Neutral Citation Number: [2026] EWCA Crim 413

Case No: 202503099 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT OXFORD
The Hon Mr Justice Sweeney
T20187145

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2026

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
LORD JUSTICE EDIS
MR JUSTICE GOOSE
and
MR JUSTICE BUTCHER

- -

Between :

BENJAMIN LUKE FIELD	**Appellant**
- and -	
THE KING	**Respondent**

- -

David Jeremy KC and **Dorothy Moorley** (assigned by **the Registrar**) for the **Appellant**
David Perry KC and **Victoria Ailes** (instructed by **the CPS Appeals Unit**) for the **Respondent**

Hearing date: 5 March 2026

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Approved Judgment

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No order postponing the publication of any report of these proceedings under section 4(2) of the Contempt of Court Act 1981 has been made.

Section 4(1) of the Contempt of Court Act 1981 applies:-

> "Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith."

The Vice-President:

Introduction

1. This case comes before the court as a result of a reference by the Criminal Cases Review Commission ("CCRC") dated 28 August 2025. It relates to the conviction at trial of the appellant of the murder of Peter Farquhar. Mr Farquhar was 69 years old when he was found deceased by his cleaner on the sofa at his home address on the morning of 26 October 2015. The appellant was convicted of his murder on 9 August 2019, after being tried with two others on an indictment containing 8 counts. Those two others were acquitted of the offences alleged against them.

2. There have been two previous judgments of the Court of Appeal Criminal Division in this case. The appellant's appeal was dismissed by the full court (Fulford LJ, Vice-President of the CACD, Whipple and Fordham JJ), in its judgment of 18 March 2021, [2021] EWCA Crim 380 ("CACD Judgment 1"). A differently constituted court (the President of the Queen's Bench Division, Sir Nigel Davis and Sir Stephen Irwin) refused his application to re-open that appeal in its judgment of 16 March 2022, [2022] EWCA Crim 316 ("CACD Judgment 2"). The facts of the case are set out in CACD Judgment 1, and also appear in CACD Judgment 2. In this third judgment we will only identify those facts which are necessary to determine the points which we have to decide. Paragraphs 7-39 of CACD Judgment 1 set out the facts, and we gratefully adopt that summary which appears as an annex to this judgment for ease of reference.

3. At paragraph 145 of its statement of reasons, the CCRC expressed the nub of the issue in this way:-

> "….this conviction is being referred on the ground that the jury were misdirected in relation to causation as regards the death of Mr Farquhar."

4. This means that after a long and complex trial, involving a number of defendants and a large amount of evidence, and an unusual appeal process, the issue before us concerns two parts of a long summing up and the response by the judge to a question posed by the jury. We will focus on that, in a way which is easier now that it is all that is in issue, than it was for the judge who had so much else to deal with under the usual pressures of a criminal trial.

5. The CCRC considered that both bases advanced to the CCRC by Mr David Jeremy KC on behalf of the appellant deserved consideration by this court. These were put in these terms:-

> i) There is a new argument - drawing on the authorities concerning consent procured by deception in the law of sexual offences - that the jury in Mr Field's case was misdirected in respect of causation
>
> ii) There are exceptional circumstances which justify inviting the Court to reconsider the argument on causation made on Mr Field's appeal (section 13(2) of the Criminal Appeal Act 1995).

Stare Decisis: the rule that the court is bound by precedent

6. The second of these grounds is an argument that CACD Judgment 1 was wrong and perhaps also that CACD Judgment 2 was wrong in not saying so. Before entertaining it we should state the basis on which we do so. Mr David Perry KC, on behalf of the prosecution, fairly and, in our judgment, correctly did not seek to defeat the argument on the basis that we were bound by the rules of precedent to reject it. The first argument is, in our judgment, not really new. The problem created for the law by consent to sexual activity which was secured or influenced by deception is not at all new. The oldest authority cited to us on the subject was *Papadimitropoulos v The Queen* (1957) 98 CLR 249. We were then invited to follow it through *R v Linekar* [1995] Q.B. 250, *Assange v Sweden* [2011] EWHC 2849 (Admin), *R (Monica) v DPP* [2019] Q.B. 1019, and *R v Lawrance* [2020] 1 W.L.R. 5025. All of these cases preceded both CACD Judgment 1 and CACD Judgment 2. We shall address the merits of this argument below, quite briefly, and mention it here to emphasise the fact that the real argument is the second one. It is important when entertaining a contention that a previous decision of this court that a conviction is safe was wrong to be very clear about the basis on which it is before the court.

7. In *R v Hayes (Tom) and R v Palombo (Carlo)* [2024] EWCA Crim 304; [2024] 2 Cr. App. R. 6 ("*Hayes & Palombo*") the Court of Appeal reviewed the rules of precedent as they are applied in this court. The Supreme Court at [2025] UKSC 29; [2025] 2 Cr. App. R. 21 reversed the decision on grounds to which we will return later, but did not comment on this passage. That case also involved a CCRC reference, but not one under section 13(2) of the Criminal Appeal Act 1995:-

> 84 The main authorities are *R. v Taylor* (1950) 34 Cr. App. R. 138; [1950] 2 K.B. 368; *R. v Gould* (1968) 52 Cr. App. R. 152; [1968] 2 Q.B. 65; *R. v Spencer* (1985) 80 Cr. App. R. 264; [1984] 1 Q.B. 771; *R. v Simpson* [2003] 2 Cr. App. R. 36; [2004] Q.B. 118; *R. v Magro* [2010] 2 Cr. App. R. 25; [2011] Q.B. 398*; R. v Barton* [2020] 2 Cr. App. R. 7; [2021] Q.B. 685; *R. v Bermingham and Palombo* [2021] 1 Cr. App. R. 24; [2021] 4 W.L.R. 113; and *R. v Layden* [2023] EWCA Crim 1207; [2024] 1 Cr. App. R. 6, from which we derive the following principles:
>
> > i. There is a rule of *stare decisis* which applies in CACD, just as in the Civil Division, which binds the court to follow a previous decision on a point of law by the CACD, or its predecessor the Court of Criminal Appeal, subject to certain exceptions: *Spencer* at p. 270 and 779D-F; *Simpson* at [26]–[27].
> >
> > ii. Those exceptions include the exceptions which apply to civil appeals as identified in *Young v Bristol Aeroplane Ltd* [1944] K.B. 718, namely where:
> >
> > > (i) the previous decision conflicts with another previous decision of the CACD; or

(ii) the previous decision cannot stand with a decision of the House of Lords or Supreme Court although not expressly overruled; or

(iii) the previous decision was reached *per incuriam*: *Spencer* at p. 270 and 778E-F.

iii. The second of these applies where there is in effect an instruction by the Supreme Court not to follow the previous decision, albeit strictly *obiter*: *Barton* at [96], [102], [104].

iv. There is an additional flexibility in criminal cases where the liberty of the subject is in issue: in such a case the court can depart from a previous decision, where this step is necessary in the interests of justice *vis a vis* an appellant because the law had been misapplied or misunderstood: *Taylor* at p.142 and 371, *Gould* at p. 153 and 68–69, *Spencer* at p. 270 and 779D-F, *Bermingham and Palombo* at [78]. This was described in *Simpson* at [38], as a residual discretion. Although initially identified as applicable only to prevent a wrongful conviction, the discretion is not so limited: *Simpson* at [34], *Barton* at [96].

v. Such residual discretion must be exercised circumspectly: *Magro* at [30]. It must take into account the principle that the rules as to precedent are of considerable importance because of their role in in achieving the appropriate degree of certainty as to the law, which is a foundation stone of the administration of justice and the rule of law: *Simpson* at [27]; *Barton* at [103]. In deciding whether to depart from a previous decision, the constitution of the court making that decision is a relevant factor: *Simpson* at [38]. Even where the court considers the previous decision wrong, it should not depart from it if it is carefully reasoned and has not overlooked any relevant argument or information: *Magro* at [30]–[31].

vi. One factor in favour of exercising the residual discretion is development of the law to meet contemporary needs: *Simpson* at [27].

85 These cases all concern the impact of a previous decision of this court in a different case to that with which it is dealing on the subsequent occasion. In the present appeal, however, we have previous decisions, at both an interlocutory stage and on full appeals against convictions, in the very cases of Mr Hayes and Mr Palombo which we are being asked to consider. We are unaware of any case considering the doctrine of precedent involving this particular circumstance, and were told that the combined researches of counsel had not found any. It must, we think, impose a heavy burden on an appellant to show that substantial injustice would be caused if they were not permitted

> to reopen the previous decisions of this court which decided the very points which are sought to be advanced. In this connection we observe that where there has been a change in the law since the date of conviction, but without a previous appeal, this court will not ordinarily grant an extension of time to appeal unless satisfied that there has been substantial injustice; and a change in the law will not of itself justify an extension of time if the conviction was in accordance with the law at the time and followed a fair trial: *R. v Cotterell* [2008] 1 Cr. App. R. 7 at [42]–[46]. Those principles, which are applicable to extensions of time for out of time appeals, may be applied to dismiss an appeal even where there has been a CCRC reference, by reason of s.16C of the Criminal Appeal Act 1968.

