Regina v Zoora Ghulam Shah

Case No. No: 9400393/Y5

Court of Appeal Criminal Division

30 April 1998

[1998] EWCA Crim 1441

1998 WL 35320281

Before The Vice President of the Queen's Bench Division Lord Justice Kennedy Mr Justice Butterfield Mr Justice Richards

Thursday 30th April 1998

Representation

Mr E Fitzgerald and Ms I Forshall appeared on behalf of the Appellant.
Mr S Lawler QC appeared on behalf of the Crown.

Judgment

Kennedy L.J.:

1 On 21st December 1993 in the Crown Court at Leeds, after a six week trial, this appellant was convicted of four offences, namely forgery, soliciting to murder, attempted murder and murder, and received sentences of 7 years, 10 years, 12 years and life imprisonment — all sentences being ordered to be served concurrently.

On 7th July 1997 the Full Court gave leave to appeal against conviction in relation to two of the offences, namely attempted murder and murder, and adjourned the renewed application for leave to appeal against sentence to this court.

Synopsis of Prosecution Case at Trial

2 The appellant was born in Pakistan on 28th February 1952 and married there. She came to England when she was twenty years old, and settled in Bradford, West Yorkshire, where she had three children, Naseem (born 13th November 1973), Amrez (born 5th January 1978) and Fozia (born 19th July 1980). She also had two other children who died very young. When she was pregnant with Fozia her husband left her for another younger woman, and by February 1983 she and her children were living in a rented terraced house at 251 Legrams Lane, Bradford. The house was purchased in July 1983 by Mohammed Salim Azam for £11,000. He was a married man, well-known to the appellant, and it has always been her case, not seriously disputed by the prosecution, that he simply lent his name to the transaction. She provided the deposit of £2000 which she borrowed in whole or in part from "the committee" — an Asian

Community organisation — and a mortgage was obtained from the Halifax Building Society. It was common ground that she paid the mortgage instalments as they fell due, using housing benefit, which she claimed, for that purpose. It was the prosecution case at the trial that the common thread running through all of the counts in the indictment was the appellant's increasingly desperate attempts to secure from Azam and to retain the title to 251 Legrams Lane.

In April 1984 Azam was arrested for serious offences connected with drugs, and in October 1984 he was convicted and sentenced to 10 years imprisonment. The appellant gave evidence at his trial. That sentence was later reduced to eight years, and he was released in May 1989. Whilst Azam was in prison the appellant began an association with Raghib Shah, another married man, and in September 1988 Raghib, with the co-operation of the appellant, put himself forward to the Halifax Building Society as a potential purchaser of 251 Legrams Lane. He sought and was offered a mortgage, and the Building Society paid to Azam £620 retained from the original advance. That payment was diverted into the appellant's account, but the proposed purchase by Raghib did not proceed because by January 1989 questions had been raised as to the authenticity of a power of attorney, apparently signed by Azam, pursuant to which the appellant was acting when offering the property for sale. Shortly before he was released from prison in May 1989 Azam wrote two letters to the appellant pointing out that she had not paid any rent for 251 Legrams Lane, and seeking possession. But he does not seem to have taken any action to enforce that request in the months after he was released.

The appellant then began her second attempt to obtain title to 251 Legrams Lane. In February 1990 the appellant and Raghib went to Mr Conway of Conway Musson and Co, a solicitor whom they did not know. Raghib pretended to be Azam, the legal owner of 251 Legrams Lane, and said that he was returning to Pakistan and he wanted to redeem the mortgage and sell the property. The redemption figure given by the Halifax Building Society at that stage was £9638.62, and on 5th March 1990 the appellant went back with Raghib to Mr Conway's office, where they gave to the solicitor £3966.47 in cash, a cheque for £4106.40 drawn on the appellant's account, and a cheque for £1700 drawn on Raghib's wife's account. They both also signed the transfer documents, and by doing so committed the forgery referred to in count 1 in the indictment.

It was said that if Azam found out what had happened to the title of 251 Legrams Lane there was likely to be trouble, and it was the prosecution case in support of count 3 on the indictment that on or about 14th March 1990 the appellant sought out Mir Aslam (otherwise known as Bala), a man who had a bad local reputation, and asked him to kill Azam for money. Bala, who had met Azam in prison, reported the proposal to Azam, and was equipped with a tape recorder when he next negotiated with the appellant. She paid over £2000 and some valuable bangles so that the deed could be done, but of course at that stage nothing was done. Azam complained to the police, and the appellant also complained to the police, alleging that Azam had made threats and caused damage to her property. She also instructed new solicitors to seek legal aid to sue Azam, and paid an expedition fee to expedite registration of the title to 251. On 28th March 1990 the appellant was arrested and interviewed, and on that occasion she asserted that Azam had transferred the property to her. She said that he had asked

Bala to kill her, and paid him £3000 to do so. She said that Bala had raped her and stolen 6 bangles worth £1300 as well as £200 in money. She denied that she had ever asked Bala to kill Azam, and said that what she said on the tape had been said piecemeal in her own home at the dictation of Bala after she had been reduced to tears. At the trial there was expert evidence called by the prosecution to show that the tape recording had not come into existence piecemeal in the way that she had alleged, and that it had probably been recorded, as Bala alleged, in a taxi or hire car.

On the day that the appellant was being interviewed, 28th March 1990, solicitors acting for Azam issued a notice to quit alleging rental arrears of £3000, and it is perhaps not surprising that at that stage the police and the prosecuting authorities decided to opt out, and to leave the dispute to the civil courts. On 29th March 1990 the appellant, Azam and Bala were all bound over, but things seem to have continued much as before. On 2nd April 1990 a Halifax Building Society cheque refunding insurance to Azam in the sum of £78.13 was endorsed by someone other than Azam and was paid into the appellant's bank account. On 23rd April 1990 the Building Society confirmed to Azam's solicitors they no longer had the title deeds to number 251 because the account had been repaid, and in May 1990 those solicitors registered a caution on the title and reported the situation to the police.

Sometime during May 1990 the appellant went to Pakistan for the wedding of her eldest daughter Naseem, and whilst she was away she heard that windows had been broken at the rear of number 251. She returned to England, and on 11th August 1990 she was interviewed by the police as to how she had obtained the title to number 251. She said then that she had paid the deposit of £2000 and the instalments and that it was Azam who had gone the solicitors, that is to say to Mr Conway, to pay off the mortgage with money she had obtained from relatives. She had not gone, she said, because she was looking after a young handicapped child.

On some uncertain date after the appellant's attempt in March 1990 to get Bala to kill Azam there was an occasion when the appellant and Azam were driven to Luton by Fawad Alam, a friend of Azam. According to Fawad the appellant jumped in front of the car as they were setting off and waved them down. During that journey Fawad observed Azam and the appellant kissing in the back of the car, and he says that Azam asked the appellant why she had got Bala to kill him, adding "you could easily have poisoned me."

By late February 1992 although the appellant and Azam were often seen in each others company they were also litigating in the civil courts. The appellant had sued both Bala and Azam, and on 25th February 1992 her solicitors wrote to Azam's solicitors, saying that the appellant had informed them that "the two families are now speaking again and that there appears to be some measure of agreement between them." The letter continues:–

> "We understand it is suggested that this action be concluded with our client making no further claims against your client and your client withdrawing his claims against our client's property so that the net result would be that the damages action against your client would cease but that your client would accept our client's title to the property … ".

Azam's solicitors replied immediately indicating that according to their client there had been no discussion along the lines suggested, and on 29th February 1992, when Azam visited number 251, the appellant, with the apparent intention of killing him, gave him food laced with arsenic. So count 4 in the indictment charged her with attempted murder. Azam was very ill, but in due course he was discharged from hospital and continued his association with the appellant. At that stage he apparently did not appreciate that she had attempted to poison him.

