Neutral Citation Number: [2022] EWCA Crim 879

Case No: 2021/0085/ B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM The Crown Court at Wolverhampton
Mr Justice Linden
T2020/7144

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2022

Before:

LORD JUSTICE FULFORD
LORD JUSTICE WARBY
and
SIR NIGEL DAVIS

- -

Between :

PHILIP DAVID JOHN PEACE	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr M Turner QC and Mr O Woolhouse (instructed by **Smith Dawson Solicitors**) for the **Appellant**
Mr A D Smith QC (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 31 March 2022

- -

Approved Judgment

Lord Justice Fulford:

1. On 25 February 2021 in the Crown Court at Wolverhampton, before Linden J and a jury the appellant (then aged 43) was convicted of murder. On 26 February 2021 he was sentenced by the judge to life imprisonment and the period of 14 years, less 3 days spent on remand, was specified as the minimum term under section 322(2) of the Sentencing Act 2020.

2. As the jury convicted the appellant of murder, they were discharged from giving a verdict on the alternative offence of manslaughter.

3. Before this court, the appellant appeals against conviction by leave of the single judge on grounds 1 and 2, as reformulated by the single judge. She refused leave on grounds 3, 4, 5 and 6, and these have not been renewed. Mr Michael Turner Q.C., who appears on behalf of the appellant along with Mr Woolhouse, confirmed before us at the outset of the hearing that grounds 3 – 6 are no longer pursued.

4. On 8 September 2017, Summer Peace, aged just over 5 months, suffered a brain injury. It proved fatal and caused her death the following day, 9 September 2017. The appellant was Summer's father. The prosecution's case was that he was guilty of her murder, causing the fatal brain injury by intentionally shaking her, and possibly striking her head against a soft surface. It was contended that at the time this occurred, he intended to kill or, at the least, to cause her really serious harm.

5. Summer was born on 31 March 2017. She was one of twins (her twin sister is called Scarlett), born to the appellant and Laura Foster. Summer developed normally in the first few weeks of her life and there were no medical difficulties of note. The appellant and Ms Foster also had an older daughter (Mollie-Mae) who was born 13 March 2016. The family home was in Dudley.

6. On 8 September 2017 at around lunch time, the family returned home from a holiday in North Wales. At approximately 1pm the parents ate a takeaway meal with their eldest daughter (Mollie-Mae), and the twins were fed and changed. At about 2.15pm Ms Foster went out to do some shopping, leaving the appellant to look after the twins.

7. At just after 4.04 pm, Ms Foster telephoned the appellant, at which stage Summer was crying loudly. It was a bad connection and the call was terminated after 57 seconds. At 4.07.24 pm the appellant telephoned Ms Foster and told her that there was something wrong with Summer. The prosecution case was that in the gap between these two telephone calls the appellant inflicted the fatal injuries to Summer.

8. During the second call, when the appellant informed Ms Foster that Summer was unwell, Ms Foster told the appellant to call 999. At 4.08pm, the appellant made a 999 call.

9. The 999 call lasted some 4 minutes, until 4.12pm, when the first ambulance arrived at the family home. When the paramedics saw Summer, she was struggling to breathe and had a very weak pulse. She was limp and unresponsive, and her skin was going blue at the peripheries indicating a lack of oxygen.

10. The paramedics provided emergency treatment. They found that Summer's airway was filled with a milky substance, which they tried to clear using suction. They performed cardiopulmonary resuscitation (CPR), giving chest compressions and assisted breathing (mouth to mouth resuscitation). The chest compressions were by way of the "encircling technique": hands were placed around the rib cage, and the lower part of the sternum was pressed up and down using the thumbs. Craig Baker, a paramedic, said he completed two cycles of CPR, a single cycle constituting 2 breaths followed by 15 compressions.

11. A defibrillator was attached to Summer and a pulse was detected; consequently, the paramedics stopped chest compressions as they considered they were no longer necessary. CPR was limited to assisted breathing, by way of a bag valve mask.

12. At 4.17pm a second responding ambulance arrived. Summer was placed inside, and at 4.21pm the ambulance left to take her to hospital. CPR using the bag valve mask continued, and her temperature was hypothermic. They arrived at Russell's Hall Hospital at 4.28pm. Summer was taken to the resuscitation unit where it was established that her heart was not beating and her airways still contained significant milky substance. This was treated by way of suction and an endotracheal tube was inserted into her airway, resulting in her breathing improving to a satisfactory level. Chest compressions continued for about 20 minutes after arrival, and the doctors administered medication including 6 shots of adrenalin. The chest compressions ceased when a pulse was established.

