She was heard by a different neighbour to shout "Dave, come back" and then "I found him, I stabbed him, but I didn't mean to do it." She arrived at the neighbour's house where Mr Butterworth had gone for help, whilst the neighbour was speaking to the emergency services, and the neighbour passed the phone to her. She again said she had stabbed her partner in the back in self-defence because he had got hold of her throat. When the police arrived at the neighbour's house Ms O'Shaughnessy was in a distraught state and helping the neighbour to tend to Mr Butterworth, who was lying on the ground outside the neighbour's front door.

29. Ms O'Shaughnessy's account to the police at the scene was consistent with what she had said in the 999 calls. She made non-specific references to problems in the relationship and to domestic violence. Mr Butterworth was by then in a bad way. Paramedics arrived, and he was taken to hospital and underwent an emergency operation, but sadly his condition deteriorated and he was pronounced dead at 8.45 am.

30. Ms O'Shaughnessy was examined by a doctor whilst in custody. She told him she had drunk a bottle of Lambrini in the period from around 10 pm to the time of her arrest. She was showing some signs of alcohol intoxication. She had 4 red marks or abrasions of varying lengths on the front of her neck which the doctor concluded could be consistent with her being held to the front of the neck. In her police interview, at which not only a solicitor but an appropriate adult was present, she gave an account consistent with what she had said earlier. She demonstrated reaching for the knife and stabbing Mr Butterworth. She was also examined by a psychiatrist, Dr Holmes, who found that she exhibited significant mental health symptoms indicative of moderate to severe depressive illness. Dr Holmes stated that unreported mental illness is highly prevalent in victims of domestic violence.

31. At trial, a blood spatter expert gave evidence that blood found on the kitchen wall was consistent both with the Crown's case that Mr Butterworth was stabbed when he had his back turned to Ms O'Shaughnessy, and that she withdrew the knife, and with the defence case that she stabbed him whilst her back was up against the worktop and he was gripping her round the throat. If he had been stabbed from behind, the person withdrawing the knife would have had to be standing in the middle of the room, or by the fridge freezer fairly close to the kitchen door. The other blood staining on the floor and pathway suggested that Mr Butterworth had not left the kitchen immediately after being stabbed, but that he had then gone into the hall and out of the house.

32. When crime scene investigators went into the kitchen, Mr Butterworth's mobile phone was found lying on the kitchen floor by the side of the bin, with a damaged screen; Ms O'Shaughnessy denied throwing it at him and had no explanation for how it came to be there. Nor was she able to explain why a white bag containing crisps and tobacco came to be on the kitchen floor by a chair. The prosecution suggested that Mr Butterworth must have brought the bag and its contents into the kitchen. Bottles and a glass by the knife rack were still upright, although there was a small cup on the floor.

33. The evidence of an expert pathologist, Dr Johnson, who conducted the post-mortem examination, was that the cause of death was the single stab wound to the back. He explained that because the knife was very sharp, and would have easily gone through the body, he could not say that the force used was more than moderate. He also found some abrasions to the deceased's face consistent with being caused by fingernails.

34. When asked about whether the wound could have been inflicted in the manner described by Ms O'Shaughnessy, Dr Johnson said that it was very difficult to give an accurate opinion because it depended on the positioning of the two individuals. The knife had gone into the right side of the back horizontally, and slightly inwards and downwards. If they had been face to face and close together this would have been possible but difficult; the further the distance between them, the more difficult it would have been, and if there had been a significant gap, it would have been impossible. It would have been easier if Mr Butterworth had been at an angle to Ms O'Shaughnessy. If they were face to face, there would not need to have been much of a gap for it to have been very hard to inflict that injury; if they were touching it would still have been difficult, but he could not rule it out as a possibility.