8. Section 13 of the Criminal Appeal Act 1995 provides as follows:-

> **13.— Conditions for making of references.**
>
> (1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12B unless—
>
> (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made,
>
> (b) the Commission so consider—
>
> (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, or
>
> (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and
>
> (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.
>
> (2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.

9. In CACD Judgment 2, the court refused to consider the merits of the causation argument which had been rejected in CACD Judgment 1. The court held, applying CrimPR 36.15, that such a course under the re-opening procedure would only be taken where it was necessary to avoid a real injustice and where the circumstances were exceptional. The court found that these tests were not met and refused to entertain what it described as a "second go". Later, it said this:-

> "[72] If (as the applicant contends) the decision of the Full Court is legally flawed and profoundly wrong, then there is a potential

> remedy: in the form of an application to the CCRC. Mr Jeremy rightly accepted that is so, even in the absence of fresh evidence or fresh legal argument: see s. 13 (2) of the Criminal Appeal Act 1995. Of course, if such an application were to be made to the CCRC it would then be entirely a matter for the CCRC itself to decide whether to entertain it and, if so, whether to direct a reference (and this court expresses absolutely no view on such matters). But the point remains that there is such a potential remedy available to the applicant. At all events, there is no question of this court exercising any residual discretion to reopen the decision in this case, to the extent that there may be such a residual discretion as suggested in *Cunningham* (cited above).
>
> [73] Mr Jeremy bluntly submitted that this court should not "kick the can down the road", in his words. But that sort of argument can only gain traction (if at all) if this court had declined to consider the allegations of unfairness and bias: and here we have considered them and rejected them. That then in effect leaves the argument that the Full Court got the decision wrong. It is not then "kicking the can down the road", however, to leave such a matter to an application to the CCRC. On the contrary, it is the required approach, in view of the need to uphold the finality of appeal decisions; in view of the need to ensure that the Crim PR 36.15 procedure should not be allowed to be used simply as a means for having a second go before the Court of Appeal; and in view of the need to ensure that the proper use of the CCRC procedure is not circumvented."

10. It is implicit in that approach that if the CCRC refers a case for a "second go" under section 13(2) of the 1995 Act, the court will not refuse to consider the merits of the argument simply because the previous court's decision is binding. That is a necessary consequence of the enactment by Parliament of section 13(2) of the 1995 Act. The list of exceptions to the rule on *stare decisis* given by the Court of Appeal in *Hayes & Palombo* should perhaps be extended to include CCRC references under section 13(2).

11. This is an argument that CACD Judgment 1 was wrong when it was decided, not that subsequent developments of the law have changed the position, so section 16C of the Criminal Appeal Act 1968 does not apply. Further, although it looks much like an application to re-open an appeal, it is not. Section 9(2) of the Criminal Appeal Act 1995 provides:-

> (2) A reference under subsection (1) of a person's conviction shall be treated for all purposes as an appeal by the person under section 1 of the 1968 Act against the conviction.

12. Therefore, the procedural requirements in 36.15 for re-opening an appeal do not require consideration in this court on such a reference. The CCRC has determined that the circumstances are exceptional for the purposes of section 13(2) of the 1995 Act and Parliament has conferred on it the power so to act. It would be wrong for this court on such a reference to apply its own procedural requirements. It must simply decide for itself whether the conviction is safe, paying due regard to CACD Judgment 1, but not

being bound by it. On that basis, it is not necessary to consider CACD Judgment 2 any further. The court in that decision refused to re-open the appeal on other grounds, including bias, which are not material to the appeal before us. We agree with their conclusion at [73] that in almost all cases where it is said that a decision of this court was wrong, the correct course is for the CCRC to consider whether to refer the case under section 13(2). This is what has happened here, as the court in CACD Judgment 2 contemplated.

Causation argument at trial and first appeal

Some facts in summary

13. The expert evidence was that death was probably caused by the ingestion of Dalmane, a medically prescribed sedative, and whisky. There was no expert evidence of smothering, but this did not mean it had not happened. The amount of the Dalmane in Mr Farquhar's body at post mortem was a consistent with a therapeutic dose. There was no direct evidence about how that dose had been administered. The most obvious ways in which that might have happened were either that it had been taken voluntarily by Mr Farquhar, or administered by the appellant without Mr Farquhar's knowledge. There was a history of the appellant doing this with other drugs in the past which had been documented by the appellant himself. In those documents there was a reference to "feeding" Dalmane, which we set out below at [15]. The last documented incident of covertly administering drugs was a few weeks before Mr Farquhar's death and did not involve Dalmane.

14. It was agreed by the appellant that he had made the bottle of whisky available to Mr Farquhar. He said he had left it for him as a temptation, but the prosecution alleged that he had been present when Mr Farquhar had drunk the whisky and they had drunk it together. On either footing, it was clear that Mr Farquhar had drunk the whisky knowing what it was, and voluntarily. There was evidence from experts about the state of his liver after his death, and other sources which showed that he was not an alcoholic, although he liked malt whisky and, on his own account, drank too much of it. He was not therefore subject to any addiction which may have made him less able to take a free and informed decision than others about whether to drink whisky. CACD Judgment 1 at [39] said:-

> "The appellant accepts that the jury must have rejected his account that he left the whisky for PF as a temptation and a test that night. They must have concluded that the appellant was present and provided alcohol (and/or Dalmane and/or smothered him)."

We highlight in passing the use of the alternative conjunctions in the form "and/or". We shall return to that.

15. One of the appellant's journal entries (see CACD Judgment 1 [28] and [29]) contained what the prosecution alleged was a plan for the murder:-

> "memory is a false flag: will martyn leaves. I have kindled yaz's endearments. I make a dinner for P then go to Ys house for the night. I text him, asking him to let me know he is ok when he

> wakes, which of course, he cannot. I call, no response &, as I have already told Y he was in peculiar & secretive melancholy 12hrs previous, insist that we check on him. Reveal: Rum & cherry brandy cocktail :4.5 Port in other btl: 8 high % malt:5. Suffocation only a mistake if either survival or evidence ensue. Feed 'dalmane' & more alcohol & less air. Curtains drawn on arrival. Tell Y to sit in lounge while I check on him. Oops ok, wait a sec. Then panicky call 999, I'm gonna CPR oh wait no pulse fuck fuck. maybe smash chair."

The legal directions

16. The judge summarised the prosecution case in his legal directions, saying:-

> "Ben Field is alleged to have carried out the murder of Peter Farquhar, in accordance with the plan that he should 'die an alcoholic's death', by being present in person and physically giving him alcohol and/or Dalmane and/or by smothering him."

17. The judge then said:-

> "The Prosecution do not have to prove motive. However, in this case it is alleged that the 'will fraud' against Peter Farquhar was the motive as, without his death, the fraud would not produce any benefit to the fraudster(s).
>
> An act causes the death of another if it is more than a minimal cause of it. If it is proved that, with intent to kill, Ben Field, in person, gave Peter Farquhar drink then, even if Peter Farquhar agreed to drink it, it would be open to you to conclude that the giving was a cause of death, unless Peter Farquhar's decision was informed in that he knew that the drink being offered to him was intended to cause his death. [NOTE: this is the fourth paragraph on page 22 of the written directions, emphasis added]
>
> I repeat, simply having left the bottle to tempt Peter Farquhar is not the Prosecution's case, and is not sufficient for proof of guilt on this Count. Rather, the Prosecution must make you sure of the case that they have advanced.
>
> Ben Field's defence is that, although he had left the whisky bottle for Peter Farquhar to find, he had gone before Peter Farquhar found it and drank from it. It is his case therefore that he was elsewhere (on the way back to Towcester or in Towcester) when the fatal events occurred."

18. The Route to Verdict contained these questions:-

> Count I — the ultimate questions (bearing in mind all my relevant directions)
>
> Ben Field

> 1. Have the Prosecution made us all sure that Ben Field intended to kill Peter Farquhar?
>
> If you all answer yes — go to question 2.
>
> If you all answer no — verdict "Not guilty" (Martyn Smith also "Not guilty")
>
> 2. Have the Prosecution made us sure that, with that intent, Ben Field did one or more of the acts alleged by the Prosecution (i.e. in person, giving Peter Farquhar drink, and/or Dalmane, and/or suffocating him) which was/were a more than minimal cause of Peter Farquhar's death?
>
> If you all answer yes — verdict "Guilty"

19. During the trial, the jury asked the following questions:

> "• Is Peter Farquhar's DNA on the whisky bottle from the night of 25th October 2015? Was the bottle tested for his DNA?
>
> • Could we have clarity on the 4th paragraph on p.22 of your legal directions, especially regarding the implications if Ben and Peter were drinking together on 25th October 2015?"