On 6th March 1992 the appellant's solicitors, having heard formally from Azam's solicitors in relation to the alleged proposal to settle the civil action, wrote to the appellant as follows:–

> "The solicitors to Mr Azam have written to say that he denies entering into any agreement with you and that the case must proceed. I will let you know when the pressure next arrives to make some progress with the case. I presume until then you would wish me to allow the matters to rest."

It was the prosecution case that having failed to remove the threat to her title to number 251 by means of an agreement the appellant resorted again to arsenic, and on 10th April 1992 at her home she laced Azam's food with a fatal dose, hence the charge of murder which was count 5 in the indictment.

There was evidence that about 3.0 am next morning, when he was very ill, Azam told his wife that he had eaten gagrella at Zoora's and there was also evidence that the appellant tried to persuade Azam's sister not to agree to the hospital conducting the post mortem examination which took place on 13th April 1992, but which yielded no significant result. Azam was therefore buried, but soon afterwards his vomit was analysed, as a result of which his body was exhumed. The presence of arsenic was firmly established, and on 17th April 1992 the appellant was arrested. She was interviewed many times, but constantly denied any wrongdoing, and chose not to give evidence at her trial.

The Defence Case at Trial

3 Although the appellant did not give evidence she did not simply put the prosecution to proof. She was represented by Mr Murdoch of T.I. Clough & Co., an experienced criminal defence solicitor who gave evidence before us, and who, with the assistance of an interpreter, took detailed instructions. Those instructions were conveyed to Mr James Stewart Q.C. and Mr Andrew Campbell, and throughout the hearing of this appeal Mr Edward Fitzgerald, Q.C., who now appears for the appellant, has accepted, in our judgment rightly, that the appellant was competently represented in the court below. For reasons which will become apparent it is of some significance to see what the defence was which was advanced, and we know what it was because we have a full transcript of Mr Stewart's final speech.

Dealing with the matter chronologically, Mr Stewart submitted that Azam, at least at times, abused the appellant's trust in relation to the house at Legram's Lane for which she had paid everything by asserting that his interest in the house was more than nominal. Nevertheless Mr Stewart contended that this cause of friction between the appellant and Azam was not such a central feature of the case as the prosecution alleged. Between 1984 and 1989, when Azam was in prison, the appellant did form a close relationship with Raghib, and in 1988 when she wanted to go to Pakistan to see her sick father she did want to sell the house to Raghib to raise money for the journey, thinking that she would buy the house back on her return, but she did not forge Azam's signature on the power of Attorney, nor did she know who did so, even though she falsely told the police that the document was signed by Azam in his wife's presence. Similarly she did not endorse Azam's signature on the back of the cheque for £620 before it was paid into her account. As Mr Stewart put it "someone forged it; it was not Zoora". The proposed sale to Raghib in 1988 did not proceed, not because of any difficulty with the Power of Attorney, but because the appellant's father recovered, and she no longer needed to raise money to go to Pakistan.

In March 1989, before Azam was released from prison, he became aware of and jealous of her affair with Raghib. In a letter to the appellant of 13th March 1989 Azam asserted that the appellant was using "my property" in an immoral way and he threatened to refer them to the authorities. Another letter of 18th April 1989, is in similar vein, so it was contended on the appellant's behalf that the 1989 letters claiming non-payment of rent and misuse of the £620 cheque should not be taken at face value. Azam and the appellant both knew perfectly well that no rent was due and that the £620 was money to which the appellant was entitled. After Azam was released from prison in May 1989 the defence contention was that he and the appellant were reconciled. To quote Mr Stewart again "they forgave each other; they became friends again, which is what Zoora said to the police and, you may think, is borne out by other evidence."

In 1990 the appellant once again wanted to raise money to go to Pakistan, and once again the solution appeared to be the sale of 251 to Raghib. Her relations with Azam were good, he recognised that in reality the house was hers, and was happy for it to be transferred to her so she could raise money by means of a sale to Raghib. That was what she told the police, and Mr Stewart relied on that assertion. So the new solicitor, Mr Conway, was visited by a man and a woman on 26th February and 5th March 1990. But the appellant was not there on either occasion. The records kept for her by her daughter Naseem were relied on to show that on each occasion she was looking after someone who was disabled. Thus, it was contended, she could have had no part in forging the transfer document which is referred to in count 1.

The incitement to murder alleged in count 3 was entirely attributable to mischief making by Bala. When the appellant's relationship with Azam was good Bala intervened and told Azam that the appellant wanted him killed. He then told the appellant that Azam wanted to kill her. Mr Stewart poured scorn on the suggestion that the appellant had given Bala £2000 and some valuable bangles to do the deed. Those to whom Bala said that he had passed on the bangles and some of the money were criticised because they had no documentary evidence to support what they said, and the authenticity of the tape-recording was questioned, largely on the basis that the police and the expert

had only been furnished with a copy. In the period of disturbed relationships allegedly brought about by Bala, Fawad Alam gave evidence that he went with Azam to break the windows of number 251. According to Fawad, Azam added to the damage by breaking a television and a fishbowl, and this was of course the time when Azam's solicitors served the Notice to Quit.

But at the trial Azam's wife said that within months of the Bala incident the appellant and Azam were friends again. Naseem also said that they took up again, and that was the case put by Mr Stewart to the jury. In 1991 Azam was visiting number 251 regularly and eating there, the appellant's mother was working for him in the nappy business, and he was regarded by the appellant's children as an uncle. When giving evidence Naseem said "we were like his children. I was closer to him than a daughter would be." The only person who, Mr Stewart suggested, was likely to have been unhappy with the arrangement was Azam's wife because Azam "was shaming her by flaunting his relationship with another woman in public."

It was the defence contention that in the spring of 1992 the civil action brought by the appellant for damages and Azam's counter claim asserting his title to number 251 was all but over. Naseem gave evidence at the trial that "at the time of Azam's death, as far as I knew, the action was being withdrawn. I heard this from Azam. He was saying this about 2 weeks before his death." So the suggestion was that the letters written by Azam's solicitors did not really represent his intentions as disclosed by what he was saying to the appellant and her family. It was accepted that on the evening of 29th February 1992, after a visit to number 251, Azam was very ill, but Mr Stewart submitted that arsenic may not have been the cause. He developed that submission by reference to a body of medical evidence. The symptoms may have been attributable to severe gastro-enteritis and neuritis arising from diabetes. If they were attributable to a deliberate administration of arsenic then the jury was asked to consider whether the appellant was shown to have been the administrator. Mr Stewart conceded at the start of his address that if arsenic were deliberately administered "you may think the probability is that whoever did it intended to murder him."

As to the events of 10th April 1992 Mr Stewart relied on the family evidence that "Azam was not even expected that night", and that in a house filled with relations there was no gagrella in sight and no opportunity for the appellant to administer arsenic, whether with gagrella or with anything else, because the food was taken from a communal dish.

The possibility was raised that Azam may have been poisoned after he got home, and the jury was invited to look carefully at Ajaib's evidence that he told her that he had eaten "some gagrella from Zoora's". Was that said, or was Ajaib just wanting to implicate the appellant? If it was said, was Azam by then confused?

We have gone into the defence case in some detail to show that there was nothing superficial about the case which was presented during the course of what Mr Stewart described to the jury, no doubt with a touch of flattery, as "the fairest of trials". In response to the case advanced by the prosecution a positive defence case was put forward, built upon evidence which was extracted from the appellant's family and other members of the Asian community. The appellant's daughter Naseem was an important witness, and of her, Mr Stewart said "You saw Naseem. You judge her". In relation to the title to the house Mr Stewart submitted that the appellant had no reason to resort

to dishonesty or violence because "she knew how to go to solicitors" and on more than one occasion he pointed to her good character, her personality and her medical history to show that she was no murderess. Quite early on he said:–

> "She is a woman described by her doctor as thin at the time, malnourished, rather highly strung, susceptible to periodic kidney infections, anaemia and depressions. Does she sound to you like a murderess, members of the jury?"