The application to adduce fresh evidence

35. The power of the Court under section 23(1)(c) of the Criminal Appeal Act 1968 to receive any evidence which was not adduced at trial depends on whether it is necessary or expedient to receive that evidence in the interests of justice. The discretion is a wide one and depends on the facts of each case. The interests of justice are the overarching concern. In considering whether to receive that evidence, the Court is required to have regard in particular to the factors adumbrated in section 23(2), though they are not exhaustive.

36. Professor Forrester's opinion evidence is plainly credible. The social services records are authentic and contemporaneous; they too are credible evidence of the matters recorded in them. However, they were always available, and the defence legal team at trial could have chosen to put them in evidence as support for the applicant's own account of her childhood. They could also have called evidence from an expert psychiatrist or psychologist to give an opinion about Ms O'Shaughnessy's mental health at the time of the killing. Whilst that expert would not have diagnosed CPTSD, since that only became a recognized condition in 2022, they would have been able to consider whether she suffered from PTSD (of which it is a variant).

37. Before turning to the key question whether the fresh evidence may afford a ground for allowing the appeal, it is important to consider its admissibility, and whether there is a reasonable explanation of why it was not adduced at trial.

38. As Dr Cumming points out in his report, the fact that a defendant is suffering from PTSD (or CPTSD) and its effect on tolerance and self-restraint is irrelevant. The question whether the defendant lost control is one of fact for the jury. So too is whether the loss of control was or may have been caused by a triggering event. The role of an expert psychiatrist in the defence of loss of control is very limited, and in effect is confined to explaining that a mental health condition such as CPTSD can make a threat of violence appear more grave or serious to a defendant suffering from that condition than it would to the ordinary person. Therefore the psychiatric evidence would have been admissible, but only for the very specific and limited purpose of assisting the jury on the gravity of the qualifying trigger (which would have required the judge to give them a very careful direction). The information on which the expert evidence was based would also have been admissible. The social services records would have been admissible to show that the expert's opinion, insofar as it was based upon the applicant's childhood history, had a sound factual foundation, though in practice the relevant extracts are likely to have been summarised as part of the agreed facts.

39. It is well established that, save exceptionally, if an appellant were allowed to advance on appeal a defence and/or evidence which could and should have been, but were not put before the jury, the trial process would be subverted: see *R v Erskine (Kenneth)* [2009] EWCA Crim 1425; [2009] 2 Cr App R 29 and the line of cases therein cited. Fresh evidence must do more than shore up any inadequacies in the evidence that *was* called at trial, or improve the quality of that evidence. It is not generally permissible to advance one defence before the jury, and when that has failed, seek to run a different defence on appeal, relying on evidence that could have been available at trial. Nor is it open to an appellant to develop or embellish their account to provide material upon which a fresh expert can base a new report and diagnosis.

40. If strategic decisions (e.g. a decision not to adduce certain evidence, or to run a particular defence) were made at trial for good reason by the defence legal team then instructed, an unsuccessful defendant cannot use an appeal as a vehicle for revisiting or second-guessing those decisions. Nor is it permissible to adduce evidence from a new expert which does no more than disagree with the evidence of previously-instructed experts on quintessentially the same material.

41. In this case, Ms O'Shaughnessy never said that she lost control or that she was unable to stop herself from stabbing her partner. She did not say it at the time of the incident, she did not say it in her police interview, she did not say it to either of the defence experts who were instructed prior to trial, and she did not say it in her very detailed proof of evidence or in the witness box. She did not even say it to Professor Forrester or Dr Cumming. Her consistent account from the time of her 999 call in the immediate aftermath of the stabbing was that she acted in self-defence, because Mr Butterworth had grabbed her round the throat with her back against the counter, and she thought he would kill her. Her actions, which she demonstrated as reaching over her shoulder to grab something to hit him with, in order to get him off her, and then striking him in a kind of "bear hug", were deliberate and controlled, although she said she did not realise at the time that the object was a knife.

42. Whilst the absence of evidence from the applicant herself that she lost control is not necessarily conclusive, there was no other evidence to support a defence of loss of control (e.g. multiple stab wounds consistent with a frenzied attack); if the single controlled blow was inflicted in the manner she described, that was inimical to it, as Mr Benson KC, who prosecuted the case at trial and also represented the Respondent at the hearing before us, pointed out.