13. Chest compressions at the hospital were administered via two different methods, the encircling method (as used by the paramedics) and also the two-finger method, by which the index and middle finger are used to press the sternum up and down.

14. Blood tests carried out at hospital revealed profound metabolic acidosis: the acidity levels of her blood were high, suggesting a long period of cardiorespiratory shutdown during which she received insufficient oxygen. A CT scan at approximately 8.30pm showed subdural and subarachnoid bleeding over the brain, as well as swelling of the brain.

15. Summer remained very unwell and a decision was made to transfer her to Birmingham Children's Hospital and she was admitted into the intensive care unit at about 10.30pm.

16. On the morning of 9 September 2017, Summer's condition deteriorated. Her pupils dilated and became fixed. Her fontanelle, the soft spot at the top of the skull, was bulging, indicating pressure within the skull.

17. A further CT scan of Summer's head and brain was performed at 9.30am. The scan showed marked changes including the presence of widespread bleeding over the brain. The brain, additionally, revealed severe changes consistent with a lack of oxygenated blood. The consensus of the treating consultants was that in the light of Summer's clinical history, her condition and her brain injury, she could not recover, and life support should be withdrawn. This took place with the parents' agreement and Summer died at 5.44pm on 9 September 2017, around 25 hours after her collapse was first reported.

18. Four days later, on 13 September 2017, a post-mortem was carried out jointly by Dr Kolar, a Home Office forensic pathologist, and Dr Marton, a paediatric and perinatal pathologist (a specialist in the diagnosis of disease and illness in babies and children).

19. The trial involved consideration of multiple areas of complex medical evidence, reflecting, *inter alia*, the significant areas of injury about which a notable number of expert witnesses were called. Although the prosecution and defence experts, certainly in some instances, were in agreement as to the range of potential explanations for individual areas of injury, opinions differed regarding various critical medical issues. In these latter areas most particularly, the jury would have needed to consider which evidence they accepted, resolving the divergent views for themselves.

20. It is unnecessary in this judgment to conduct an in-depth review of the medical evidence, since the appeal turns on the single question of whether the verdict is unsafe because the judge failed to give a tailored direction on the appellant's suggested responsibility for an alleged earlier subdural bleed as a result of shaking. Given this narrowly focussed context, it is sufficient to provide no more than a broad outline of the main medical and other evidential issues in the case.

21. A significant number of the marks and injuries on Summer's body could have resulted from various interventions. Two of the paramedics saw reddening around the upper chest area which they assumed was the result of chest compressions carried out before they arrived. Dr Kolar (called by the prosecution) was of the view that the bruising on Summer's body was inconsistent with normal handling but could have been caused by attempts at resuscitation. Although there was bruising to the central occipital area of Summer's scalp which reflected blunt force trauma, in his view the injuries to the scalp may have been sustained in the course of treatment in hospital. By way of contrast, Dr Kolar found bruising to three areas of Summer's left ear. In his opinion these injuries resulted from the ear coming forcefully into contact with a soft surface, or having been gripped and pulled. He said these injuries were concerning as it was uncommon for an ear to be accidentally injured in this way. The defence suggested that the injuries could be the result of the paramedics taking Summer's temperature in the ambulance, but Dr Kolar testified that he did not regard this as a realistic possibility. Head injury was the medical cause of death, with a hyperflexion extension injury having caused her collapse. In Dr Kolar's view, the constellation of Summer's eye and head injuries were recognisable as being associated with shaking. He said there was evidence of at least one impact, and the most likely explanation was that the deceased had been shaken, culminating with her being thrown onto a soft surface.

22. Dr Marton found that Summer had established acute pneumonia in both her lungs, but he could not say when this developed. This was relevant to the rival contentions: *per* the Crown that it developed in hospital after her collapse and *per* the defence that it may have been present at an earlier stage. Dr Marton could not identify a pre-existing medical condition to explain Summer's collapse.

23. Dr Keenan, an expert in paediatric haematology, carried out a specialist examination to determine whether Summer suffered from a disorder that would have caused her to bleed more easily than most other children. No blood clotting abnormality was identified, however, and in Dr Keenan's opinion Summer had a normal blood clotting system.