20. The judge discussed the second of these questions with counsel in the absence of the jury and, when they returned to court, said this [we have emphasised certain critical passages]:-

> "Right, thank you. In order to answer your question, I am firstly going to remind you what the definition of murder is, because that is going to underlie my answer. And it begins at the bottom of page 21.
>
> "Murder is committed if, unlawfully and with intent to kill, a person does an act which causes the death of another. It is only lawful to kill someone if the person who kills is acting in necessary and reasonable self-defence, whether of himself or another," which obviously, does not arise in this case. You are entitled to infer what a person's intention was, from all the relevant circumstances including what they did or did not do and did or did not say, whether before, during or after the incident, something juries do all the time.
>
> The prosecution do not have to prove motive. However, in this case it is alleged that there is one, as I have set out. And "an act causes the death of another, if it is more than a minimal cause of it." I am going to stop there insofar as that paragraph is concerned. It is then, important to remember what the cases on either side are insofar as the actual murder itself is concerned. In which event, we need to go back to page 20, at the bottom. The prosecution case, Ben Field is alleged to have carried out the

murder of Peter Farquhar in accordance with the plan that he should die an alcoholic's death by being present in person and physically giving him alcohol and/or Dalmane and/or by smothering him. It is for the prosecution to prove its case as thus advanced. I emphasise that simply having left the bottle to tempt Peter Farquhar to drink the whisky is not the prosecution case and is not sufficient for proof of guilt on this count.

On behalf of Ben Field, it is submitted that the prosecution evidence suggests that having discovered that Peter Farquhar "suicides not", Ben Field encouraged him to drink alcohol and to put him at greater risk of dying rather than murder him. It is argued that the evidence does not prove that Ben Field was present at the time of Peter Farquhar's death, or prove that he gave him alcohol or drugs as alleged. If we then go on to the ultimate questions that I have posed for your consideration in Ben Field's case on murder. Against the background that he denies an intention to kill, the first question addresses that issue.

Have the prosecution made us all sure that Ben Field intended to kill Peter Farquhar? If you all answer yes, go to question 2. If you all answer no, the verdict is not guilty and Martyn Smith is also not guilty. If, however, you have all answered yes, i.e. you are sure that he did intend to kill Peter Farquhar, it is then and only then, that you go on to question 2, which is have the prosecution made us sure that with that intent, Ben Field did one or more of the acts alleged by the prosecution, i.e. in person, gave Peter Farquhar drink and/or Dalmane and/or suffocating him. In other words, he has to have had the intention to kill when doing one or more of those alleged acts. And then the critical words, "which was or were a more than minimal cause of Peter Farquhar's death."

So, if we then go back to the paragraph about which, your question has been asked. If it is proved that with intent to kill, Ben Field in person, gave Peter Farquhar drink then, even if Peter Farquhar agreed to drink it, it would be open to you to conclude that the giving was a cause of death, unless Peter Farquhar's decision, that is the decision to drink, was informed in that he knew that the drink being offered to him was intended, by Ben Field, to cause his death. Why the difference between the two? In the first part of the sentence, if it is proved that with intent to kill, Ben Field in person, gave Peter Farquhar drink, then even if Peter Farquhar agreed to drink it, it would be open to you to conclude that the giving was a cause of death unless Peter Farquhar's decision to drink was informed, in that he knew that the drink being offered to him was intended to cause his death.

The difference is because it is not the prosecution - the prosecution do not put its case in that way and they must prove

> their case. And the reason why they do not put their case in that way is that if Peter Farquhar's decision to drink was in the knowledge that the drink was being offered to him with the intention of causing his death, then his decision in that knowledge, to drink, would in law, be the only cause of his death. It would not be the responsibility of Ben Field.
>
> On the other hand - and here, we have the prosecution case, that they were together and that Peter Farquhar most certainly did not know that he was being offered drink with the intention of killing him by his consumption of it, that in those circumstances, even if he agreed to drink - not knowing that it was intended by Ben Field that it was to kill him - it would be open to you to conclude that the giving was a cause of death. And it is open to you so to conclude because then, it is a matter of fact. And you and you alone are the judges of fact and therefore, it would be open to you to conclude, if you thought it right, that in those circumstances, that the - notwithstanding the agreement to drink, that the giving of the drink or the drug was more than a minimal cause of death.
>
> Can I try and put it also in another way, to make it even simpler? If, at the end of the day, it was or might have been that even though they were together and even though Ben Field was intending to kill Peter Farquhar, that Peter Farquhar drank in the knowledge that Ben Field was giving him the drink. He, Ben Field intending to kill Peter Farquhar, then it would not be right to convict Ben Field. If it was or might have been that, then the prosecution would have failed to prove their case, which was that he was given alcohol with that intention and most certainly, without the knowledge that Ben Field was intending to kill him thereby. Now, is that clear? I see nods. Thank you."

CACD Judgment 1

21. In CACD Judgment 1, the court set out the argument as it understood it in these terms:-

> 43. It is submitted that this case involves consideration of the circumstances in which the voluntary act of the victim displaces the responsibility of the principal or perpetrator, with the result that the victim became the "*doer of the act*" and the "*causer of his death*", particularly as considered by House of Lords in *R v Kennedy (No 2)* [2007] UKHL 38; [2008] 1 AC 269. The act of suicide is suggested to be one example of such a voluntary act.
>
> 44. It is highlighted that it was only shortly before the legal directions were given to the jury by the judge that the prosecution indicated that they would argue that PF's drinking of the alcohol should not be regarded as voluntary because the appellant had deceived him into drinking by not revealing his

> intention to kill PF. The judge was persuaded to adopt this approach. In the event, his directions prompted a note from the jury on the issue, to which the judge responded, as set out below at [55] and [57], by repeating his original directions (albeit in a slightly different order).
>
> 45. Mr Jeremy argues that the crucial question for the jury was causation. They needed to determine whether the appellant had caused PF's death, given, as the appellant suggests, the voluntary consumption by PF of alcohol or drugs would displace the appellant's responsibility as the doer of the act that caused PF's death. Mr Jeremy submits that the judge should have left to the jury the question as to whether PF's consumption of whisky broke the chain of causation. The judge's direction, therefore, needed to be explicit as to, first, the alleged acts by the appellant that were capable of being more than a minimal cause of death, and second, the events that were potentially capable of breaking the chain of causation vis-à-vis the appellant's liability for the death. It is contended that the judge should have directed the jury that in order to convict the appellant they needed to be sure that his deception as to his intention to kill PF was the cause of the latter's decision to consume alcohol and/or drugs and that, but for the deception, PF would not have consumed the alcohol and/or drugs.

22. Those submissions were rehearsed before the court in CACD Judgment 2, and advanced again to the CCRC and again to us. In the process, they have acquired additional elements, including, in particular a contrast between a part of paragraph 63 in the draft judgment distributed by the court in CACD Judgment 1, and that which is found in the judgment as handed down:-

i) DRAFT:-

> "These directions rightly recognised that in this particular case- if the jury was sure that the appellant was giving PF drink with intent to kill him, of which intention PF was ignorant- then PF's act of drinking could not be a free, voluntary and informed decision, because in those circumstances PF was being deceived by the appellant as to the nature of the act."

ii) FINAL

> "He also told them that if PF agreed to drink – not knowing that it was intended by the appellant that it was to kill him – it would be open to them to conclude that the appellant's giving of drink was a cause of death. These directions rightly recognised that in this particular case the jury had to be sure that the drink was given to the deceased with intent to kill, that the drink was a (more than minimal) cause of death and that PF's act of drinking was not a free, voluntary and informed decision such as to break the chain of causation."

23. There has also been argument about what came to be known as the "weak swimmer" analogy, which was recorded by the court in CACD Judgment 1 as a concession by Mr Jeremy described in this way at [49]:-

> "It is accepted by Mr Jeremy that a defendant's **intention** can, in certain circumstances, be relevant to the risk attaching to a course of action. He gave this example. If an accused, for instance, encouraged a weak swimmer to take to the water having promised to provide assistance if the swimmer encountered difficulties, but privately had no intention of doing so and did not do so, the accused could be criminally liable for the victim's death by drowning in these circumstances. The victim had volunteered to swim on the false assurance of rescue if the need arose. The victim's uninformed state as to the defendant's actual intention would have changed the nature of the act embarked upon and rendered it more dangerous."

24. The weak swimmer analogy played an important part of the court's decision in CACD Judgment 1.

25. We have not found it helpful to consider the events which occurred at trial which led to the legal directions being given as they were, or the events at and following the first appeal concerning the draft judgment and the use made of the weak swimmer analogy. We do not intend to be drawn into a detailed examination of the history of the case. The question is whether the judge's directions were right, and not how he came to give them. The question is whether the court in CACD Judgment 1 was right in its final judgment as handed down, and not how it reached its decision.