43. By and large, a defence of loss of control will not sit easily as an alternative to a case that the defendant took reasonable and proportionate steps to defend themselves against a threat of violence. There may be circumstances in which the victim's behaviour could properly be characterised as both the type of threat which would cause the defendant to take steps to defend themselves, and as a qualifying trigger, which led to the defendant being unable to control what they did in response, but they are likely to be rare: the case of *Sargeant*, to which we have referred above, is an illustration, though in that case neither defence succeeded. However, on the facts of the present case, a defence of loss of control (which is only a partial defence) would have undermined the principal defence (which, if the prosecution were unable to disprove it, would have resulted in an acquittal). Moreover it would have been (and remains) contrary to Ms O'Shaughnessy's own account of events, which her trial counsel were obliged to advance. Therefore, if a deliberate decision was taken by the defence legal team not to run it as an alternative defence, which appears to be the case, that decision was fully justified.

44. Ms Bennett-Jenkins KC, who appeared with Ms Timan on behalf of the applicant, very fairly accepted when it was put to her by the Court that in reality, the only way that the jury would have been invited to consider loss of control would be if the judge decided there was sufficient evidence to leave the partial defence to the jury, which, in the event, he did of his own initiative. That is a matter of some importance, because the decision about what witnesses to call and which documents should be put before the jury is a matter for the defendant's legal representatives (subject only to rulings on admissibility).

45. The applicant has waived privilege and the *McCook* procedure has been followed. Given the length of time which has elapsed since the trial, the amount of information available about what consideration was given to obtaining or adducing such evidence prior to the trial is very limited. The experienced leading counsel who represented Ms O'Shaughnessy at trial (a criminal specialist) has retired; unsurprisingly, his junior and instructing solicitor have not retained their notes, and their recollection is not clear. All that survives is a copy of an advice written by junior counsel dated 9 March 2015, Ms O'Shaughnessy's very detailed proof of evidence, and the two expert reports which were obtained but not used at trial. Junior counsel has confirmed that all tactical decisions would have been taken by his leader, as one might expect.

46. It is clear that some consideration was given to the question whether to run a defence of loss of control as well as to the issue of diminished responsibility. Before leading counsel was instructed, after considering the unused material served by the prosecution, junior counsel specifically advised that "an expert psychologist should be instructed to consider whether the history of provocative conduct that the Defendant has suffered over a number of years (and not just from the deceased but from her previous partners and family members) could have resulted, by 7 December 2014, in the Defendant suffering from "battered woman syndrome" or another such diagnosed psychological condition." He also advised that the social services records relating to her childhood should be obtained. For reasons that it is no longer possible to ascertain, they were not obtained. No application appears to have been made to the court for an adjournment in order to obtain them.

47. We have carefully considered the reports of Dr Richardson and Dr Verstreken. Ms O'Shaughnessy disclosed to both experts that she had been a victim of physical and emotional abuse as a child, and had suffered domestic violence at the hands of her two previous partners as well as Mr Butterworth. Her stepfather had smacked her on her bare bottom and shouted at her. She told Dr Verstreken that when she was a child she was a "bit of a handful" and would throw tantrums if she did not get her own way. Her stepfather would hit the children for the slightest thing. She also told him that while her mother was at work her stepfather made her draw pictures of penises, and when she was in her early teens, she sometimes woke up on the sofa and found his hands up her back and sides. He claimed that he had been trying to calm her down.

48. The original experts noted that each of Ms O'Shaughnessy's three significant romantic relationships had been unstable, and had included verbal arguments and the use of physical violence. She told them both that her first partner had gripped her by the throat whilst she was holding their child in her arms. He had also forced her to have an abortion. Her second partner had serious mental health problems and hit her in the face with a bag containing cans, whilst she was pregnant with their child. She told Dr Verstreken that this man had also, on one occasion, grabbed her by the throat and held her against a wall.