24. Professor Al-Sarraj, a neuropathologist, examined Summer's brain and the upper part of her spinal cord. During his examination, he found subdural and subarachnoid bleeding that had occurred in the 48-hour period before her death. Professor Al-Sarraj said that there were three injuries: subdural bleeding, subarachnoid bleeding and ischaemic hypoxia. These were well recognised symptoms associated with non-accidental traumatic injury to children. In his opinion, Summer's injuries had resulted from a movement of the head and spine. He said that the head moved forwards and backwards with force, so that there was a hyperextension and hyperflexion of the neck, which caused damage to the brain stem, and resulted in cardiorespiratory arrest and in turn ischaemic hypoxia. Professor Al-Sarraj said that the minimum degree of force required to cause such injuries could not be precisely quantified, but it would have to be outside (meaning greater than) the range of normal handling or even rough handling. The pattern of damage to the brain stem area meant he could be 70 to 80 per cent confident that the damage was caused by trauma. There was an older subdural bleed to the brain which had occurred a few to several weeks earlier which was the result of trauma. On this issue, Dr Jayamohan, a paediatric neurosurgeon, concurred. The defence case, in contrast, was that the older subdural bleed – if it existed at all – may have been a consequence of the birthing process.

25. Professor Stivaros, a paediatric neuro-radiologist, was of the opinion that Summer's brain injuries were consistent with shaking with the force of a high energy assault to the brain; therefore, what occurred was outside the range of normal handling.

26. The preferred explanation for Summer's collapse for Mr Jayamohan was that she had suffered a traumatic head injury that would have involved shaking; in his estimation, the force required would have been outside the range of normal handling.

27. Dr McCarthy, an ophthalmic pathologist, examined Summer's eyes and he found extensive bleeding and other abnormalities. His view was that Summer's injuries were consistent with traumatic injury, in particular involving vigorous head movement or impact to the head, or a combination thereof, over and above that occurring in the course of day-to-day handling.

28. Professor Williams examined Summer's ribcage and sternum via micro-CT scanning. He found fractures to the sternal ends of Summer's left 6th and 7th ribs. Professor Mangham, an expert in bone pathology (histopathology), subjected Summer's ribcage and sternum to microscopic examination. He found additional fractures to those revealed on the CT scan, and he identified a total of 11 rib fractures and a single fracture to the sternum. Some of these were posterior rib fractures. In his view, anterior rib fractures might possibly be caused by CPR, but for posterior fractures there would need to be gripping and squeezing of the rib cage, which would not occur during properly conducted CPR. Professor Mangham suggested, therefore, that Summer had been unnecessarily gripped around the ribs, squeezed and shaken.

29. Dr Saggar, an expert in clinical genetics, investigated whether any form of genetic or inherited condition might explain the injuries. He concluded that given Summer's mother, Ms Foster, suffered from hypermobile spectrum disorder (HSD), there was a 60 per cent chance that Summer had HSD. He was unable to assess the severity of any disorder in her case. With HSD, the sufferer is likely to have a degree of weakness

within her "connective tissues". These provide support to such parts of the body as the skin, tendons and blood vessels. One consequence of a person having HSD is that they may bleed for longer or at a higher volume following the application of force than with a person who does not have HSD (there is fragility of the blood vessels). Dr Saggar said that it was less certain whether HSD caused fragile bones, although there was evidence that adults and children with vascular or Hypermobile Ehlers-Danlos Syndrome were more likely to suffer bone fractures.

30. Dr Evans, a consultant paediatrician, said that Summer had no symptoms of pneumonia when she collapsed, indicating positively that pneumonia was not present. The fractures, in his view, had not been caused by CPR.

31. Against that evidential background, the issues in the trial were summarised in the prosecution's Opening Note, as follows:

> "The Brain Injuries in Overview
>
> 78. Allow me to draw together these various strands of expert evidence concerning Summer's brain injuries for a moment.
>
> 79. There appears to be little dispute that there was evidence of older, subdural bleeding as observed by Professor Al-Sarraj under the microscope. The issue for you will be whether that older bleeding represents another event in which Summer suffered deliberate, traumatic injury or whether it may represent, for example, bleeding that can occur during the birth process.
>
> 80. In relation to Summer's death, the prosecution anticipates that there is little dispute about the location, type and ageing of the recent brain bleeding and associated changes identified in Summer. Instead, the focus of your assessment will be on whether the head injuries explain Summer's collapse and, if so, how were they caused.
>
> 81. Was it that Summer collapsed as a result of pneumonia and Mr Peace unintentionally caused brain injury when handling her before the 999 call? Was it, for example, that Summer's earlier brain bleeding exacerbated the degree of bleeding she suffered on 8th September? Or was it, as the prosecution say the evidence will demonstrate, that her head injuries were caused by the deliberate actions of the defendant shaking Summer, perhaps also impacting her head on a soft surface at the same time?"