26. In CACD Judgment 2, the court was concerned to capture the reasoning of the court's judgment in CACD Judgment 1. At [35] the court said "The core of the Court's reasoning [in CACD Judgment 1] is to be found in paragraph 59 to 63 of the judgment. In view of the submissions now made to us it is unavoidable that we set them out in full". We find ourselves in the same position, and set them out here again:

> "59. The concession made by Mr Jeremy in relation to the weak swimmer is both correct in our view and important. As he accepts, the victim's uninformed state of mind in this example as to the accused's real intention would have changed the nature of the undertaking on which the victim embarked, by rendering it more dangerous. The false friend was potentially liable to a conviction for homicide on account of his or her undisclosed intention that the victim should die by not providing assistance in the event of difficulty. This is highly pertinent in the present case. Mr Jeremy's concession also recognises that whether the victim's ignorance of the accused's real intention does relevantly change the nature of the undertaking on which the victim embarks, as in his example, will depend on the specific nature of the individual case. The concession acknowledges, moreover, the appropriateness of the trial judge addressing the nature of the individual case in deciding how to direct the jury. It follows that in situations exemplified by the weak swimmer example, it

would be appropriate for the judge to give the jury a direction on causation referable to the victim's knowledge or ignorance of the accused's intentions.

60. The undisclosed murderous intention of the appellant, in our judgment, substantively changed the nature of the undertaking upon which PF embarked, in this particular case. The jury must have rejected the appellant's account that he was not present when the victim drank this large quantity of whisky which he had supplied. PF, therefore, would have believed that he was drinking 60% proof whisky in the company of someone who loved and would care for him, not someone who wished for his death. As a consequence, PF would not have had an informed appreciation of the truly perilous nature of what was occurring. Being provided with the whisky, he was being encouraged by the appellant to consume a significant quantity of a powerful alcoholic drink, which inevitably would have started to impair his judgment, most particularly as it interacted with the Dalmane. Engaging in this activity was not, as a consequence, the result of a free, voluntary and informed decision by PF. To the contrary, he was being deliberately led into a dangerous situation, as with the weak swimmer, by someone who pretended to be concerned about his safety: as was undisputed on the evidence in the case, the appellant posed as his lover and partner – someone who PF would undoubtedly have assumed would be solicitous of his wellbeing – whereas, in reality, the appellant simply desired PF's demise. The appellant, therefore, manipulated and encouraged PF into a position of grave danger, given the combination of the sedative effects of the substances risked decreasing the levels of the victim's consciousness, thereby fatally impairing his airway. The appellant's undisclosed homicidal purpose, in these circumstances, changed the nature of the act: PF was to a material extent unwittingly lured into a perilous drunken and drugged position by someone who feigned to be his loving partner. Once the effects of the substances started to affect PF's judgment and as he succumbed, the appellant would have been a mere bystander, or worse. He certainly would not have sought medical assistance, given he admitted he wanted to increase the risk of PF dying.

61. It follows we are of the view that the position of the appellant is to be likened to that of the deceived swimmer. It would be open to a jury in either case to conclude that the victims (real and fictional) had been lured into a false sense of security by the accused's undisclosed murderous purpose, embarking as a consequence on a fatal course of action uninformed as to or unaware of the true dangers of the undertaking, so that the deceit was a cause of death.

> 62. Whether or not the deceased acted freely and voluntarily, when in a position to make an informed decision, will always depend on a close analysis of the facts of the case. If, in the context of a decision by the deceased, there is a significant deception by the accused that changes the truth or the reality of what is happening, such as materially to increase the dangerous nature of the act, then he or she may be criminally liable for what occurred. That 'deception' as to the 'nature of the act' may – as in the weak swimmer example – be directly linked to the undisclosed intentions of the accused. The judge incorporated the idea of 'deception' as to 'the nature of the act' thus in a ruling given on 4 July 2019 in relation to the charge of conspiracy to murder AMM by encouraging suicide (count 3 TI):
>
> "[…] a Defendant's conduct may amount to murder if he drives the victim to suicide by force, duress or deception (with the deception being as to the nature of the act encouraged) such that the suicide was not the voluntary act of the victim. […]"
>
> 63. For these reasons we consider that the approach of the judge was correct. He left it to the jury to determine whether the appellant's actions were a more than minimal cause of PF's death. He told the jury if they were sure that, with intent to kill, the appellant in person gave PF drink, and PF drank it, it was open to them to conclude that the giving of drink was a cause of the death; but he told them that conclusion would not be open to them if PF knew the drink being offered was intended to cause his death. He also told them that if PF agreed to drink – not knowing that it was intended by the appellant that it was to kill him – it would be open to them to conclude that the appellant's giving of drink was a cause of death. These directions rightly recognised that in this particular case the jury had to be sure that the drink was given to the deceased with intent to kill, that the drink was a (more than minimal) cause of death and that PF's act of drinking was not a free, voluntary and informed decision such as to break the chain of causation. The judge's directions captured the essence of the issue in a clear and admirably succinct manner. Those directions were, moreover, given in the broader context of the supposedly caring and protective nature of the relationship, whose falsehood lay at the centre of the undisputed evidence in the case, as the jury undoubtedly understood."

27. We have therefore captured the essence of the submissions made by Mr Jeremy KC, and the parts of CACD Judgment 1 which deal with them.

28. Rather than setting out the submissions made on behalf of the respondent at different stages of these proceedings, we will summarise very concisely the written and oral submissions placed before us by Mr David Perry KC who appeared with Ms Victoria Ailes in place of trial counsel for the prosecution, both of whom have now been appointed to the Bench.

29. In his written submissions Mr Perry emphasised that the House of Lords in *R v Kennedy (No 2)* [2007] UKHL 38; [2008] 1 AC 269 ("*Kennedy (No 2)")* said that an act by someone other than the defendant (in our case the victim) will break the chain of causation between the alleged misconduct and the prohibited outcome (in this case the death of the victim) only if that act is free, deliberate and informed. That formula has been abbreviated by some of the academic commentators as "FDI". FDI is the test for establishing whether the act was "voluntary" in law so that it alone is treated as the cause of the prohibited outcome. In this case it is the last of those words which is engaged. Was Mr Farquhar's decision to drink the whisky "informed"? Mr Perry submits that it was not, for the reason given in CACD Judgment 1, namely that he was not informed of the fact that the person with whom he was drinking intended that he should die. This is true, as a matter of fact, because on the directions they were given the jury must have been satisfied that the appellant had directly provided the drink, which was consumed in his presence. They must also have been sure that the appellant did intend that Mr Farquhar would die, and that Mr Farquhar did not know this. The question, therefore, is whether that intention was legally relevant to the voluntariness of the decision of Mr Farquhar to drink the whisky.

30. In his oral submissions, Mr Perry made a somewhat more expansive argument. He emphasised the depraved nature of the appellant's conduct, as admitted or determined by the jury. He relies on this passage from Lord Bingham in *Kennedy (No 2)* at [15]:-

> "Questions of causation frequently arise in many areas of the law, but causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises."

31. He points to the answer in *Kennedy (No 2)* to the certified question as revealing the importance of the factual context in making any judgment about causation.

32. The certified question was:-

> "When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?"

33. The answer was, at [25]:-

> "The answer to the certified question is: 'In the case of a fully informed and responsible adult, never.'"

34. Mr Perry referred also to *R. v Hughes* [2013] UKSC 56; [2014] 1 Cr. App. R. 6 (p.46) where Lord Hughes and Lord Toulson giving the judgment of the court said:

> "[20]. … It is trite law, and was common ground before us, that the meaning of causation is heavily context-specific and that Parliament (or in some cases the courts) may apply different legal rules of causation in different situations. Accordingly it is

> not always safe to suppose that there is a settled or 'stable' concept of causation which can be applied in every case."

35. Mr Perry referred to *R. v Wallace* [2018] EWCA Crim 690; [2018] 2 Cr. App. R. 22 in support of his submission and took us through the criticism of that decision by Professors Simester and Sullivan in *Causing Euthanasia* (2019) LQR 135 January at page 21, to show that it was misplaced. Professor Simester has developed the theme of that casenote in *Modern Criminal Law, Essays in Honour of GR Sullivan* (2024) in his essay "*Free, Deliberate and Informed?*". The date of that essay enabled Professor Simester to appraise the decision in CACD Judgment 1 in this case.

The questions for us

36. In our judgment the key questions we have to address in deciding this appeal are:-

    i) Whether the judge and CACD Judgment 1 erred in finding that the undisclosed intention of the person with whom Mr Farquhar drank the whisky would, in law, render his decision to drink it involuntary for the purposes of the rule explained in *R v Kennedy (No 2)*.

    ii) If the undisclosed intention of the person with whom Mr Farquhar drank the whisky could, in law, render his decision to drink it involuntary for the purposes of the rule explained in *Kennedy (No 2)*, was this was a matter of fact for the jury to decide and did the judge's directions leave the issue properly to them?

    iii) In any event, were the judge's directions adequate to leave the issues clearly and accurately to the jury?

Hayes & Palombo

37. The critical importance of correctly identifying the issues in a case which are properly issues of law for the judge and those which are issues which must be left to the jury to decide was emphasised by the Supreme Court in this case.

Discussion

Question 1: Did CACD Judgment 1 impermissibly depart from *Kennedy (No 2)*?