49. She described Mr Butterworth to Dr Richardson as an alcoholic who would argue with her if alcohol was not available, and portrayed him as a coercive controlling partner who stopped her from seeing her friends, always wanted to know where she was, and tried to control how she dressed. He had threatened to kill himself as a way of exerting control over her. She also said she had woken on several occasions to find him on top of her having sexual intercourse with her. He had never pushed, kicked, slapped or punched her or threatened her with a weapon, but he had "choked her two

or three times". She described the October 2014 incident as one in which Mr Butterworth was the aggressor but said she had "accidentally" hit him with the keys.

50. She told Dr Verstreken that Mr Butterworth smoked cannabis and drank every day and this caused the couple to argue. He was more argumentative when drunk and she avoided him by going shopping with her mother. At times she would wake up to find him having sexual intercourse with her, to which she did not consent, but there had been no other physical violence. The arguments became more frequent after he lost his job in July 2014 and became depressed. He started drinking more and on a number of occasions she told him to get out of the house, whereupon he went to sleep in the car or stay with a friend. He could be verbally abusive, calling her an unfit mother. He also questioned whether he was the father of their child.

51. Her account of the October 2014 incident, consistent with her proof of evidence and what she told the police officer at the time, was that the argument ended up with Mr Butterworth pinning her by the throat to the wall by the kitchen door, at arm's length. She had the car keys in her hand as she was going to take the children to her mother's. She swung out and hit him with the car keys, and the blow landed on the back of his head. After that he followed her into the lounge and pushed her to the floor. She said that in the aftermath of that incident she had told him that he would have to find somewhere else to live after Christmas. To all intents and purposes the relationship was over.

52. In her account of the stabbing she said that on previous occasions, including 14 October, Mr Butterworth had held her by the throat at arm's length, but this time it was "like a headlock." She was trapped and found it difficult to breathe, and was unable to get him to move off her. Again, that is consistent with what is said in the proof of evidence.

53. Dr Richardson was instructed to conduct a "full psychological assessment of Ms O'Shaughnessy". Details of the psychological tests administered as part of that assessment were set out in an appendix. Dr Richardson's report focused specifically upon traumatic stressors and on Ms O'Shaughnessy as a victim of domestic violence. Her opinion was that Ms O'Shaughnessy presented as an individual who responded to the tests in a manner that was designed to portray her character in a positive way, and that it was therefore necessary to interpret the tests with caution. She concluded that Ms O'Shaughnessy had no form of mental illness or psychological impairment but there was an indication that she was suffering from mild depression at the time of interview.

54. Dr Richardson said that Ms O'Shaughnessy appeared to be highly accommodating, dutiful, submissive and eager to please others, which made her vulnerable to exploitation within relationships. As well as being a victim of physical and emotional abuse from romantic partners and vulnerable to, among other forms of abuse, coercive and controlling tactics, she herself had been the perpetrator of emotional and physical abuse towards romantic partners and had responded to situations with aggression and hostility.

55. Dr Verstreken was specifically instructed to consider defences of insanity and diminished responsibility. He ruled out both; in particular, he stated that there was no evidence of abnormality of mental functioning arising from a recognised medical

condition. He said that there was no clear evidence of a major mental disorder, though it was likely that Ms O'Shaughnessy had become mildly depressed at the time of the stabbing and her alcohol use may have exacerbated this. He did say that her abusive domestic situation was likely to have negatively impacted on her mental stability, in that it was likely to have led to mood swings, irritability, fatigue and poor sleep, and possibly to feelings of helplessness and resentment. Her alcohol use would have been a disinhibitor that could have led to anger and further altercations.

56. In the last paragraph of his report Dr Verstreken said this:

> "as regards a defence of loss of control, it is of course for a jury to decide as to whether or not there was loss of control or a qualifying trigger. If the court was to ask my personal opinion, I am of the view that the defence of loss of control is not relevant in this case."