32. The appellant denied shaking Summer. His case was that Summer collapsed as a result of pneumonia, choking on milk, or some other unknown cause and that when the appellant picked Summer up, he must have inadvertently caused her brain and eye injuries, aspects of which were made more likely or were compounded by other factors such as HSD, CPR and raised inter-cranial pressure. Dr Herron, a consultant neuropathologist, expressed the view that the subarachnoid bleeding could have been caused either by trauma or ischaemic hypoxia. He noted widespread ischaemic hypoxia in the context of the damage to the brain stem area, although he could not exclude an element of trauma. He said it would be difficult to quantify the force needed to cause such brain injuries. Generally, the faster the movement and the greater the forward and

backward movement, the more likely it was that such an injury would occur, although he said it was possible that it could happen to a vulnerable child in one sudden movement. In a normal child, there would have to be something more than what might be regarded as normal handling. His opinion, when looking at the findings in relation to Summer's brain in their totality, was that trauma was the most likely cause. As to the older subdural bleeding, it was very difficult to date once it is more than two or three days old and in this instance it was impossible to say whether it was weeks rather than months old. He agreed that this type of bleeding is uncommon in caesarean section cases and that it was unlikely that birth was the explanation for the older bleeding, although HSD needed to be taken into consideration.

33. Mr Richards, a consultant neurosurgeon indicated that the injuries to the brain were traumatic in origin. They could be explained by the actions of the appellant in picking Summer up if these had included the use of high force. A single excessive backwards and forwards movement, possibly with rotation, would be sufficient. However, this level of force would have involved handling Summer in a manner outside the normal handling as expected of carers, be they skilled or unskilled, and it would have been demonstrably wrong. His opinion on the older subdural bleed was that subdural bleeding can occur in caesarean section births but this provided an unlikely explanation for the older bleeding. Otherwise, the explanation was trauma.

34. Professor Luthert, an ophthalmic pathologist, said that in absence any other obvious explanation, the likely cause of the bleeding in Summer's eyes was trauma. A single movement of rapid acceleration and then rapid deceleration could be enough to cause the injury, and that it did not necessarily require a forward movement of the head as well as a backward movement. He indicated that the precise level of the force could not be measured, but it would have to be out of the ordinary, and normal rough and tumble would not produce these injuries. He regarded the bleeding in this case as being at the extreme end of the spectrum. He said that CPR could cause retinal bleeding, but not the other types of bleeding which were found in the eyes.

35. Professor Scheimberg, a paediatric and perinatal pathologist, was of the view that Summer probably (*viz.* there was a 60% chance) had pneumonia at the time of her collapse. She disputed the findings of Professor Mangham concerning the rib fractures. She only found fractures to the front fourth to seventh left ribs and in relation to the posterior ribs, although there were abnormalities, in her view the features were equivocal. She required further evidence for her to be sufficiently confident they were fractures.

36. The appellant gave evidence at trial. He said he had been in a relationship with Ms Foster since 2014. He had been happy at the birth of all the children. Ms Foster had miscarried on a number of occasions. The holiday in Wales had been enjoyable; he was not stressed or tired; and there had been nothing to indicate any problems with Summer. When Ms Foster left to do some shopping she took their eldest daughter with her, and the appellant stayed at home to look after Summer and her twin sister. Scarlett became unsettled shortly after Ms Foster left but the appellant managed to settle her. Then Summer started to cry. Once he had settled Summer, Scarlett became restless and this became the evolving pattern, with the result that they were inconsolable. He tried to give them an early feed, but Summer did not respond as usual and was intermittently

crying. This became increasingly loud and would not stop. He thought she was upset rather than ill.

37. At 4.04.15pm, the appellant received a call from Ms Foster. The appellant told her he had Summer with him. He could not hear properly because she was crying. The call was ended at 4.05.12 pm.

38. After the call ended, the appellant put Summer on the floor to check on her twin sister. He said it was at this point that he realised Summer was unwell since she suddenly became quiet and struggled to breathe properly. By now he was panicking, and he lifted Summer up. Events at this stage were somewhat blurred in his mind, but he recalled failing to support her head which went back. He placed her on the sofa, and at 4.07.54 pm he spoke again with Ms Foster for 17 seconds who advised him to call 999. He gave a fuller account in evidence than he did when interviewed as to how he picked up Summer.