38. The academic criticism of the decision in this case is summarised by Professor Simester in his 2024 essay we have referred to above. Smith, Hogan and Ormerod's *Criminal Law* (17th ed) at 85-86 makes similar criticisms. Essentially, they say that the Court of Appeal in *Wallace* and in CACD Judgment 1 have departed from *Kennedy (No 2)* and failed to apply the FDI principle of autonomy. They say that this is wrong both as a matter of precedent and because the autonomy principle is an important way of limiting legal responsibility in the criminal law for acts which are truly not the acts of the defendant. Professor Simester (echoing Professor Glanville Williams) argues that the responsibility, if any, in such cases should rest on the secondary liability of those who are complicit in the act of the principal rather than by erroneously attributing the act of the principal to a person who may be, at most, a secondary party. Here, of course, no question of complicity arises because if Mr Farquhar caused his own death, he

committed no crime in doing so. But the analysis is said to support the principle which should be applied to this case. The reason why there is no complicity was explained in *Kennedy (No 2)* at [18]:-

> "If the conduct of the deceased was not criminal he was not a principal offender, and it of course follows that the appellant cannot be liable as a secondary party. It also follows that there is no meaningful legal sense in which the appellant can be said to have been a principal jointly with the deceased, or to have been acting in concert."

39. We are first, therefore, required to consider whether this academic criticism is correct. In this case, this involves deciding whether the covert intention of Field that Mr Farquhar should die truly means that his act of drinking the whisky was not free, deliberate and informed. This requires some analysis of principle and of the decision in *Kennedy (No 2)*. The relevant part of the opinion of the committee, as delivered by Lord Bingham, is actually an explanation for a concession made by Mr Perry, who argued the case for the prosecution. He had conceded that because of the FDI principle, the prosecution had to prove the first offence created by section 23 of the Offences Against the Person Act 1861 ("offence (1)"), as the unlawful act on which the charge of manslaughter was based. This requires proof that D "administered" the noxious substance to V. The second and third offences could not amount in law to causes of death, because of the FDI principle. The account of that principle was not confined to this question but is at a high level and of general application. It is in these terms:-

> "13 In the course of his accurate and well-judged submissions on behalf of the Crown, Mr David Perry accepted that if he could not show that the appellant had committed offence (1) as the unlawful act necessary to found the count of manslaughter he could not hope to show the commission of offences (2) or (3). This concession was rightly made, but the committee heard considerable argument addressed to the concept of causation, which has been misapplied in some of the authorities, and it is desirable that it should be clear why the concession is rightly made.
>
> 14 The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article "*Finis for Novus Actus?*" [1989] CLJ 391, 392, Professor Glanville Williams wrote:

> "I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before."
>
> In chapter XII of *Causation in the Law*, 2nd ed (1985), p 326, Hart & Honoré wrote:
>
> "The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."
>
> This statement was cited by the House with approval in *R v Latif* [1996] 1 WLR 104, 115. The principle is fundamental and not controversial."

40. The qualifications in paragraph 14, described as "internal limitations on the principle" by Professor Simester in *Free, Deliberate and Informed?* at page 5, do not apply in this case, unless they are modified. CACD Judgment 1 found that because he was not fully informed about the appellant's state of mind, his decision to drink the whisky was not to be treated as an autonomous act within the principle in *Kennedy (No 2)*. It is at this point that the CCRC suggests that the cases about what kind of deception may vitiate consent in a case involving an alleged sexual offence may come into the analysis. We doubt that there is much to be gained by importing that difficult subject into this more straightforward area of the law. We venture to suggest that the state of the authorities about sexual cases is not entirely coherent and this is not a suitable case to attempt to resolve that and then import whatever the result may be into this analysis. There is no evidence in this case that the appellant deceived Mr Farquhar with the result that he drank the whisky. He certainly did deceive him, and ruthlessly preyed upon him with the intention that he should die and that he would benefit financially from that death. That deception was the context in which the whisky was drunk, but the jury was not directed that it should decide whether a direct causal link between it and the decision to drink that whisky was made out.

41. In CACD Judgment 1 [60], cited above, the court decided that Field's undisclosed intention that Mr Farquhar should die "changed the nature of the act" of Mr Farquhar in drinking whisky. He thought he was drinking whisky with someone who "cared for him, not someone who wished for his death". It was in this context that the weak swimmer analogy became relevant. But there was no evidence that Mr Farquhar believed himself to be in any danger as a result of drinking whisky, something he did often, or that his decision was affected by any thoughts he may have had about what the appellant might do if he were to get into difficulties. The weak swimmer chose to swim because an accused had "promised to provide assistance if the swimmer

encountered difficulties". As the matter is put in Smith, Hogan and Ormerod (17th Ed) at page 86:-

> "…in confirming that behaviour as murder, the court effectively circumnavigated *Kennedy (no 2),* eroding the concept of 'voluntariness' so that the basis of homicide liability could be expanded."

42. It is true that the authors misunderstood the facts in one respect, because Field did not merely leave the bottle of whisky out to tempt Mr Farquhar to drink. He did more than that on the jury's finding, see [14] above. However there was no evidence that he did anything which could amount to "administering" the whisky, within the meaning of section 23 of the Offences Against the Person Act 1861 (offence (1) in the passage quoted from *Kennedy (No 2)*) and so the same problem which caused Mr Perry to make his concession in that case arises here. There was no evidence that the appellant's act in relation to the whisky was in any legally material way different from the act of the drug supplier in *Kennedy (No 2)*.

43. That being so, we respectfully disagree with the court in CACD Judgment 1, and consider that they were bound by *Kennedy (No 2)* to quash the conviction. We also respectfully disagree with their decision to refuse to certify that their decision involved a point of law of general public importance and ought to be considered by the Supreme Court, for the purposes of section 33(2) of the Criminal Appeal Act 1968. A better course, in our judgment, would have been to allow the appeal and grant such a certificate so that the prosecution could have sought a ruling from the Supreme Court on the scope of *Kennedy (No 2)*. Since we take the view that this is what that court should have done, this is what we will now do.

Question 2: If the basis on which CACD Judgment 1 upheld the murder conviction was sound, should the jury have been directed differently so that they decided the relevant factual issues?

44. Should the jury have been directed that they had to be sure that Mr Farquhar's decision to drink the whisky was not free, informed and deliberate? Should they have been directed in terms that the only basis on which they could so find was that the appellant's undisclosed intention that he should die had changed the nature of the act of drinking whisky in the way suggested in CACD Judgment 1, leaving it to them to decide the issue? The importance of leaving questions of fact for the jury to decide is the essence of the decision of the Supreme Court in *Hayes & Palombo.* In those cases, a failure in this regard led to the quashing of convictions where the issue which had been wrongly withdrawn (the meaning of two documents) was much less central to that case than the voluntariness of Mr Farquhar's decision to drink whisky was in this one. For this reason also, therefore, we would quash this conviction for murder.

45. The fourth paragraph on page 22 of the written directions is quoted above at [17], and is there underlined. The expression "even if he agreed to drink it" withdraws from the jury the question on which their verdict in this case would actually turn, once they rejected the appellant's factual case.

46. When the judge gave further directions orally in answer to the jury question, he did give the jury a direction about the relevance of the appellant's intention to kill. This was a

new direction. Its cogency was affected by the fact that it concerned only the whisky (because that is what the jury had asked about) but included the formula from the written directions and route to verdict "physically giving him alcohol and/or Dalmane and/or by smothering him". The question the jury were invited to answer was whether, when doing one, two or all three of those different things, the appellant had intended to kill Mr Farquhar. This begged the question. The appellant certainly, on the jury's finding, intended that Mr Farquhar should die as a result of drinking the whisky. As the judge put it, the plan was that he should "die an alcoholic's death". Whether that was an intention to kill him depends on whether in law the act of giving him the whisky was a cause of death, or whether the sole cause was Mr Farquar's free, deliberate and informed choice to drink it.

47. Further, the revised way of putting the case which emerged in these oral directions posited two options: either the appellant gave the whisky intending to kill Mr Farquhar but kept that intention secret, or Mr Farquhar was fully informed in that he knew that the whisky was intended to kill him. Only in the latter case would his act of drinking the whisky amount to a free, deliberate an informed act which was, in law, the sole cause of his death. CACD Judgment 1 later explained why that might be an appropriate analysis of the case, but the issue was never put to the jury in the terms which were used in that explanation. The jury was not directed that it had to be sure that the appellant's hidden intention that Mr Farquhar should die as a result of drinking the whisky meant that Mr Farquhar's decision to drink was not free, deliberate and informed because it "substantively changed the nature of the undertaking upon which PF embarked, in this particular case", CACD Judgment 1 at [59]. This was the view of the facts formed by the Court of Appeal and one which the jury may very well have shared, but was not a question which they were required, in terms, to decide. We do not agree, therefore, with this conclusion contained in the revised paragraph 63 of CACD Judgment 1, see [22](ii) above:-

> "These directions rightly recognised that in this particular case the jury had to be sure that the drink was given to the deceased with intent to kill, that the drink was a (more than minimal) cause of death and that PF's act of drinking was not a free, voluntary and informed decision such as to break the chain of causation."

Question 3: In any event, were the directions defective even if the answers to the first two issues favour the safety of the conviction?