Later on, when dealing with the allegation of incitement to murder, Mr Stewart said:–

> "What you are going to have to do is to ask yourselves whether it is conceivable that this mother of three children, who is one of life's losers you may think, who is described by her GP as highly strung and subject to depression, could conceivably go to a man like Mir Aslam and offer to pay him £2000 to kill somebody else."

The background to those submissions is of some importance, and that is a matter to which we now turn.

Medical Evidence available at Trial

4 On 29th July 1992, six days after the appellant had been re-arrested and charged with murder, she was examined by Dr Wood a consultant psychiatrist instructed by her solicitors. She had already been seen at length by Dr Singh of the medical staff of HMP Newhall, and Dr Wood was accompanied by Daljit Kaur, a representative of the appellant's solicitors, who translated to and from Punjabi. Dr Wood did not have access to the GP notes or hospital notes, but he learnt from the appellant that she had not previously been seen by a psychiatrist although she had taken too many pills on two occasions, the most recent being eight years previously. She said that she had been beaten by her husband, but felt badly let down and disgraced by his leaving her. Dr Wood got the impression that she might well have had a succession of men friends thereafter, but she denied that, although she said that she had called the police when pestered by men and had attacked two men who had given her unwanted attention. Dr Wood also thought that she may have been anxious and depressed prior to the alleged offence of murder. At page 5 of his report he says:–

> "My discussions of the current allegation of murder elicited straight forward denials from this accused. She was plainly aware of the nature and the seriousness of the charge that she is facing, but she told me that she had not committed any offence. She was prepared to give a very detailed account of the background to her acquaintance with the victim of this offence, and she was determined that she had not done anything to deserve to be charged with murder."

Dr Wood considered the risks if she were to be granted bail, and concluded:–

> "It was plain on 29th July, 1992 that she was not suffering from a depressive illness."

On 7th October 1993 at the request of the court, another consultant psychiatrist Dr Paul Collins examined the appellant at Newhall. He had access to IQ tests and to her inmate medical record, which included photocopies of some GP records covering the six months prior to her remand in custody. He had also read the depositions, so he knew the case against her. Dr Collins obtained a medical history from the appellant who told him, amongst other things, that she had been to see her GP because of worry and depression, but she said that at the time of Azam's death "she did not feel depressed, nor did she have any trouble sleeping, eating or with her general health." She described her life as normal, but forcefully refused to answer questions relating to sexual matters which she said were of no relevance. Dr Collins found her presentation to be consistent with mild depression. His opinion was that with the aid of an interpreter she would be able to follow court proceedings and give instructions to her legal advisors. Dr Collins concluded:–

> "Following her reception into custody there was some evidence of depression, which was probably reactive to the situation in which she found herself and which may persist to some extent still. From my interview and examination of Zoora Ghulam Shah and the other information available to me I am not of the opinion that at the material time she suffered from such an abnormality of mind as would have substantially impaired her mental responsibility for her acts or omissions in playing or being a party to the killing of the victim."

During the course of the trial the appellant's solicitors, on the advice of counsel, obtained a statement from the appellant's general practitioner Dr Mughal, which was read to the jury. She had only become his patient in February 1992, so his statement consists mainly of a review of her general practitioner records which showed depression or anxiety intermittently since early 1986, anaemia and kidney infections. Dr Mughal had himself observed her to be thin and malnourished, and rather highly strung. He said that no medicine prescribed for her would have caused her to become depressed.

So the medical evidence at that time, as it seems to us, was all one way. It showed that the appellant had often sought medical assistance, that she had suffered to some extent from depression and anxiety, but there was no evidence that at the material time when Azam died she was suffering from such an abnormality of mind as would have substantially impaired her responsibility for her acts. Furthermore when examined in custody she appreciated her position, she co-operated with the examiner, and was plainly so far as could be ascertained capable (with the assistance of an interpreter) of giving instructions to solicitors and counsel in the normal way.

Developments after Sentence.

5 On 23rd March Grounds of Appeal were settled by trial counsel in relation to the conviction on counts 4 and 5, and in relation to the sentence imposed on counts 1 and 3. On 2nd April 1994 leave to appeal was refused by the single judge. Thereafter the appellant instructed her present solicitors, and they instructed Pragna Patel, a part-time community worker with Southhall Black Sisters to visit the appellant. She did so on many occasions over a period of 18 months, and assisted the appellant to prepare a full statement which, together with the solicitors, Pragna Patel reduced to the 59 page statement which we have seen. We summarise what in that statement the appellant says:–

(1) persistently over the years she had lied to the police, the doctors and to her lawyers.
(2) her husband had been violent to her, yet when he left her she was worse off — stranded in a strange land, unable to speak English, and with young sick children.
(3) having met Azam she decided to have sex with him in return for his help. In her statement she said at first she thought she loved him, but that was not her evidence in the witness box. Before Azam lent his name to the purchase of 251 Legram's Lane she knew that he was involved in drugs and kept weapons. She sought help from Raghib but he was afraid of Azam, and for what help he gave her he "extracted a price". She became pregnant by Azam and eventually had an abortion — it was one of several she had over the years.
(4) in about October 1982 she went to Pakistan to see her father and was told by Azam to bring back drugs. He was angry when she did not do so. He took her to the cemetery where her children were buried, and there abused her verbally, physically and sexually.
(5) in about 1983 she when pregnant took an overdose of tablets but vomited, recovered and eventually had an abortion. Even when she was weak and unwell Azam demanded sex.
(6) on one occasion when the appellant was ill Azam threatened to turn his attention to Naseem, then aged about 10.
(7) when Azam was arrested in April 1984 she visited him in prison, and Zamoorat (Azam's sister's husband) began to call on her. He and Raghib had keys, and both sexually abused her whilst Azam was in prison. Zamoorat and others claimed to do so with Azam's approval.
(8) in 1986 Naseem was sent to Pakistan because of Azam's "persistent interest" in her.
(9) the forgery of transfer documents in relation to 251 was Raghib's idea. he said that Azam would never give her the house but offered her money, which she needed to go to Pakistan, if she co-operated in getting the house transferred to his name. About £2000 of the £9638.62 paid to Mr Conway on 5th March 1990 to redeem the mortgage came from her own and Naseem's savings, the rest came from the committee and from Raghib.
(10) when Azam came out of prison he threatened to evict her and leave her to Raghib. He also denied sending Zamoorat to her. In the result both Azam and Raghib continued to abuse her, and Azam expressed further interest in Naseem, who was then sent back to Pakistan. She appealed to Azam's brother Sher Azam an "elder" in the community but he declined to help.
(11) because of Azam's treatment of her she did ask Bala to beat up Azam, to show that there was someone on her side. Bala said that as Azam was a very dangerous man she would then be in danger, and recommended that Azam be killed. After discussing the proposal with Raghib she agreed, and gave Bala money and jewellery.
(12) after her attempt to hire Bala to kill Azam was discovered, Tariq, who she had met through Raghib, suggested that she say that she was raped. She knew Azam to be behind the damage done to her house and he and Fawad continued to harass her after the binding over. Damage was done to her home in May 1990 while she was in Pakistan for the wedding of Naseem.