39. During the 999 call, he was advised to carry out mouth to mouth resuscitation. He attempted chest compressions, although this had not been suggested by the 999 operator. He had had basic first aid training and he pushed down on the front of Summer's chest, with one hand on top of the other.

40. He denied that he caused Summer's fatal injuries by shaking her or grabbing her. He denied that he had shaken Summer on a previous occasion.

41. He called character evidence, which included Laura Foster, Kathleen Peace, Jodie Holmes, Carl Holmes and David Hicks.

42. The issues for the jury were, first, were they sure that the appellant shook Summer and, second, when this occurred, did he intend to kill her or, at least, to cause her really serious harm?

43. Although, as set out above at [3], the written Grounds of Appeal contained six separate arguments on which leave to appeal against conviction was sought, permission was granted by the single judge on a limited basis that can be shortly summarised. As part of the prosecution's case, it was suggested that the earlier injury, to which we have referred above, established potentially that the defendant had shaken Summer on an earlier occasion, thereby causing subdural bleeding; put otherwise, he had previously behaved in the way presently alleged. It was not suggested by the appellant that this evidence was inadmissible (see section 101(1) of the Criminal Justice Act 2003); indeed, as explained at [45] the appellant relied on this earlier instance of bleeding as an explanation for the extent of the bleeding when Summer died. The judge summed up the issue to the jury as follows:

> "I turn then to the older subdural bleeding. Again, by way of a signpost, you will appreciate that this is said by the prosecution to be evidence of an earlier episode of shaking. That is denied by the defendant who said there'd been no such earlier episode of shaking. He suggests that the evidence of older subdural bleeding may be related to bleeding during the birth process, and that there may have been rebleeds after that. He says that, if there was scarring originating in the older bleeding, that may have contributed to the acute bleeding, the more recent

bleeding. Now, looking at the evidence about those arguments, under the microscope Professor Al-Sarraj also found evidence that there'd been a bleed in the past. He said that this was in the form of minute amounts of the by-products of healing. So, he wasn't actually seeing blood, he was seeing signs that indicated there'd been healing after a bleed. He said that these traces were found in the same three compartments as the more recent subdural bleeding, and that the evidence of the older and more recent bleeding was mixed and close together. He said that he estimated that the older bleeding had taken place a few to several weeks earlier, and it was hard to estimate how much bleeding there had been as the blood is reabsorbed by the body. In relation to the causes of the bleeding, he considered the possibility that the older subdural bleeding was caused during the birth process, but he thought that was unlikely for two reasons. Firstly, he pointed out that Summer was born by caesarean section where, he said, the pressures on the head are generally significantly lower than when the baby is born by natural delivery. He said that there may be subdural brain bleeding in children born by caesarean section where, for example, forceps have been used to help the process, but that, in general, this was a great deal rarer than subdural bleeding in natural childbirth cases. The second reason he gave was the age of the bleeding. He said that it had taken place weeks rather than months earlier, and that it had taken place, in his view, more recently than five months ago when Summer was born.

Professor Al-Sarraj told you that he saw no evidence of any natural disease that might be the cause, nor of any malformation of tumour, but he would defer to the clinicians as to whether there was any issue with Summer's system of coagulation. In the agreed facts, the evidence is that there was no problem with blood coagulating once there'd been bleeding. He said that his preferred explanation for the older bleeding was trauma. He accepted that there was older subdural bleeding in all of the samples, and that that might be evidence which supported there being more than one episode of earlier bleeding, though it was impossible to be certain of it being one episode, and that the traumatic opening up of an old site might confuse the issue as to the timing of the older subdural bleeding. He also said that he'd considered whether the older bleeding could have led to the more recent bleeding and concluded that that was unlikely. He said that the sites of the older bleeding had healed completely and, in his view, did not contribute to the more recent bleeding. He said that the earlier bleeding had not left blood vessels which were fragile and at increased risk of rupture. So, that Professor Al-Sarraj on this topic. Dr Jayamohan also said that, in normal babies, the risk of subdural bleeding where there has been birth by caesarean section was very low. He said it might happen where forceps are used as part of the caesarean section process, but that had not been the case here. He said that hypermobile spectrum disorder may be associated with greater vascular fragility, but that there was no evidence of it causing spontaneous bleeding. He said that nor would he associate HSD with spontaneous bleeding over the brain more generally.