48. This is a short point which is an additional reason for finding the conviction for murder unsafe. It arises from the use, throughout the legal directions, including the rephrased way in which the jury was directed orally in answer to a question, of the formula which involved three different methods of causing death, joined by the expression "and/or". This is found in Question 2 of the Route to Verdict in these terms:-

> "Have the Prosecution made us sure that, with that intent, Ben Field did one or more of the acts alleged by the Prosecution (i.e. in person, giving Peter Farquhar drink, **and/or** Dalmane, **and/or** suffocating him) which was/were a more than minimal cause of Peter Farquhar's death?"

49. As we have explained in answer to Question 2, an additional question was necessary to invite an answer to the question of whether the ingestion of "drink and/or Dalmane" was, in law, voluntary. The jury could, at that point, have been directed that if they were sure that smothering was a cause of death, question 3, as it would have been, did not arise. Linking these three different acts with the conjunction phrase "and/or" did not assist in clarifying the different considerations which may have applied to the circumstances in which each of them may or may not have played a part in causing death.

50. The evidence of the pathologist was that the only cause of death of which there was evidence was the combination of alcohol and Dalmane. It was not that it could have been either. There was no expert evidence that suffocation had been a cause of death, save that there were no external signs of trauma, and no evidence that it was alcohol alone. The written notes kept by the appellant, quoted above, contained evidence of an intention to smother Mr Farquhar should it be necessary:-

> "Suffocation only a mistake if either survival or evidence ensue.
> Feed Dalmane and more alcohol and less air."

51. Therefore, Question 2 of the Route to Verdict left it open to the jury to convict on the basis that the cause of death may have been alcohol, on its own, or Dalmane, on its own, or smothering on its own, or some combination of them. Clearly, if smothering was a cause of death it was inflicted on Mr Farquhar and did not result from any voluntary act on his part. If, however, it was either alcohol or Dalmane, or both, then that issue did arise for consideration.

52. CACD Judgment 1 summarised the pathology evidence at [27]:-

> "However, once the police investigation into the appellant's behaviour towards AMM was underway, a second post-mortem examination was carried out by Dr Lockyer. He found that the cause of death was acute alcohol toxicity and Dalmane use. Alcohol and Dalmane should not be used in combination and Dr Lockyer's evidence was that the combination of the two was likely to have resulted in the potentiation of the sedative effects of both substances, and could have proved fatal by decreasing the level of PF's consciousness, thereby creating a threat to the maintenance of an adequate airway. He could not rule in, nor rule out, the possibility of smothering as it was possible to do this without leaving any evidence. However, there was no pathological evidence that PF had been smothered."

53. In retirement, the jury asked their question about alcohol alone, which the judge answered in his oral directions set out above. These directions continued to use the "and/or" formula, but the last part focusses only on the drink as the sole cause of death. It says:-

> "Can I try and put it also in another way, to make it even simpler? If, at the end of the day, it was or might have been that even though they were together and even though Ben Field was intending to kill Peter Farquhar, that Peter Farquhar drank in the

> knowledge that Ben Field was giving him the drink. He, Ben Field intending to kill Peter Farquhar, then it would not be right to convict Ben Field. If it was or might have been that, then the prosecution would have failed to prove their case, which was that he was given alcohol with that intention and most certainly, without the knowledge that Ben Field was intending to kill him thereby."

54. So the jury may have convicted on the basis that the alcohol was the sole cause of death, having been previously directed that they might find that it was Dalmane on its own, or smothering on its own. They were also directed that "it would not be right to convict" the appellant "if Peter Farquhar drank in the knowledge that Ben Field was giving him the drink, he, Ben Field, intending to kill Peter Farquhar". We have corrected the transcription so that it reads as we understand it. This means that it would not be right to convict the appellant if Mr Farquhar knew that the appellant intended that to kill him when he gave him the whisky.

55. However, they may also have convicted on the basis that Dalmane was the sole cause of death, or a cause of death in conjunction with alcohol, but the jury was not directed about the circumstances which might justify a finding that the Dalmane had been ingested as a result of some act by the appellant, rather than as a result of a free, deliberate and informed decision to take it. The fact that death was caused by both drugs in combination was dealt with in the factual part of the summing up, but was dealt with in the legal directions in the way we have described.

56. The sentencing remarks set out the judge's own findings of fact about the way in which Mr Farquhar died. The judge found that the appellant covertly gave him the drug Dalmane, got him to drink a large quantity of very strong whisky and if that combination had not killed him, finally suffocated him in a way that left no trace. That suggests that he considered that there was no sufficient evidence that smothering had played a part in causing death. The appellant's note had established an intent to do this if necessary, but not that it had been done. The judge's directions therefore left a possible cause of death to the jury of which there was no sufficient evidence. This is a significant deficiency in them.

57. Mr Perry sought to persuade us that there was an overwhelming inference that the Dalmane was administered covertly. If that was so, then no question of a voluntary or informed decision to take it could arise. Further, the decision to drink whisky would not be fully informed either, because its danger was substantially increased by the unknown presence of Dalmane. If the prosecution could prove that the Dalmane had been covertly administered by the appellant with the intention that he would then drink alcohol and die, that would be a perfectly straightforward way of charging murder. That, however, is not how it was put to the jury, and we do not know whether the jury accepted that the prosecution had proved that the appellant administered Dalmane (the word in the directions is "gave" or "giving") without Mr Farquhar's knowledge. They were not asked to decide that question by the judge's legal directions. Had they been, and had there been a conviction, it would not have been necessary for CACD Judgment 1 to rely on the undisclosed intention of the appellant as changing the nature of Mr Farquhar's act in drinking the whisky.

58. For these reasons, we take the view that the way in which the jury was directed did not sufficiently direct the jury to consider and make a finding about the circumstances in

which the Dalmane came to be consumed. The directions also left it open to the jury to convict on the basis that Mr Farquhar had been killed by smothering, without requiring the jury to make a finding that this was so and when there was insufficient evidence for them to make any such finding. Finally, the jury were not directed correctly and in accordance with the pathologist's evidence as to the cause of death, either in the two questions they were required to answer (the steps to verdict) or in the answer to the jury note.

Conclusion

59. We therefore find ourselves in respectful disagreement with the court in CACD Judgment 1. We find that the conviction for murder was unsafe, for the reasons given and will, in due course, quash it.

60. We circulated a draft of this judgment to the parties under embargo in accordance with the usual practice. In it we indicated that we intended to decide whether to order a retrial on the basis of written submissions. We originally intended the hand down to be remote, but on the day when that was listed we decided to hand the judgment down at a hearing instead and directed written submissions on all consequential matters which we have now received and considered. This was to avoid any difficulties with the course we had indicated in the draft when dealing with that issue and the other consequences of our decision that the murder conviction was unsafe.

61. In the draft, we said:-

> "This means that there are two inconsistent decisions of this court on the safety of the conviction in this case. The difference turns on our somewhat different understandings of the decision of the House of Lords in *Kennedy (No 2)*, as well as of how the jury was directed at this trial. In these circumstances we consider it right to certify that our decision involves a point of law of general public importance.
>
> We invite the prosecution to submit a draft point of law which we will certify. It will assist us if it is agreed. It may be that the precise terms of it are less critical than they were once thought to be, given that the Supreme Court has decisively held that it is not limited by the terms of the certified question, once an appeal is before that court. However, we hope that the Supreme Court may be assisted if we seek to identify accurately the point which we consider is involved.
>
> We consider that the very unusual circumstances of this case mean that we should ourselves grant leave to the prosecution to appeal to the Supreme Court. Almost invariably, this court defers to the Supreme Court in selecting the cases which it resolves to hear and does not remove that decision from that court by granting leave itself. This case is quite exceptional because it turns on whether the principle in *Kennedy (No 2)* requires reconsideration in the light of a number of decisions in this court, including the present case but also including in

> particular *R v Wallace* [2018] EWCA Crim 690; [2018] 2 Cr App R 22 and *R v Rebelo* [2021] EWCA Crim 306; [2021] 2 Cr App R 3. That was a decision of the House of Lords and it is a matter for the Supreme Court to consider its reach in the light of these difficult cases. We would add that cases have recently arisen in the Crown Court in which allegations are made of homicide by causing death where the death was the result of suicide following a lengthy period of domestic abuse. This case raises an important and current issue which appears to us to warrant consideration by the Supreme Court. There is a degree of urgency because we may decide to order a retrial and, if we do, we may remand the appellant in custody to await it. For these reasons we have taken the unusual step of shortening the timetable by ourselves granting leave to appeal to the Supreme Court."

62. We wrote that because it seemed to us inevitable that the prosecution would invite this court to certify a point of law and to give leave to appeal. It was also inevitable that we would agree to certify a point. We wished to shorten the period during which these proceedings were subject to the uncertainty of a further appeal, particularly given that we thought it likely that the appellant would be detained pending its outcome and, if the re-trial is to take place thereafter, pending that event as well. For that reason we decided that we would give leave to appeal if asked to certify a point of law, as we now have been. We felt that it would be helpful for the parties to know how we viewed the consequences of our decision so that they could address the issues on an informed basis. Of course, since these views were set out in a draft, they were capable of revision in the light of the submissions we received. A decision becomes a decision when it is made, not when it is set out in a draft judgment distributed under embargo. In any event, as we have said, we delayed the hand down and directed written submissions on all consequential matters, and a hearing to resolve any outstanding issues.