(13) whilst in Pakistan she obtained a taveez (writing on a piece of paper) from a holy man, intending to give it to Azam to get him to transfer the house to her name and to leave her alone. The taveez was to be administered by putting the paper in water until the ink dissolved and then getting Azam to drink the water. She also got Dr Sejad to give her something to affect Azam's legs and make him impotent. He gave her a green powder (Neela totha) and told her that a teaspoon would have the desired effect, but if she gave more Azam would die.
(14) on return to England she did not use the powder, but still feared Azam's interest in Naseem despite Naseem's marriage, and early in 1992 she was afraid that he was interested in Fozia as well. So she arranged for Fozia to go with her mother to Pakistan.
(15) on 29th February 1992 when she used the powder because of Azam's continuing harassment, she put some of it into a samosa mixture. She also used the taveez. She fed Naseem and Fozia first with unadulterated samosas and when Azam arrived gave him the four somosas made with the adulterated mixture. He insisted in sharing the last somosa with Naseem and Fozia, which the appellant could only watch helplessly, but when he left she gave them milk and got them to vomit.
(16) after Azam recovered he behaved as before. The appellant was very exhausted, and on one occasion had to be admitted to hospital. On discharge Azam took her to his friend Akhtar's house, and despite discouragement from the appellant made sexual advances to her in the presence of Akhtar's girlfriend.
(17) Azam was again talking about Fozia (now nearly 12) and was angry when the appellant said that she planned to send Fozia to Pakistan with her mother for 4 weeks. On 10th April 1992 Azam again took the appellant to the cemetery for sex and on the way back she got him to buy some gagrella. She got home about 4 pm and Azam then left. She knew he would return about 8 pm and before he did so she added about a full teaspoon of the green powder to the gagrella. There were a number of relatives in the house and when Azam returned she took him aside into the front room to ask him not to make a fuss about Fozia going to Pakistan. His price was that she have sexual intercourse with him. She agreed, and got him then to eat the gagrella. In her statement the appellant does not say that on 10th April she intended to kill Azam. She says that she wanted him to become so ill that he would not be able to touch her again, and, by inference, would be no threat to her daughters.

Dr Lipsedge, a consultant psychiatrist at Guys Hospital in London who has particular experience of trans-cultural psychiatry, was then consulted. He saw the appellant on 22nd March 1997 with Pragna Patel at Durham Prison, and concluded that she was suffering from a mental disorder when she poisoned Azam. The disorder was, in his opinion, a severe depressive illness which developed as a reaction to Azam's behaviour towards her and her daughters, and it diminished her responsibility at the material time. Further statements were obtained from Dr Mughal and Naseem, and fresh grounds of appeal were prepared in relation to counts 4 and 5 which admit to the deliberate administration of poison but contend that–

(a) in relation to the offence of attempted murder (count 4) there was no intent to kill, only an attempt to render Azam impotent and incapable of causing further physical harassment:
(b) in relation to the offence of murder (count 5) when administering the laced gagrella the appellant "was no longer concerned whether Azam lived or died".

The court was invited to receive the appellant's 59 page statement, and the report of Dr Lipsedge together with an addendum of 18th June 1997, and to conclude that a reasonable jury in the light of the fresh evidence would acquit the appellant of murder and convict her of manslaughter on the grounds of diminished responsibility:

alternatively it would be assisted by the report to conclude that the Crown had failed to disprove provocation. Of course neither the issue of provocation nor the issue of diminished responsibility played any part in the trial, but in the light of the fresh evidence the convictions are said in the grounds of appeal to be unsafe and unsatisfactory.

On 7th July 1997 the full court (differently constituted) gave leave to appeal, without deciding whether the evidence of any individual potential witness should be received. Statements continued to be taken, even after we began to hear the appeal, and we now have–

(1) a wealth of psychiatric evidence, including not only the original reports of Dr Wood and Dr Collins and the report of Dr Lipsedge, but also further reports from Dr Collins and Dr Lipsedge and reports from Dr Shubsachs and Dr Rix (instructed by the Crown):
(2) General Practitioner material, including records and statements of successive General Practitioners Dr Modi, Dr Abbasi and Dr Mughal:
(3) Social services records:
(4) Statements from a number of lay witnesses who observed the appellant's demeanour at the relevant time:
(5) A statement from Mr Murdoch, the solicitor who acted for her.

Conduct of this Appeal

6 We agreed to hear some witnesses orally, and to look at the rest of the material without deciding pursuant to section 23 Criminal Appeals Act 1968 , as amended, whether or not to receive the evidence. We therefore heard oral evidence from Dr Mughal, the appellant, Mr Murdoch and Dr Lipsedge. We also heard submissions on behalf of the appellant and on behalf of the Crown. Mr Fitzgerald for the appellant urges us to receive the fresh evidence and to allow the appeal on the basis that once the evidence is received it becomes clear that the appellant was suffering from a depressive illness and that the defence of diminished responsibility "might well succeed and might well have succeeded at the trial if advanced on the present lines" (to use the words of Lord Bingham CJ in *Campbell (1997 1 Cr. App R. 199)* . The conviction is therefore said to be unsafe (see section 2(1)(a) of the 1968 Act as amended) and the appeal in relation to that count should be allowed. Mr Fitzgerald recognises that if the appeal is allowed the normal course is to order a re-trial, and he did not seek to persuade us to adopt any other course, but he submitted that as count 4 (attempted murder) is closely linked with count 5 the conviction in relation to count 4 should also be set aside and the order for a re-trial should apply to that count also, so that the appellant can deploy further evidence of lack of intent to kill. Mr Fitzgerald accepted that if he could not persuade us to order a re-trial to enable the appellant to raise the issue of diminished responsibility he could not on the evidence available achieve that result to raise the issue of provocation, but he reserved the right if a re-trial is ordered to raise that issue also.

The Crown's primary submission is that the fresh evidence should not be received, and it is really common ground that without fresh evidence the appeal must fail. Alternatively Mr Smith contends that if the fresh evidence is received it can be seen on

analysis to be of little weight as the experts on whom the appellant relies are themselves relying on what she has told them, and she is a witness whose evidence has been demonstrated to be not worthy of belief. To that Mr Fitzgerald replies that the experts have other sources of information and their evidence can survive even if, contrary to his submissions, her evidence is not believed.

Should the fresh evidence be received?

7 Section 23 of the 1968 Act, as amended, provides so far as relevant:–

> "(1) For the purposes of this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice –
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
>
> (2) the Court of Appeal shall in considering whether to receive any evidence have regard in particular to –
>
> (a) whether the evidence appears to the Court to be capable of belief;
>
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

We therefore have a discretion under subsection (1). In deciding how to exercise that discretion we must give primary consideration to what is necessary or expedient in the interests of justice, but we must also pay particular regard to the four matters listed in subsection (2).

We turn therefore to consider each of those four matters separately.

(a) Capable of Belief?