57. There is no express indication that either expert applied the diagnostic criteria for PTSD in ICD-10, even though Dr Richardson had listed PTSD as a matter of particular interest to her. However the experts did have the benefit of seeing the domestic violence reports and Ms O'Shaughnessy's proof of evidence as well as conducting their own interviews with her. Whilst she did report poor sleep patterns, none of that material reported her experiencing flashbacks, vivid intrusive memories or nightmares, which might have flagged up a potential diagnosis of PTSD, which at that time was generally thought to be attributable to a single life-threatening or very traumatic experience. Dr Cumming has also pointed out that there is a considerable overlap between the symptoms of depression and of PTSD. For whatever reason, neither expert diagnosed it at the time.

58. Ms O'Shaughnessy's accounts of her childhood and of her three significant romantic relationships including with the deceased which were given to Professor Forrester and Dr Cumming and recorded in their expert reports are far more detailed. They contain a degree of embellishment of what she said to Dr Richardson and Dr Verstreken, most markedly in the negative portrayal of Mr Butterworth. For example, she suggested to Professor Forrester that he raped her in the manner she had described to Dr Richardson and Dr Verstreken "virtually every day"; she said that he had threatened to kill her during the 14 October incident; and she told Professor Forrester (contrary to what she said to Dr Richardson and Dr Verstreken) that she experienced violence every day and that the police had tried to help her, but she was too scared to leave.

59. The social services reports have no bearing on Ms O'Shaughnessy's relationships with her three domestic partners. There is no reason why she could not have provided the same information about those relationships to the experts who were originally instructed. As Dr Cumming points out, the experts were heavily dependent upon the reliability of her reports, including her more detailed reports of coercive and controlling behaviour by Mr Butterworth. There was little or no independent corroboration of much of what she said.

60. There was certainly sufficient information provided by the applicant herself to enable the experts originally instructed to form a view as to whether she was suffering from PTSD. We agree with the single judge that it is very unlikely that they both failed to consider that condition, but for the purposes of these applications, we shall assume that they either thought about it and discounted it as a possible diagnosis, or that they

did not consider it, possibly because of the absence of an identifiable sufficiently serious traumatic event. That does not mean that it should be permissible to revisit their conclusion ten years later in order to bolster a defence which was not run by the defence legal team at trial, but which nevertheless the jury considered and rejected.

61. Whilst the social services records add more detail to the history of what was undoubtedly a very troubled childhood, marked by excessive physical chastisement not only by her stepfather but by her mother (a matter she claimed to have forgotten), including an incident of alleged choking by the stepfather which led to his being charged with assault, in our judgment they add very little to the material that was already available, and nothing of any significance. The records are not essential to the diagnosis of PTSD or CPTSD, and do not in themselves provide a proper basis for appeal. Indeed not all of the evidence is helpful to the applicant, as it shows that she, too, could be violent and manipulative. We reject Ms Bennett-Jenkins's submission that without this information the experts instructed at the time were "only getting a surface picture" and that the social services material was crucial evidence for the jury to consider.

62. As to whether there is a reasonable explanation for the failure to adduce the evidence at trial, there is one, but it is not helpful to the applicant. The expert evidence obtained at the time concluded that the history of abuse suffered by Ms O'Shaughnessy did not give rise to a defence based on any recognized mental health condition. Dr Verstreken had considered loss of control and whilst he correctly identified this as being largely a matter for the jury, he indicated that if he were to give evidence on that topic it would not help the defence. In all the circumstances the decision not to adduce expert evidence at trial was both reasonable and justifiable. It is also understandable why in those circumstances a decision may have been taken not make or to pursue a request for the social services records. That evidence was not relevant to any issue the jury had to resolve.