63. Mr Jeremy's remarkable tenacity in these proceedings does him great credit. In his written submissions he seeks to persuade us that our decision involves no point of law at all, still less one of general public importance. We reject that submission as unrealistic in the highly unusual circumstances of this case.

64. We agree with Mr Perry, on behalf of the respondent, and will order accordingly. He puts the matter this way in his written submissions:-

> "3. The Respondent invites the Court to certify a question in two parts:
>
> 1. Were the directions given to the jury by the trial judge in this case right in law?
>
> 2. Did either the first or third Court of Appeal err in their understanding and application of *R v Kennedy (no 2)* [2007] UKHL 38; [2008] 1 AC 269; and is any reconsideration of that decision required?

> 4. It is submitted that this formulation is neutrally worded and appropriate in that:
>
> i) Both substantive appeals proceeded on the basis that the question whether there was any error of law in the judge's directions to the jury was the ultimate question on which the appeal against conviction turned; and hence it is the ultimate issue on which this Court has disagreed with the reasoning of the constitution which considered the first appeal. It is also the ultimate issue on which the Supreme Court decision will turn.
>
> ii) The question whether jury directions in a particular case were right in law is capable of being a point of law of general public importance in a case which is itself of sufficient seriousness and importance.
>
> iii) The Court's draft judgment rightly identifies the difficulty arising from the existence of two conflicting Court of Appeal decisions on the safety of the conviction in this case, and the second part of the question invites the Supreme Court to resolve that issue.
>
> iv) The Court has also raised the question whether the principle in *Kennedy (no 2)* requires reconsideration in light of other decisions of the Court of Appeal, which the second part of the question addresses."

65. We will certify that a point of law of general public importance is involved in our decision and ought to be considered by the Supreme Court further to section 33(2) of the Criminal Appeal Act 1968. We will also grant leave to appeal. Mr Jeremy says that there is no urgency in this case because the appellant "is a serving prisoner and will remain one for some years whatever the outcome of this appeal". This observation has caused an enquiry into the sentences which were imposed for the other offences concurrently with the life term. This has revealed that the warrant issued by the Crown Court is not consistent with the judge's very clear sentencing remarks. The Crown Court is directed to correct the record, so that a warrant reflecting the judge's sentence as explained in court, is issued. In fact the other sentences imposed totalled an effective determinate sentence of 16 years. There is some uncertainty about the relevant early release provisions and the Prison Service, for obvious reasons, has not yet calculated a release date. However, it appears to be the case that the appellant may be eligible for release rather sooner than Mr Jeremy suggests. In those circumstances we consider that in the interests of the appellant himself, we should do what we can to avoid any unnecessary delay. In any event, as we said in our draft judgment, the rule in *Kennedy (No 2)* is a matter of public importance and if any clarification is required it is in the public interest that this should happen without any avoidable procedural delay.

66. We will direct a re-trial. Whether that will take place, and what the law is which will apply at it if it does will, of course, be affected by the Supreme Court's decision on the appeal. The prosecution has applied for an order for a re-trial and Mr Jeremy, sensibly, makes no submissions to the contrary. He has also made no application for bail on

behalf of the appellant, whose detention pending the outcome of the appeal we direct under section 37(2)(a) of the Criminal Appeal Act 1968.

Reporting Restrictions

67. We record a discussion which took place at the start of the hearing. Because of the possibility of a re-trial we raised the question of whether a reporting restriction should be imposed in relation to these proceedings under section 4(2) of the Contempt of Court Act 1981. In view of the fact that all the earlier proceedings have been published, and that there has been very extensive publicity about this case over a number of years, both counsel accepted that such an order would achieve nothing and we decided not to make one.

68. We remind everyone of the terms of section 4(1) of the Contempt of Court Act 1981:-

> "Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith."

ANNEX TO JUDGMENT: THE FACTS AS SET OUT IN CACD JUDGMENT 1

The Facts in Outline

7. The appellant accepted that from late 2012 until mid-2017 he had pretended to be in a genuine and caring relationship first with the deceased, Peter Farquhar ("PF") and subsequently, with Anne Moore-Martin ("AMM"), when instead he was seeking to manipulate and exploit them for his own gain. He admitted several frauds against PF and AMM, along with burglaries at the homes of other elderly people in the same street.

Peter Farquhar (PF)

8. PF was aged 69 years old when he died in October 2015. He lived at 3 Manor Park, Maids Moreton, Buckinghamshire having shared the house with his mother until her death in 2002. He was a retired English teacher, although he continued to lecture at the University of Buckingham. He was a novelist. He experienced good health, remained mentally sharp and kept detailed journals. He found it difficult to resolve his strong Christian beliefs with his gay sexuality. As a consequence, throughout his adult life he remained celibate and although he was close to his family and had a wide circle of friends, he was said to have been a lonely man who craved love and affection.

9. The appellant, in his early twenties and studying at the University of Buckingham in 2012, appreciated and ruthlessly exploited PF's vulnerability. He set about seducing PF, claiming to share the same interests and beliefs. He moved in with PF in 2013. The two men commenced what PF thought was a mutually loving and supportive relationship. In 2014, the appellant proposed, and they arranged, a "betrothal ceremony". PF was persuaded to change his will so that the appellant would receive a large inheritance. In 2015, the appellant gave the impression that he was caring for PF, who appeared to be suffering from a mystery illness, potentially some form of dementia. In fact, the appellant was covertly drugging PF but suggesting to others that the latter was drinking too much and was developing a suicidal ideation.

10. PF was found dead in his home by his cleaner on 26 October 2015. He appeared to have drunk himself to death. The appellant inherited substantially from his estate.

11. The issue left for the jury by the judge on count 1 was whether they were sure the appellant, with intent to kill, had given PF alcohol and/or Dalmane (a drug prescribed for insomnia), and/or smothered him causing his death. Whether the judge's directions to the jury in this regard were correct in law is the focus of this appeal.

Anne Moore-Martin (AMM)

12. Shortly before PF was found dead, the appellant also began a relationship with AMM, aged 83, the circumstances of which were relevant to the course of the investigation into the death of PF.

13. AMM lived alone at her home, 6 Manor Park, in the same street as PF, and was also a retired teacher. She was a regular Catholic churchgoer with a strong faith. She suffered from two brain conditions, but her intellectual powers were still good for her age. As with PF, the appellant realised that she was lonely and therefore vulnerable to his seduction and exploitation.

14. The appellant sent AMM cards, gave her gifts and researched sex with the elderly on the internet. Only a month after PF's death (in November 2015), the appellant began a sexual relationship with AMM. He again set about falsely persuading her that he loved her, so that he could exploit her. He wrote messages on mirrors in 6 Manor Park, successfully persuading her that they were messages from God. These were designed by the appellant to persuade her to change her will and to leave her home to him, rather than to her niece.

15. He persuaded AMM to give him money for a car and to fund a dialysis machine for his brother's invented kidney disease. Without her knowledge, he also took pictures of her performing a sex act on him, so that he could use these against her in the future, should the occasion arise.

16. When, in late 2016, AMM attempted to change her will in the appellant's favour, coincidentally she went to the same firm used by PF and the solicitor became suspicious. She informed AMM that the appellant had inherited from PF's will, causing AMM to change her mind. However, the appellant increased his efforts and eventually in December 2016, she altered her will, despite, as she was to express to police later, feeling uncomfortable about doing so.

17. In November 2017, AMM became ill and went into hospital. While she was there, the appellant removed items from her home that he feared may incriminate him. Her niece, Ann-Marie Blake, who encountered him at the premises, became suspicious of his behaviour and alerted the police. Shortly afterwards, however, AMM passed away from natural causes.

18. The prosecution relied on the hearsay statements of AMM to the police prior to her death, regarding her relationship with the appellant. There was evidence on this issue from Ann-Marie Blake. The Crown introduced medical evidence, regarding AMM's various health conditions and her visits to doctors prior to her death.

19. During the ensuing investigation into AMM's death, the police reconsidered the death of PF. The appellant was initially arrested on the fraud offences but in due course he was charged with the murder of PF and conspiring/attempting to murder AMM. Other than a short, prepared statement, the appellant gave no account when interviewed by the police.

The Prosecution Case in Detail as regards the Murder of Peter Farquhar

20. On count 1 (murder), the Crown alleged, therefore, that the appellant falsely persuaded PF that he loved and cared for him and PF as a consequence fell in love. This was the beginning of a detailed plan, about which the appellant kept a detailed record in journals and notes. He had determined to manipulate PF into changing his will, with the intention thereafter of killing him. He sought to make PF's death appear to have been suicide.