We consider first the appellant's own evidence. Making every possible allowance for the difficulty of giving evidence through an interpreter to English judges whose experience of Asian culture is bound to be limited, we have to say that we found the appellant to be a most unsatisfactory witness, and her evidence to be not capable of belief. For example she said when giving evidence in chief that at the very beginning of their sexual relationship, before she went to number 251, Azam raped her. In cross-examination she said he treated her with respect "when we first bought the house" (i.e. number 251). She professed, perhaps rightly, to care a great deal for her daughters, but if what she has told us is right she never warned Naseem to beware of Azam although she believed that he posed a threat to her, and she stood by on 29th February 1992 and watched both daughters eat part of the samosa which she knew to be poisoned. She was not prepared to admit that she got Naseem to lie for her at her trial, but if her evidence to us is correct Naseem's account of eating samosas bought at a shop which the appellant could not have tampered with, and her portrayal of a happy relationship between the appellant, her daughters and Azam right up to the time of his death must have been a lie. The whole theme of the appellant's evidence to us was that for years she was subjected to physical and sexual abuse at the hands of Azam, Raghib, Zamoorat, and others, yet no one seems to have noticed a single suspicious bruise (other than one black eye), nor does she seem to have shared with any one what she now says was the cause of her troubles. We appreciate that for someone from her background it may not have been easy to unburden herself, but she had many contacts — three successive general practitioners, all Asian; social services representatives to whom she did speak about intimate matters such as abortion, and who included two ladies from her own culture; hospital staff, police and solicitors. Furthermore, although plainly at times anxious, undernourished and depressed she was, according to her daughter, a "strong-willed woman", and there was clear evidence of that in what she did. She not only broke the windscreen of a car belonging to one man, but, as the history shows, she conspired to commit forgery, hired a hit man (Bala) and, when double crossed made allegations of rape and theft which she now admits to be false. If she was prepared to share problems with a holy man and Dr Sejad in Pakistan when the problems were themselves many miles away we cannot see what prevented her from sharing them with doctors, social workers and others in Bradford who shared her cultural background, especially when her own liberty was at stake. Of course it would not be easy to say that she was being persistently sexually abused, but when she eventually alleged abuse by Zamoorat it was on six or eight occasions in her statement, but on a hundred occasions to Dr Shubsachs. That degree of discrepancy makes it impossible to accept that either version is true. Part of the appellant's explanation for the lack of candour with solicitors after her arrest was that she was led by them to believe that the case against her was not strong, but in cross-examination she conceded that she had no such illusions by the time of the trial and, having heard from Mr Murdoch, we very much doubt whether she had any illusions long prior to that. More than once the appellant referred to the Koran. She said that she did not give evidence at her trial because she did not wish to take the oath and then tell lies, but she accepted that she did just that at Azam's trial in 1984, and if what she now says is right she did it again when she swore an affidavit in relation to her civil action. More generally by her own admission she has lied repeatedly in the past, and we are far from satisfied that

she has ceased to do so in the account she puts forward now.

For present purposes we accept that the other evidence now laid before us — from lay witnesses, general practitioners, social workers, a solicitor and two consultant psychiatrists — is capable of belief. As Lord Bingham CJ said in *Steven Jones (1997) 1 Cr. App. R. 86* at 93 C:–

> "The requirement in subsection 2(a) that the evidence should be capable of belief applies more aptly to factual evidence than to expert opinion, which may or may not be acceptable or persuasive but which is unlikely to be thought incapable of belief in any ordinary sense."

Dr Lipsedge and Dr Shubsachs both approached their task in the normal way. They took a history from the patient and then went on to apply their expertise on the assumption that the history was correct, which at that time coincided with their belief. If, as is now apparent to us, both doctors were misled, the question arises as to whether their opinions can survive. Mr Smith submits that they cannot, but the two psychiatrists, in late supplementary reports tendered after the appellant gave her evidence, say that their conclusions are adequately supported by evidence drawn from other sources — GP records, hospital records, social services records, lay witnesses' observations, etc. That seems to us to be a tenable position for the two psychiatrists to adopt, but it is undeniable that their views would have carried much more weight if in each case it were possible for us to regard the patient's history as reliable. As Dr Rix points out, the patient's history — her record of symptoms — is one of the pillars on which psychiatric diagnosis stands.

If the conclusions of Dr Lipsedge, Dr Shubsachs and to some extent Dr Mughal were to be accepted at face value then a jury would find that at the time of the killing the appellant was suffering from a depressive illness — a major depressive episode. Up to a point Dr Rix agrees. He considers that the appellant did suffer from a depressive or mixed anxiety and depressive disorder, but on 29th July 1992 (3½ months after the killing) Dr Wood said that it was plain that she was not suffering from a depressive illness although she may have been anxious and depressed prior to the offence occurring. Dr Collins, who has seen the appellant on two occasions, one of them shortly before her trial, says that "deliberate fatal poisoning of adults is not compatible with significant clinical depression". The force of that point is easily grasped by a non-medical mind especially where, as here, the poisoning is repeated.

(b) Grounds for allowing the appeal?

The defence relied upon is diminished responsibility, which is set out in section 2 of the Homicide Act 1957 . So far as material, it provides:–

> (1) where a person kills … another he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts …. in doing … the killing.
> (2) on a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

"Abnormality of mind" means a state of mind so different from that of ordinary human beings that a reasonable person would judge it to be abnormal (*Byrne (1960) 2 QB 396*).

If a jury were to accept without qualification the views of Dr Lipsedge and Dr Shubsachs as to the extent of the appellant's depressive illness at the time of the killing then it may well be that they would find that she suffered from abnormality of mind, but, as Dr Rix points out, it does not necessarily follow that because a depressive or mixed anxiety and depressive disorder is present there was an abnormality of mind–

> "Whether or not a jury would have regarded it as amounting to an abnormality of mind, which such disorders are capable of being, would depend on how they appraised the various elements of the evidence."

Similar problems arise in relation to the next ingredient in the statutory defence. If there was an abnormality of mind it must have been such as substantially impaired the appellant's responsibility for what she did. In other words it must have been a real cause of the appellant's conduct in poisoning Azam. It need not have been the sole cause, but she must show that its effect was more than merely trivial (*Lloyd (1967 1 QB 175*). Here again, as it seems to us, the evidence of Dr Lipsedge, Dr Shubsachs and Dr Mughal, if accepted, does provide the basis for such a finding, but there are three consultant psychiatrists who express a different point of view, including both of those who saw the appellant before her trial.

(c) Admissibility

If the issue of diminished responsibility had been raised at the trial the evidence now sought to be relied upon would have been admissible, subject to exclusion of hearsay from the medical evidence (See *Bradshaw (1986) 82 Cr. App. R. 79*). But it was held in Melville (1975) 62 Cr. App. R. 100 that when section 23 of the 1968 Act speaks of the evidence being "admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal" that "means an issue which was raised below and is the subject of the appeal in this court" (per Lord Widgery CJ at 104). The emphasis is ours. Although Melville was decided long before the 1968 Act was amended the words in question have not been changed. It follows that in our judgment the fresh evidence does not meet the criteria in section 23(2)(c) .

(d) Reasonable Explanation for failure to adduce

We accept that in some cases where the issue of diminished responsibility is not raised at the trial the explanation may be found in the same medical condition which is said on appeal to furnish the appellant with a defence. For example, in the recent case of Borthwick 27th October 1997 unreported , this court considered the possibility that an appellant said to be a paranoid psychotic, may not have been able to give rational instructions as to the way in which his defence was to be run. But that is not this case. Here Mr Fitzgerald submits that the appellant put forward a defence which she now admits to have been a tissue of lies because she wished to protect herself and

especially her family from further shame and the risk of violence. We heard evidence from the appellant and from Dr Lipsedge as to the importance of honour in the society from which the appellant springs, and as to the possibility of retaliatory violence. Up to a point that is evidence which we accept, but only up to a point because this appellant, as it seems to us, is an unusual woman. Her way of life had been such that there might not have been much left of her honour to salvage, and she was certainly capable of striking out on her own when she thought it advisable to do so, even if it might be thought to bring shame on her or to expose her to the risk of retaliation. The forgery executed to obtain title, and the false allegations of rape and theft made against Bala are but two examples of that. The nature of her defence at the trial which involved an open attack on Bala and others, and a thinly veiled suggestion that the deceased's own widow might have been responsible for his death is another example. So we find ourselves wholly unable to conclude that the appellant has put forward a reasonable explanation for what happened in the court below. If she had not chosen to lie about her role in administering the poison it seems likely that her solicitors would have gone back to Dr Wood for a further medical report, and it may be that evidence would then have been forthcoming which would have enabled the defence of diminished responsibility to be raised, but that, at this stage, must be a matter of speculation.