63. The applicant told Dr Cumming that she was given the option of speaking negatively about Mr Butterworth and given some advice that speaking badly about him might work against her. The evidence at trial of previous violence within the relationship was confined to the incident on 14 October, and she gave no evidence about the sexual abuse. In our judgment that was sensible and sound advice. Leading counsel for the defence cannot be criticised for taking the tactical decisions that he did. He not only faced the problems that a defence of loss of self-control undermined the primary defence of self-defence, and was contrary to his client's own account, but the further problem that any highlighting of evidence about the rapes, in particular, would afford her a motive for revenge and thus lend weight to the prosecution case. Counsel could not avoid all references to that topic, since Ms O'Shaughnessy herself brought it up in the recorded argument, but then she only referred to it happening on one occasion.

64. In summary,

    i) the fresh evidence is credible.

    ii) Apart from the diagnosis of CPTSD, all of it was available at the time of trial.

    iii) The social services reports add further detail to and provide corroboration for the applicant's account of her troubled childhood. However the up to date

expert diagnoses are based to a significant extent on a more detailed or embellished account given by the applicant of her adult relationships, which she could have provided in 2015, and which is largely uncorroborated.

iv) Expert evidence relating to Ms O'Shaughnessy's mental health was not adduced at trial, for the very good reason that it would not have advanced the defence.

v) There are good reasons why a greater effort was not made to obtain the social services records. They corroborate Ms O'Shaughnessy's recollection of her dysfunctional childhood but that was unlikely to have been something the prosecution could or would have challenged even without independent corroboration.

vi) Trial counsel cannot be criticised for the tactical decisions they took or for the advice given to the applicant. They decided, for unimpeachable reasons, not to advance a defence of loss of control or to highlight in evidence any aspect of Mr Butterworth's behaviour that might have given Ms O'Shaughnessy a motive for a revenge attack.

vii) The expert evidence would only be admissible for a very limited purpose, about which the jury would need to be carefully directed. It does not, in and of itself, afford the applicant a defence; at best, it potentially supports a defence she did not run, which the expert psychiatrist instructed at the time would not have supported.

viii) No criticism could have been levelled at the trial judge had he made the decision *not* to leave loss of control to the jury, since the factual basis for a defence of loss of control was, and remains, virtually non-existent. However, he did leave the defence, he gave impeccable directions about it, and the jury rejected it.

65. Therefore on balance the statutory and other relevant factors we have considered thus far militate against its admission. It suffers from all the deficiencies to which we have referred in paragraphs 39 and 40 above. We therefore turn to consider the final statutory factor, namely, whether the evidence, if admitted, would form a basis for allowing the appeal.

66. If the expert evidence had been obtained at the time, the only way it could have been put before the jury would have been if defence counsel decided to adduce it. In our judgment it is extremely unlikely that the tactical decision not to advance the partial defence of loss of control would have been any different if counsel had been armed with a diagnosis of CPTSD and the view of Professor Forrester that this condition may have heightened the applicant's perception of a threat by the deceased.

67. This is because expert evidence about the defendant having a heightened fear of serious violence from the deceased because of her previous experiences of violence would have been of limited value even if the defence legal team decided to run an alternative defence of loss of control. It would have had little relevance in circumstances where the defendant's account was of a physical attack by the deceased, carried out in a completely different manner from previous choking

incidents, namely, being held in a headlock and choked at close quarters, with one hand trapped behind her, struggling for breath and unable to break free, whilst he was screaming abuse in her face. That cannot sensibly be described as a situation in which a person without PTSD or CPTSD would not have been in fear of serious violence but a person with those conditions would or might have been. The jury would not have needed expert assistance to help them to conclude that this type of attack, had it happened, would have been a qualifying trigger.

68. Therefore our consideration of whether it appears that the evidence may afford any ground for allowing the appeal depends on an unrealistic premise, namely, that the defence would have chosen to call Professor Forrester, which they would only have done if they decided to run the defence of loss of control. If his evidence would not have been adduced, the outcome would have been exactly the same. In the highly unlikely event that trial counsel *had* decided to adduce the evidence, we consider that it would not have led to a different result, since it adds little or nothing to the defence that the judge left to the jury.