He ultimately said that it was very unlikely that the old bleed had led to the new bleed, but that, when HSD was factored in, he would modify that to unlikely, rather than very unlikely, but he couldn't exclude the possibility given that fresh bleeding was in the same compartments as the old bleeding. Dr Jayamohan also said that his preferred explanation for the older bleed was a traumatic event looking at the evidence overall. He said that the event would have to be a

memorable event and would be recalled by a carer, although he said that, in his experience, those who were caring for more than one child -- in this case three -- may give a more hazy history and, therefore, may not recall the traumatic event that caused older subdural bleeding. So, those were the prosecution witnesses. Dr Herron's view was that the subdural blood vessels in this case were active and could, therefore, have bled with minimal trauma. He said that there was under reporting of subdural bleeding in the birth process, but he couldn't with any confidence that they could be birth related. He was asked, you may recall, three times, by Mr Smith, whether he accepted that caesarean section is a less traumatic birth process from the point of view of the risk of subdural bleeding in the brain, but he maintained that he did not know, one way or the other, as he had no expertise in obstetrics. He said that he had no reason to disagree with the evidence given by other witnesses, such as Mr Evans and Mr Jayamohan, but this was outside his area of expertise. He did, however, agree that this type of bleeding was uncommon in caesarean section cases and that, in general terms, it was unlikely that birth was the explanation for the older bleeding, although the fact that Summer probably had HSD needed to be taken into consideration. Dr Herron also said it was impossible to say whether there'd been one or more than one older bleed, although this was potentially the case. He thought it was very difficult to date the subdural bleeding where it was more than two to three days old, and it was impossible to say, in this case, whether it was weeks rather than months old. So, he disagreed with that aspect of Professor Al-Sarraj's evidence. He said he couldn't say whether the older bleeding was a contributing factor to the fresh bleeding. Mr Richards said that he didn't see evidence of older subdural bleeding, but he'd not looked at the brain under the microscope as Professor Al-Sarraj and Dr Herron had. He said that the subdural bleeding could occur in caesarean section births but, in cross-examination, he accepted that the likelihood of this being the explanation for any older bleeding was low, and that if it was not birth then it was trauma. He said that trauma was one of the main possibilities. So, that is a summary of the evidence about the different aspects of the bleeding in the brain and the spine.

44. The single judge accepted that it was arguable that the jury should have been directed that they needed to be sure that the older injury was (i) non-accidental and (ii) inflicted deliberately by the defendant, for it to have been capable of supporting the prosecution’s case; otherwise, the jury should have been directed it was to be disregarded.

45. The single judge additionally determined that it was irrelevant that the appellant had relied on this earlier injury, for entirely different reasons, as being supportive of his case. The appellant suggested that this old subdural bleed, if it existed, potentially explained the extent of the bleeding when Summer died, in that it potentially meant that an old injury had reopened. Mr Turner, additionally, addressed the jury in his closing speech on the basis that there may not have been an older subdural bleed at all: that was the view of the Consultant Paediatric Neurosurgeon, Mr Richards, who opined, as set out above, that any microscopic old blood could have been the result of a birth-related bleed. Additionally, Mr Turner submitted that given the appellant’s character, any earlier incident of shaking was implausible.

46. The single judge noted that the material relating to the older injury was a very small part of the overall evidence in the case, given the "vast majority" of the evidence was directed at what had caused the injuries that Summer sustained on 8 September. The single judge noted that the directions in law were agreed with counsel before they were given to the jury, and no point was taken about the need for a propensity direction at that time, or prior to the appellant's conviction.

47. This basis on which leave was granted by the single judge was adopted unreservedly by Mr Turner when advancing his arguments on this appeal, and it is unnecessary, therefore, to summarise the written Grounds of Appeal which were entirely superseded by the Second Skeleton Submissions (22 March 2022) and his oral submissions. The argument is essentially confined to the contention that it was critical, given the prosecution's case on the older injury, for the judge to give the jury a warning on "propensity". Mr Turner referred the court to the suggested directions in this context set out in the Crown Court Compendium August 2021 at page 12.15 *et seq*. He suggests that the court should apply the decision of Mantell LJ in *R v Davis, Rowe and Johnson* [2001] 1 Cr App R 8 at [56]:

> "The following is not intended to be an exhaustive statement of the principles involved. We simply extract the following. The Court is concerned with the safety of the conviction. A conviction can never be safe if there is doubt about guilt. However, the converse is not true. A conviction may be unsafe even where there is no doubt about guilt but the trial process has been "vitiated by serious unfairness or significant legal misdirection" as in *Smith (Patrick and Others)* and in *Weir*. Usually it will be sufficient for the Court to apply the test in *Stirland* (1945) 30 Cr App R. 40, [1944] AC 315, which, as adapted by Mr Perry, might read:
>
> > "assuming the wrong decision on law or the irregularity had not occurred and the trial had been free from legal error, would the only reasonable and proper verdict have been one of guilty?"."