Necessary or Expedient in the Interests of Justice?

8 Having given careful consideration to the matters identified in section 23(2) to which we are required to have regard when deciding whether or not to receive fresh evidence we return now to the discretionary powers set out in section 23(1) . We may receive the evidence if we consider it necessary or expedient in the interests of justice to do so. In Steven Jones (supra) Lord Bingham CJ at 93A said of section 23 that it acknowledges in subsection 2(d)–

> "The crucial obligation on a defendant in a criminal case to advance his whole defence and any evidence on which he relies before the trial jury. He is not entitled to hold evidence in reserve and then seek to introduce it on appeal following conviction. While failure to give a reasonable explanation for failure to adduce the evidence before the jury is not a bar to reception of the evidence on appeal, it is a matter which the court is obliged to consider in deciding whether to receive the evidence or not."

That was an echo of what was said by Lord Taylor CJ in *Ahluwalia (1993) 96 Cr. App. R. 133* at 142–

> "Ordinarily, of course, any available defences should be advanced at trial. Accordingly if medical evidence is available to support a plea of diminished responsibility it should be adduced at the trial. It cannot be too strongly emphasised that this court would require much persuasion to allow such a defence to be raised for the first time here if the option had been exercised at trial not to pursue it. Otherwise, as must be clear, defendants might be

> encouraged to run one defence at trial in the belief that if it fails this court would allow a different defence to be raised and give the defendant, in effect, two opportunities to run different defences. Nothing could be further from the truth.
>
> Likewise, if there is no evidence to support diminished responsibility at the time of the trial, this court would view any wholly retrospective medical evidence obtained long after the trial with considerable scepticism."

Mr Fitzgerald submits that even if a defendant puts forward a lying defence the interests of justice may require this court to permit him or her to put forward a different defence if persuasive evidence to support such a defence is available by the time that the case reaches the Court of Appeal. We recognise that in some situations that may be the case, but we see little room for the operation of such a principle in a case of murder where a defendant has freely chosen to deny responsibility for the acts or omissions which caused the death. If his choice was forced upon him by his illness then of course the position is quite different, but in general no one is entitled to more than one trial, and that, in our judgment, is a principle which ought to apply in this case.

Mr Fitzgerald invited our attention to other cases in which this court has considered the provisions of section 23 and received fresh evidence and sent the case back for re-trial, even though the appellant had put forward a lying defence at his trial. In Richardson 9th May 1991 unreported , that course was adopted, but only it would seem because of the problems which arose as a result of the case being handled by different divisions of this court, and it must always be borne in mind that the power in section 23(1) is discretionary. In Ahluwalia (supra) the appellant's responsibility for the acts which caused death was never in issue, and the evidence of diminished responsibility was available at the time of trial. When giving judgment Lord Taylor CJ said at 143–

> "It is unclear how this potentially important material came to be overlooked or was not further pursued at the time of trial."

In Arnold 7th February 1996 unreported , a case to which Mr Fitzgerald referred on more than one occasion, the appeal failed because no reasonable explanation was given for the failure to adduce evidence of diminished responsibility at the trial, and the court concluded that the new evidence, if received, would do nothing to show that the convictions were unsafe.

So the decision in each of the cases relied upon turned on the particular facts of that case, and each case emphasizes the point that only in wholly exceptional circumstances will this court receive fresh evidence to enable a defence to be advanced which was not put forward at the trial.

Leaving aside for the moment the one trial principle to which we have referred there are, as it seems to us, other reasons why in this case we should hesitate to exercise our discretion in favour of admitting the fresh evidence. The appellant's own evidence is, as we have said, not capable of belief. The medical evidence on which she seeks to rely

came into existence long after the relevant time, it initially relied heavily on her account which we have found to be flawed, and it is at variance with the evidence of the other psychiatrists who have been involved in the case. That factor is not of course decisive but compare, for example, Binning 12th April 1996 unreported , where the fresh evidence was unchallenged. We recognise, of course, that in section 23(2)(b) the word used is "may" but we cannot treat this as a case in which had the evidence now sought to be relied upon been deployed at trial the defence of diminished responsibility would have been bound to succeed.

For all of those reasons we have come to the conclusion that it is not necessary or expedient in the interests of justice to receive the further evidence in this case, and without that further evidence the appeal against conviction must fail. As Mr Fitzgerald recognised, if the appeal against conviction fails the application for leave to appeal against sentence ceases to be of any significance and it too will be dismissed.

LORD JUSTICE KENNEDY: For the reasons set out in the judgment which has been handed down, this appeal is dismissed so far as conviction is concerned. The application for leave to appeal against sentence referred to this court is also dismissed.

MR FITZGERALD: My Lord, there is a proposed list of points for certification to the House of Lords.

LORD JUSTICE KENNEDY: We have had the advantage of seeing those quickly, thank you.

MR FITZGERALD: May I address you on this? Firstly I am seeking a certified point of law, and secondly leave to appeal. We do submit that, whatever your Lordships' view as to the leave to appeal, this judgment does raise and this case does raise points of law of general importance.

The first of those, which we have identified as point 1, is that of the correct interpretation of section 23(2)(c) . That is to say whether the issue must be one which was raised below as well as being raised in the grounds of appeal. My Lord, that issue is dealt with in your Lordships' judgment at page 25 and relies on the decision in Melville . So far as I and my learned friend can recall this was not a matter on which we addressed your Lordship on either side, but obviously we felt it was before the court.

The position is this, that firstly we would submit, it is in a single sentence in Melville , that approach to the interpretation of similar words. It is our submission that if one looks at the exact words of section 23(2)(c) , which are set out in your judgment at page 19, whether the evidence would have been admissible in the proceedings on an issue which is the subject of the appeal. We submit that there is no reference there to the additional criteria and which was an issue below. It is true—

LORD JUSTICE KENNEDY: Nor was there in Melville , in the words which were then in play.

MR FITZGERALD: The formulation is not identical, but even assuming it your Lordships are always able to reconsider a decision of the Court of Appeal where the relaxation of a previous interpretation goes in favour of a defendant or appellant. In any event this is a question of whether the House of Lords should have an opportunity of determining whether that is a correct interpretation and we submit in relation to that, firstly, that

your Lordships would not be bound in any event by an interpretation if your Lordships found that it worked in justice. However, having adopted that interpretation, the issue is whether there is an important point for resolution by the House of Lords in relation to this interpretation.

My Lords, the two points made are these: firstly, it is not there. The words in issue in the court below are not in the subsection. To read into a penal statute words which are not there to the disfavour of the defendants is, in our respectful submission, a big step to take. There is no necessity in reading in. Indeed evidence for that comes conclusively from the decision in Campbell where a different interpretation was adopted. I cannot say definitely that they considered the case of Melville on this point, although it was before them in the citation. My Lord, I have to accept that it is not clear that they had before them that particular passage in Campbell . However as evidence of how these words strike the Court of Appeal — as their natural, ordinary meaning struck the Court of Appeal — we say that the decision in Campbell adopts an approach which is quite different and far more generous to the defendant. We have set out the passage in the skeleton argument. It is plain that the evidence would have been admissible for proceedings on which the appeal lies on an issue of diminished responsibility which is subject of the appeal. So just taking the approach there of the Court of Appeal of Bingham LCJ, plainly it was not his view that there had to be an issue which had been raised in the court below. Your Lordships can see that at 204 where, having cited the modern formulation that:

> "(2) the Court of Appeal shall, in considering whether to receive any evidence have regard in particular to —
>
> > "(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal."