21. Having moved in with PF in November 2013 and following the "*betrothal ceremony*" in 2014, the appellant set about covertly drugging PF. From at least January 2015 to the end of September 2015, the appellant regularly administered prescription and hallucinogenic drugs to PF, often disguised in food or drink. The toxicological analysis of PF's remains demonstrated repeated administrations of sedating drugs in

the months preceding his death. These included lorazepam, trazadone, diclazepam, and flubromazolam. The appellant's diary documented these covert administrations, and the amounts and timings broadly correlated with symptoms experienced by PF as detailed in his own journal entries.

22. The appellant "*gaslighted*" PF, that is he persistently manipulated and brainwashed him, thereby instilling self-doubt and a diminished sense of perception, identity, and self-worth. He secretly moved objects around the house and hid things. His purpose was to ensure there was no suspicion that PF had been murdered but instead, whilst ill and when alone, he had drunk himself to death.

23. Once PF had changed his will in the appellant's favour, the latter took the next step in the plan and murdered him on 25 October 2015. The prosecution relied on the simple and self-evident proposition that in order for the fraud relating to the will to succeed the victim had to die. The prosecution needed to prove that the appellant gave PF the alcohol and/or the Dalmane, and/or smothered him in circumstances that materially contributed to his death.

24. The evidence the Crown relied on came from a variety of sources. The prosecution presented a detailed timeline identifying the key events which they linked to the relevant documentary evidence. The journals kept by PF provided hearsay evidence chronicling his life and thoughts over the period he was being deceived by the appellant. The prosecution relied on evidence from the friends and family of PF, regarding his character, his drinking habits and his relationship with the appellant. There was medical evidence detailing the prescription drugs taken by PF and his various visits to doctors in the months before his death. As to the death of PF, the Crown introduced evidence from PF's cleaner, along with the paramedics and the police, about the finding of PF's body on 26 October 2015. DNA and fingerprint evidence matching that of the appellant was found on the glass and the bottle next to PF when he died.

25. There was pathology evidence as to the cause of death and the presence of alcohol and drugs in PF's system both before and at the time of his death. In this regard we note a number of expert witnesses examined PF's body after he had died. It was suggested that there was no medical evidence to support the suggestion that PF was an alcoholic or had any mental health issues. When this evidence was considered with the other evidence in the case, in particular the notes and journals, it suggested a systematic campaign by the appellant to drug PF and encourage him to drink, in order to make it look like there was something wrong with him, when in fact there was not.

26. The evidence of Dr Bailey, who conducted the first post-mortem, was that PF's body showed a blood alcohol level of approximately three times the legal drink drive limit. At the time, he concluded that the quantity was sufficient to cause acute alcoholic intoxication, coma, and death in a person who was not a persistent heavy drinker, and he recorded the cause of death as "*acute alcohol toxicity*".

27. However, once the police investigation into the appellant's behaviour towards AMM was underway, a second post-mortem examination was carried out by Dr Lockyer. He found that the cause of death was acute alcohol toxicity and Dalmane use. Alcohol

and Dalmane should not be used in combination and Dr Lockyer's evidence was that the combination of the two was likely to have resulted in the potentiation of the sedative effects of both substances, and could have proved fatal by decreasing the level of PF's consciousness, thereby creating a threat to the maintenance of an adequate airway. He could not rule in, nor rule out, the possibility of smothering as it was possible to do this without leaving any evidence. However, there was no pathological evidence that PF had been smothered.

28. In the light of this evidence, the prosecution argued that the appellant had a motive to kill PF (in order to inherit from his will) and his notes as to how he intended to go about the murder accorded with the method he had actually used on the night of 25 October 2015. By way of detail, the jury were provided with extracts from the journals and notes of the appellant, evidencing his thoughts and intentions, detailing his covert drugging and "*gaslighting*" of PF and his research into alcoholism, strong whisky, suicide and the methods by which one might kill another. The appellant had a white notebook which contained extensive notes concerning PF. A comparison of these notes showed in some detail the drugs and alcohol administered to PF in 2015 and the effects they had upon him. It was suggested by the Crown that this was a plot long in the making: one of the appellant's notes set out *"I moved in [that is, in 2013] so he could die [which took place in October 2015]."* The appellant's notes revealed that he explored the possibility of inducing his victim to commit suicide; but this approach failed, as the notes also recorded (*"It became clear that he suicides not"*). The allegation against the appellant was that he then conceived a plan that PF should appear to have succumbed to an alcoholic's death. To that end, he created a false narrative that the victim was drinking to excess and/or suffering from dementia. He sought to establish that his death was an unsurprising event, and he was assisted in this endeavour by the effects of the drugs he was covertly administering, which appeared to others to indicate that PF was intoxicated.

29. The prosecution suggested that the appellant in one of his notes set out what he had planned, and thereafter put into effect, in order to kill PF on 25 October 2015 – "*High percentage malt £. Suffocation only a mistake if either survival or evidence ensues. Feed Dalmane and alcohol and less air*".

30. Diana Davis, the solicitor, gave evidence concerning the changes to PF's and AMM's wills. The prosecution relied on the appellant's propensity, namely his guilty pleas in relation to various frauds and burglaries, and a video made by the appellant at the care home where he worked which established his exploitation of another elderly person. There were various relevant emails between the appellant and his co-accused. The Crown relied on the appellant's failure to mention multiple facts in interview which he relied on at trial. There was a schedule of Agreed Facts.

The Defence Case

31. The defence case was that, despite the appellant's admitted and repulsive behaviour towards PF, he had not, in fact, intended to kill PF and he had not murdered him. He accepted he had lied to and deceived almost everyone he came into contact with between 2012 and 2017. He admitted he had lied to PF as to his true feelings and that he had intended to inherit from him on his death. He had similarly lied to AMM and

had defrauded her of various sums of money. He burgled the properties owned by other elderly people in the street, because, in his words, "*he could*".

32. He acknowledged that he had drugged and gaslighted PF, causing him great suffering. He had manipulated AMM (although he denied having drugged her or encouraged her to commit suicide) and he accepted this had caused her regret and misery when she discovered what he had done, shortly before her death. He accepted that he was a "*snake talker*" and prided himself on his ability to manoeuvre people to achieve his ends without ever actually asking them directly to do what he wanted them to do. However, he denied ever intending to kill PF, he denied having any part in his death and he denied conspiring to or attempting to kill AMM.

33. Between 2012 and 2017, he had also engaged in casual relationships with various women, including particularly Lara Busby and Satara Pracha to whom, he accepted, he had consistently lied. He maintained that he was not homosexual, albeit had had a number of sexual experiences with men, which he suggested he had not enjoyed but had used to test himself. He accepted he had lied about the extent of his sexual experiences with men during examination-in-chief because, as he suggested, he had felt ashamed talking about these experiences in front of his parents. He insisted, however, that he had told the truth in evidence about all other matters.

34. Focussing on the journals and notes, the appellant suggested he had lived an isolated and internalised life since his school days. He had acquired the habit of reading extensively, including dictionaries, and he made copious notes (some of which the police found within computer files). He maintained that in the absence of genuine relationships or communication with others, he used to write as a means of working out his thoughts and as an outlet for frustrations and feelings that he could not otherwise express. While the appellant's notes included numerous references to various ways in which both PF and AMM might die, his writings also included many references to other – what he suggested to be – wholly fantastical ideas.

35. He used the white notebook to write about PF. He claimed that he was genuinely interested in PF's journals, which he copied out in large part. He also made notes about characters and storylines for PF's last book, on which he claimed they were collaborating. He said that although some of the things he had written represented his thinking and intentions, others did not and were simply for amusement, to blow off steam or to see how they looked on paper. He maintained that he had written many of the notes in the white notebook, including the note "*Feed Dalmane and alcohol and less air*", after PF's death. This otherwise highly incriminating entry therefore did not reflect his future intentions or a settled plan to kill PF.

36. On 25 October 2015, the appellant went away for the weekend and he asked MS (Martyn Smith) to stay with PF on the Saturday night. He had bought a bottle of whisky for MS as a "*thank you*". MS ended up leaving the bottle at the house when he left on the Sunday morning. Having arrived for dinner on the Sunday night, the appellant decided to leave the bottle out as a temptation and a test for PF. The victim had been trying to abstain from drinking on the advice of his doctor after his apparent illness. The appellant's account was that when, as he claimed, he left the house after dinner, neither he nor PF had drunk any whisky. He was not aware that PF had taken

any Dalmane that night. He tried unsuccessfully to call PF several times later that evening and during the following morning. He was informed of PF's death by the cleaner.

37. The appellant accepted that whilst the bottle of whisky must have played some part in the fatality, he had not intended to kill PF. He maintained he had played no direct part in PF drinking alcohol that night and he was not present when he died.

38. His case was summarised by the judge as follows:

> "On behalf of Ben Field, it is submitted that the prosecution evidence suggests that, having discovered that Peter Farquhar 'suicides not', Ben Field encouraged him to drink alcohol and to put him at greater risk of dying, rather than murder him. It is argued the evidence does not prove that Ben Field was present at the time of Peter Farquhar's death, or prove that he gave him alcohol or drugs as alleged."

39. The appellant accepts that the jury must have rejected his account that he left the whisky for PF as a temptation and a test that night. They must have concluded that the appellant was present and provided alcohol (and/or Dalmane and/or smothered him).