69. The jury rejected both self-defence and lack of control. That means that they were satisfied by the prosecution either that there was no loss of control (which seems the most likely scenario), or that any loss of control was not due to a fear of serious violence, or that a reasonable person in Ms O'Shaughnessy's circumstances would not have lost control and stabbed him. All of those were factual questions on which the expert evidence had no bearing.

70. Since the scenario described by the applicant was one in which she was in serious danger of asphyxiation and unable to struggle free without making matters worse, this was not a case in which the jury could realistically have accepted her account but considered that the level of force that she used in the heat of the moment to defend herself was disproportionate. In rejecting the defence of self-defence it is obvious that they must have disbelieved her account of being choked at the time when she stabbed Mr Butterworth, despite the marks to her neck.

71. That is not surprising; the prosecution case was strong. The applicant's account of how she came to cause the fatal wound was completely implausible, even though the pathologist could not discount it altogether. If she had grabbed the nearest object to hand from behind her, over her shoulder, in order to get Mr Butterworth off her, the idea that she would then have leaned around his left arm which was gripping her throat, with her head back, to hit him with that object on the other side of his body in a kind of "bear hug", when she could have hit him far more easily with the object in the upper back, neck or shoulder, makes no sense at all. The fact that the bottles and glass next to the knife block on the work surface were undisturbed further undermined her account.

72. Moreover, as the prosecution submitted, the tape of the earlier argument points very clearly to Ms O'Shaughnessy as the aggressor. She is the one threatening violence and goading him, whereas he is the one being conciliatory, whilst complaining of her being violent to him in the past. Indeed, there are strong suggestions by Mr Butterworth in the course of the argument that she was the controlling partner in the relationship, phoning him nightly whilst he was at work and abusing him verbally.

73. It is therefore to be inferred that the jury accepted that the prosecution had proved its case that Ms O'Shaughnessy stabbed Mr Butterworth from behind when he had his back to her and was walking away from her, after he had ceased to pose any threat. They must also have concluded that she knew that the weapon was a knife, since she would not have been restrained by the neck with her back to the counter when she took it out of the block. Although a loss of control does not have to occur immediately after the threat, it must be triggered by the threat and it must not be a considered act of retaliation. In the absence of any evidence from Ms O'Shaughnessy as to what caused her to do this (since she denied that was what happened), there was no evidential basis for the jury to decide that she did or may have lost control, let alone that this was in response to previous violence or threats of violence from him.

74. Ms Bennett-Jenkins speculated that if Professor Forrester's report had been made available to the Respondent at the time, and their expert had agreed with his diagnosis, the Crown would have accepted a plea of guilty to manslaughter. However, quite apart from the fact that this would have required Ms O'Shaughnessy to agree not to run self-defence and to offer that plea (which seems unlikely, as it would mean accepting that she had lied consistently from the moment of the first 999 call), that overlooks the extremely important fact that Professor Forrester's evidence does not afford Ms O'Shaughnessy a defence. The jury would need to consider, first, whether she did or may have lost control, and that would depend on precisely the same evidence on which they concluded after the first trial that she was guilty of murder, that partial defence having been left to them by the judge. Mr Benson submitted, and we agree, that even if that plea had been offered, the trial would still have gone ahead.

Conclusion

75. We have concluded that the evidence, if admitted, would not afford grounds for allowing the appeal. It does not call into question the safety of Ms O'Shaughnessy's conviction. When this is taken into account together with all the other factors, it is neither necessary nor expedient in the interests of justice to admit it. Indeed allowing the applicant to adduce it would be to subvert the trial process. As the single judge said, the case really turned on the principal defence, and the proposed fresh approach to the case is inconsistent with the approach perfectly properly taken by the applicant's counsel at trial. We are satisfied that the conviction is safe.

76. For those reasons, we refuse both the application to adduce the fresh evidence and the renewed application for leave to appeal.