The court applies that criteria at D:

> "It is plain it is that evidence would have been admissible in the proceedings from which the appeal lies on an issue of (diminished responsibility) which is the subject of the appeal."

There is no doubt that in Campbell that diminished responsibility had not been an issue in the court below. The criteria were interpreted following exactly the words of the statute, adding nothing. In our submission the decision in Melville , which did add something which was not there and did so in a way which restricts the rights of the defendant, is in our submission one which is suspect, both because it offends the fundamental interpretation that you do with the ordinary and natural meaning of the words, and secondly because it is inconsistent with the approach taken by this court in the more recent case of Campbell .

My Lord, those are the submissions we make. Of course we would submit that there is a point of law of public importance and that this needs to be resolved; whether the approach under section 23(2)(c) is that the issue must have been raised in the court below or whether in this case it is sufficient to say, as in Campbell , that it is an issue in the stipendiary Court of Appeal. If that issue had been raised in the court below it would have been admissible evidence in relation to it. It is our submission that 23(2)(c) is concerned with admissibility rather than whether the issue had been raised in the court below. The reasonable explanation deals with the question of whether the thing was raised in the court below. This is purely to ensure that the admissible test is satisfied.

Those are the submissions we make on point 1. We say it is an important point. It needs resolution in the light of two or more Court of Appeal authorities as to the correct approach to its interpretation. It arises in the course of your Lordships' judgment and is part of the finding that your Lordships made.

Therefore whatever is your Lordships' decision in relation to the appeal, and I appreciate that the normal course is to leave it to the House of Lords, there is a point of law of public importance and the door should not be closed to that issue being resolved.

The second point we make is in relation to point 2. We say that that point arises from the passage at the bottom of page 27. May I say immediately that of course it is obviously a point of public importance where the balance is to be struck between the one trial principle that your Lordships have identified, and the principle that the most important consideration is whether there is evidence of a trial at issue which casts doubt on the safety of a conviction. We entirely accept that. That is an issue which has to be resolved.

There are perhaps two approaches. One is to emphasise the one trial principle. The other is to emphasise, as the Court of Appeal did in Arnold , that the most important thing is whether an issue has been raised which goes to the safety of the conviction. However looking at your Lordships' formulation of the principle, it sets out the submission that even if a defendant puts forward a line of defence then the interests of justice may require this court to permit him or her to put forward a different defence, if persuasive evidence to support such a defence is available by the time the case reaches the Court of Appeal. The court then recognises that that might apply in some situations but took a restrictive view in relation to murder where the defendant has freely chosen to deny responsibility. We see that—

LORD JUSTICE KENNEDY: In relation to the facts of this case. This was a case of murder. It was not intended to put murder into a special category.

MR FITZGERALD: My Lord, that, forming a crucial part of the res desidendum, is almost inevitably going to lead to the formulation of the principle; the rightness of which would be for the House of Lords to decide. However once it is voluntary and not constrained by duress, the presumption is, in fact the rule is that there is little room for the operation of such a principle where a defendant has freely chosen to deny responsibility for the acts of omissions which caused the death.

In any subsequent case where the argument is put, as relied on in Arnold , what really

matters is not whether the person has lied but whether there is evidence of unsafeness of conviction. In this part of the ratio we see the operation of such a principle in a case generally, not in this case, but in any case where a defendant has freely chosen to deny responsibility for the acts or omissions that caused death.

My Lord, it is not an untypical situation. This is not the only case in which it is likely to arise. Indeed there are cases before the Criminal Case Review Board which raise similar issues where perhaps the degree to which the medical disorder or handicap could be an issue. We say this is a point of fundamental importance. It is not an isolated case. It is not formulated in such a way to be confined to the facts of this case. Indeed, as we understand it, your Lordships are seeking to identify a point of public policy for use in the resolution of these issues. Except where your Lordships envisage an exception where the person is so disabled by mental illness that they do not really have a choice, we would submit that of course in that case you would have a reasonable explanation, and yet Parliament clearly contemplates, and even where you do not have a reasonable explanation, that there can be cases where any reasonable explanation is absent, such as being disabled by mental illness, nonetheless it may be permissible in the interests of justice to allow the new evidence. We do stress that the court's approach is of fundamental importance.

The emphasis is different to that in the decision of your Lordships' court in Arnold where it was stated at 28E:

> "It is thus possible for the Court of Appeal to receive fresh evidence after a defendant has deliberately not run a particular defence at trial and even where his predicament has arisen from his having told lies at an earlier stage."

Now that was in the context of a murder case and in the context of where there were lies going to participation in murder.

LORD JUSTICE KENNEDY: We do not say it is not possible. This is the difficulty. It is a balancing exercise to be carried out on the facts of every individual case.

MR FITZGERALD: My Lord, it is really—

LORD JUSTICE KENNEDY: We say it is going to be difficult.

MR FITZGERALD: Yes, little room for the operation of such a principle and then how can the principle operate?

MR JUSTICE BUTTERFIELD: Only in very exceptional cases, as the judgment makes clear.

MR FITZGERALD: But then the example given is one which that so disabled in mental illness, you have not deliberately taken the choice because you have been disabled.

My Lord, that is the point. We do submit that it is not entirely clear about what the scope of the principle is because the appellant did not give evidence and her only evidence on the record is from police interviews. My Lord, we do submit that the scope of the one trial principle, which your Lordships have identified as an important and

perhaps in this case a determinative principle, is something which raises a point of law and public interest. It may be difficult to formulate the precise point of law.

LORD JUSTICE KENNEDY: I am inclined to agree with you.

MR FITZGERALD: That does not mean there is not an issue of—

LORD JUSTICE KENNEDY: We can only certify if there is a point of law which we can identify. I think your difficulty is that we are in the area where there is going to be a question of judgment and discretion in this court.

MR FITZGERALD: I accept that, my Lord, but if one looks at what happens in the House of Lords very often the question is a very open-ended one, such as what is the scope of the one trial principle? One does not have to define it in so limited a way that it determines the ratio of the case, but we say there is here — obviously your Lordships know better than I do what was the ratio of the case because you decided it — if one looks at that sentence:

> "We recognise that in some situations that may be the case, but we see little room for the operation of such principle in a case of murder where a defendant has freely chosen … "

Given how it goes on, it is likely to be presented as a ratio where someone deliberately chooses to deny responsibility, save in situations of duress or medical disorder, that the principle that lies should not stand in the way of raising the unsafeness of the conviction. That is a general principle. My Lord, that is the submission I make in relation to point 2.

Point 3, formulated in manuscript, is the crucial question in determining the exercise of discretion under section 23 "whether the proffered evidence may afford ground for … " My Lord, that is quoted directly from the Arnold decision. Your Lordships have obviously seen that, but it is at 23H to 24A, where having decided the reasonable explanation test, the court said that the crucial question is whether it affords a ground for allowing the appeal. We submit that there is a tension between the approach, does it afford a ground for allowing the appeal, and the one trial principle approach which must be applied, save in exceptional circumstances such as disability from mental disorder. That is what we would identify as the issue: whether the approach adopted by the court in Arnold , that the crucial question is whether the verdict is unsafe operates to overpower, as it were, the one trial principle wherever the court can say there is evidence which raises the issue of whether this verdict is unsafe.

Just looking at that issue, your Lordships dealt with the question of grounds for allowing the appeal at page 23 to 24 and, given the way in which you have invited us to approach it, your Lordships do not reach a conclusion there but simply leave that as an open question: that there is evidence on the one side and there is evidence on the other.

We would respectfully submit that applying the test laid down in Campbell , that is to say might a jury well have found in the light of this new evidence that this was a case of diminished responsibility, your Lordships certainly do not say that that test has

failed. If that test has not failed, and coming back to it at the end where your Lordships deal with it again, your Lordships do not there say it has failed, then we would submit that is the crucial test, as identified in Arnold , as being passed, and that that is more important than the question of strict adherence to the one trial principle.