He submits that the only answer to that latter question in the present case is "no" and that, as a result, the conviction should be quashed. The single judge, in contrast, highlighted that the real issue for the full court is whether the conviction was unsafe as a result of this omission.

48. As Mr Turner explained, the contest vis-à-vis the old subdural bleed – if one was properly detected – was reflected, on the one hand, in the prosecution's argument that it must have been caused by a previous abusive incident during which the appellant shook Summer and, on the other, in the applicant's argument that it had occurred at the time of Summer's birth.

49. Mr Turner submits that this suggested previous incident was critical, given its potential adverse impact on the appellant's credibility as regards his explanation as to the events in the period immediately prior to Summer's collapse on 8 September 2017. It is argued that if it was determined by the jury he had shaken her before, he was unlikely to be believed as to what had occurred shortly before her demise. Mr Turner submits that this was not an overwhelming case. The appellant was of previous good character, he gave

impressive evidence from the witness box and called a number of witnesses as to his character, including particularly regarding his dealings with children (he was said to be a loving and committed father). It is submitted he had provided a credible explanation for the injuries which the prosecution could not discount.

50. Leading counsel for the respondent, Mr Andrew Smith Q.C., addressed the jury in his closing speech as follows, "*If you are sure that the older bleed was caused by trauma* […]" in the context of the evidential significance of this earlier suggested instance of the appellant unlawfully shaking Summer. The appellant submits that whatever may have been said by either leading counsel, it was critical that the direction came from the bench, as part of the directions in law, rather than from counsel as part of their argumentative submissions.

51. Mr Smith contends that the absence of an express direction to the jury in the sense outlined above has not rendered the verdict unsafe. It is suggested that this was a strong prosecution case.

52. The judge's summing up made it clear that the jury were faced with a stark decision. This is conveniently reflected in his summary in the Directions of Law as regards the offence of murder:

> "16. The Prosecution say that the Defendant is guilty of murder because he caused Summer's collapse and subsequent death by shaking her and, depending upon your view of the evidence, striking her head against a soft surface and because, when he did so, he intended to kill her or, at least, to cause her really serious injury. By "shaking" the Prosecution mean a shaking action by the Defendant before Summer's collapse which went beyond the bounds of normal handling and caused her collapse, and not the Defendant's description of picking her up only after she had collapsed.
>
> 17. The Defence case is that Summer collapsed as a result of pneumonia, choking on milk, or some other unknown cause and that when the Defendant then picked Summer up he inadvertently caused her brain and eye injuries, aspects of which were made more likely or compounded by other factors such as Hypermobile Spectrum Disorder, CPR and raised intercranial pressure. The Defendant denies shaking Summer and he denies intending to kill her or cause her really serious injury.
>
> 18. A person is guilty of murder if he or she unlawfully kills someone, and at the time of doing so, intends to kill that other person, or at least intends to cause them really serious harm. In order to prove murder the Prosecution must make you sure that:
>
> > a. The Defendant's behaviour was unlawful; and
> >
> > b. The unlawful behaviour caused the death of Summer Peace; and
> >
> > c. At that time, the Defendant intended either to kill Summer Peace or to cause her at least really serious harm."

53. The jury, therefore, needed to assess whether the evidence, including particularly the medical evidence, made them sure of the scenario set out in [16] in the above quotation, and the elements of murder as summarised in [18]. The jury were directed in the clearest possible terms that the burden of proof lay on the prosecution, to the criminal standard. The respondent suggested that the medical evidence revealed that there had been an earlier bleed, which was consistent with trauma on account of an anterior incident of shaking for which the appellant was suggested to have been responsible. Put otherwise, the respondent asserted that the presence of older subdural bleeding caused by trauma supported trauma being the cause of similar bleeding on 8 September 2017. We are wholly confident that the jury would have understood that they should only act on that contention if they were sure that it was correct. This approach was sufficiently conveyed, in our view, by the summing up as a whole and it was part of the implicit framework in which the jury were operating vis-à-vis the evidence. Put otherwise, it is inconceivable that the jury would have held the suggested earlier incident of shaking against the appellant simply because they thought that it "might" have happened. The evidence, overall, needed to make them sure that the appellant shook the baby thereby causing the fatal injuries and he did so with intent to kill or cause really serious injury. The jury would only have taken the older incident of bleeding as evidence against the appellant if they were sure it demonstrated that he had unlawfully shaken Summer on an earlier occasion. If they were uncertain of that contention, we have no doubt it would have been ignored by them as forming part of the evidence that was said to demonstrate the appellant's guilt.