I accept that at pages 20 to 25 your Lordships do deal with the sufficiency of the evidence, but your Lordships do not say at any stage in this judgment that the test adopted at the start of the appeal, and formulated in the light of Campbell , that this medical evidence might well have led to the jury finding diminished responsibility. That is what I am concentrating on, the independent evidence of the three psychiatrists. The evidence of one of the doctors was that it was certainly a depressive condition capable of amounting to an abnormality of the mind. That evidence, we respectfully submit, does support the contention that a jury might well have found that this was a case of diminished responsibility. In dealing with the submissions through the evidence your Lordships merely conclude that this is not a case where a defence of diminished responsibility would have been grounds to succeed. That is, in our respectful submission, too high a test because in Arnold and Melville it is specifically not followed, in saying that evidence has to be overwhelming.

So if there is a principle that if the court concludes a defence of diminished responsibility might well have succeeded, and your Lordships do not say that that is not the case here, that is more important than the one trial principle, and then we say that there is an important point of law raised by this case. Clearly there is a tension between the one trial principle with its emphasis on finality, and the "might this new evidence have led a jury to conclude differently" as formulated in Arnold and Campbell .

We do say that this is an issue of public importance, that it is raised by the ratio of your Lordships' decision and it is a matter on which, at the least, the doors should be open so the House of Lords can reconsider. These are important matters which their Lordships' House should consider.

Those are the submissions I make in relation to that point. There is one matter about sentencing which perhaps I can deal with at a later stage.

MR LAWLER: This is for your Lordships. I have to confess I am in difficulty because I was only handed these points just before your Lordships sat and I have only just seen your Lordships' judgment. I have not had time to consider it. My Lords, all I would offer is this: this is very much a case with its own special facts, the court has exercised its discretion and that, we would submit, would militate against any point of public importance which requires further consideration. However should your Lordships think there is something in the submission, I would respectfully invite you, should you wish for submissions from the Crown, to defer in order to give us an opportunity to consider them.

(Short break in proceedings)

LORD JUSTICE KENNEDY: Despite the careful submissions addressed to us by Mr Fitzgerald, we are not prepared to certify.

Now, there is some point you wish to make in relation to sentence, Mr Fitzgerald.

MR FITZGERALD: My Lord, may I just clarify the position that I had hoped I had

adopted. I know that there was discussion of the interrelation of the sentence appeal and the conviction appeal, but I do not record making a concession that if we failed in relation to the conviction appeal the sentence appeal should be not be proceeded with. I appreciate your Lordships' point that one of the factors your Lordships considered is that she has at present a very long tariff, and the 12 years for the attempted murder is substantially less than that. The reason that we would have wished to argue that you proceed to deal with the question of leave to appeal against sentence is this; that whilst one can see how the one trial principle operates in relation to conviction and whilst clearly I would need your Lordships' leave to admit the new evidence in relation to sentence — we are not saying the attempted murder point is one where that, but for the evidence of depression, it would not necessarily have been in issue — the court can adopt a far more liberal approach in relation to new evidence that goes to sentencing. It is very often the case that between the original trial and sentencing new evidence comes to light and the Court of Appeal considers it because it does not offend against the one trial principle, that the conviction is inviolate unless one gives a reasonable explanation, and then the court can consider the evidence. Indeed, perhaps in the interests of public interest, the court should adopt a different approach to sentencing, so that having been convicted a person can lay the full facts before the Court of Appeal.

Our submission would be that the objective evidence, independently verified evidence, which your Lordships will recall was quite dramatic in relation to this appellant's state of mind, the repeated admissions to the hospital throughout February with a series of complaints, the collapses, the overdoses, does afford evidence which is strong mitigating evidence in relation to the attempted murder. There is no inhibition that to admit that evidence to be heard in relation to sentence would offend against the one trial principle which clearly the court has to operate more strictly in relation to an application to challenge a conviction. So our application would be that the new evidence—

LORD JUSTICE KENNEDY: Realistically what does the sentence in relation to the attempted murder matter?

MR FITZGERALD: My Lord, it matters in this way. You are aware that there is a very long tariff.

LORD JUSTICE KENNEDY: I understand the tariff but I do not at the moment see why you say that bears directly on the tariff.

MR FITZGERALD: The point that one would wish to put to the Home Secretary in relation to the tariff is that objective, independent evidence of mental disorder which may not have been sufficient to upset the conviction should be taken into account in relation to the appropriate sentence.

LORD JUSTICE KENNEDY: Now we are talking about the sentence in relation to the offence of murder, are we not? That I do understand, but I do not at the moment see why it matters, in realistic terms at the end of the day, to your client what the sentence for attempted murder was, whether one thing or the other, as long as the sentence in the relation to the murder persists.

MR FITZGERALD: Our argument is this. If in fact the sentence of 12 years was too long, and for reasons already stated evidence of depression was not there at the time of the

trial, then it should be reduced in any event as a matter of justice. If it is too long, it should be cut down. It is not academic because if it comes down then that is a powerful case, albeit the conviction stays in place, that shows that the rejection of the conviction appeal does not mean that there are not mitigating circumstances which have seen the light of day and should be taken into account.

MR JUSTICE BUTTERFIELD: Presumably the tariff was fixed at a time when the appellant was still maintaining that she was not responsible for the events. Of course all the medical evidence can be used in whatever way you, as her advisors, think appropriate.

MR FITZGERALD: Clearly that is one of the most important matters we wish to establish. If the attempted murder sentence is too long because it failed to take account of factors which are now available then, in our respectful submission, it should be reduced. I accept, of course, that your Lordships can take into account the exercise of your discretion, the fact that there is this, as it were, supervening event of the conviction of murder. For example in the case of Batty, (1984) Cr App R , there was a conviction for murder of an Indian diplomat and, at the same time, for false imprisonment of that diplomat. The Court of Appeal heard an appeal against the sentence for the false imprisonment and reduced it on the basis that if it was too long it should be reduced. The effect of a reduction might influence the Home Secretary in his approach to the tariff for murder. So what I am asking your Lordships to do is not without precedent.

LORD JUSTICE KENNEDY: Shall we look at it?

MR FITZGERALD: It is 1984, Batty .

MR JUSTICE BUTTERFIELD: Speaking for myself, of course, this is a high risk strategy. Supposing we accept your submission that we should examine it and then reject your submissions, then what?

MR FITZGERALD: One always runs that risk.

MR JUSTICE BUTTERFIELD: I hope I make my thoughts clear to you.

LORD JUSTICE KENNEDY: It may be better to use what you have, than to deploy an argument which fails.

MR JUSTICE BUTTERFIELD: That is what I am suggesting in a rather Delphic way. It is only a suggestion.

MR FITZGERALD: I am aware that you are going to take the decision is relation to both matters. My Lord, can I put it this way? If you take the view that the supervening event renders it not in the interest of justice, then I will not persist.

LORD JUSTICE KENNEDY: I think is very important that the further evidence should be available to the Secretary of State, that is a different matter altogether. It is not a matter over which we have control.

MR FITZGERALD: I am grateful for that indication. Clearly new issues have arisen which may not go to the interests of justice in relation to the conviction. Your observations will, I am sure, carry weight with the Home Secretary. In those

circumstances I will not take the matter further.

LORD JUSTICE KENNEDY: In those circumstances we seemed to have cleared the ground, and the application as I understand is not being pursued any further; is that right, Mr Fitzgerald?

MR FITZGERALD: It is.

LORD JUSTICE KENNEDY: Thank you very much.