54. Significant support for this approach is to be found in *R v Gabbana* [2020] EWCA Crim 1473; [2020] 4 WLR 160. In that case evidence of bad character was admitted, pursuant to section 101(1)(f) of the Criminal Justice Act 2003, of evidence of cash payments paid into the defendant's bank accounts on the basis that those payments were evidence that the defendant had been involved in serious crime. This material was admitted to correct a false impression given by the defendant. In his Grounds of Appeal, the defendant argued that, in summing up, the judge's legal direction on bad character was erroneous in that it failed to instruct the jury that before they could convict they first had to be sure that the defendant had given a false impression in his answers in interview.

55. In giving the judgment of the court, Davis LJ observed:

> "108. In many criminal cases, of course, a jury may be made sure of guilt, viewing the individual strands of evidence cumulatively, even though each individual strand of itself may not suffice to justify a conviction to the criminal standard. Nevertheless, […] we accept that, as *Mitchell* confirms, the criminal standard can apply to an individual element of the prosecution case such as disputed bad character evidence. (A *Lucas* direction on lies is another example where the criminal standard is the applicable standard and a direction to that

effect is normally given.) The very fact of this appeal on this ground thus indicates that it would no doubt have been better for the judge, even if very shortly, to have included in her bad character direction a reference to the criminal standard ("so that you are sure") in circumstances where there was an issue of whether the defendant had been trying to mislead the jury and had derived money from illicit sources. The current version of the Compendium also would suggest that: although, it might be noted, such words had not featured in the relevant remarks in the seminal case (on propensity) of *R v Hanson* [2005] EWCA Crim 824; [2005] 1 WLR 3169, as to how a summing-up in such a context should proceed: see para 18 of the judgment. But be that as it may, a failure to do so does not necessarily mean in any given case that a conviction is necessarily unsafe.

109. Viewed in the round, whilst we accept that the jury in this case needed to be sure, if to rely on this point, that the defendant had given a false impression (in that he had not been living entirely off legitimately acquired funds and that some or all of the cash deposits derived from criminality) we consider that that was sufficiently conveyed, overall, by the summing up; and in any event the lack of more specific direction on the standard of proof in dealing with the false impression issue was, in the circumstances of this case, not sufficient to render the conviction unsafe.

110. We should, in this respect, add that, with an intervening interlude of over seven years from the trial, we entertain considerable concerns that this whole issue of conveying a false impression is now being given a far greater prominence than it had acquired at trial, given the realities of this trial as revealed on the papers before us. This at least surely also finds some reflection in the fact that very experienced trial counsel agreed this direction at the time and thereafter saw no basis for it grounding an appeal following conviction. As stated in *R v Hunter* [2015] EWCA Crim 631; [2015] 1 WLR 5367, quoting from *Renda* (cited above), even if there has been a misdirection on bad character it does not follow that the conviction will be quashed. And the court in *Hunter* also went on, at para 98, to say this:

> "We should also add that if defence advocates do not take a point on the character directions at trial and/or if they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss. The trial was considered fair by those who were present and understood the dynamics."

We think, given the circumstances, that those observations are directly in point on this appeal."

56. Similarly, in this case the judge and counsel were painstaking in their approach to the directions in law, and we are confident that the "dynamics" of the case meant that there would have been no doubt at the relevant time as to the correct approach to be taken by the jury on this issue (the "implicit framework" referred to in [53] above). Hence, it did not occur to counsel or the judge that this required a separate direction as to the jury being "sure" of the earlier incident. We agree that such a direction should have been given but the failure to do so does not undermine the safety of this conviction, which followed an otherwise flawless summing up.

57. We are grateful to Mr Turner for the eloquent way in which this appeal was argued but we are unpersuaded that the verdict is unsafe. The appeal against conviction, accordingly, is dismissed.