Neutral Citation Number: [2022] EWCA Crim 316

Case No: 201903270 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT OXFORD
MR JUSTICE SWEENEY
T20187145

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2022

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
SIR NIGEL DAVIS
and
SIR STEPHEN IRWIN

- -

Between :

REGINA	**Respondent**
- and -	
FIELD	**Applicant**

- -
- -

Mr David Jeremy QC (instructed by **Reeds Solicitors**) for the **Applicant**
Mr Oliver Saxby QC & Ms Victoria Ailes (instructed by **CPS Criminal Appeals Unit**) for the **Respondent**

Hearing date: 27 January 2022

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Approved Judgment

Dame Victoria Sharp, P:

Introduction

1. On 9 August 2019, following a trial at the Oxford Crown Court before Sweeney J and a jury, the applicant, Benjamin Field, was convicted of murdering Peter Farquhar. He was acquitted on counts of conspiracy to murder and attempting to murder Anne Moore-Martin. He was also acquitted on a count of possessing an article for use in fraud. He had previously pleaded guilty to various counts of fraud and burglary. He was in due course sentenced to imprisonment for life. The minimum term was specified as 36 years.

2. He sought permission to appeal against his conviction for murder. Permission was granted by the Single Judge. In granting permission the Single Judge among other things had said this:

> "… You raise an important point of principle in a most difficult area and you advance powerful arguments (as do the Crown in a very full [Respondent's Notice]).This is clearly a case for the Full Court and your grounds are clearly arguable. This was a difficult case in many ways and there was no clear and obvious route to verdict…"

3. The appeal came on for hearing on 28 January 2021 before Fulford LJ (Vice-President of the Court of Appeal, Criminal Division), Whipple J and Fordham J. The applicant was represented by Mr David Jeremy QC, who had appeared below and Mr Paul Wakerley. The Crown was represented by Mr Oliver Saxby QC, who had appeared below, and Ms Victoria Ailes. At the end of the hearing judgment was reserved. Judgment was handed down on 18 March 2021. The appeal against conviction was dismissed. Subsequent applications for permission to appeal to the Supreme Court and for the certification of a point of law of general public importance were refused on 22 June 2021.

4. On 29 June 2021 the applicant applied, pursuant to Crim PR 36.15, to re-open the determination of the Full Court of 18 March 2021. By this stage, Counsel for the applicant was Mr Jeremy alone. The grounds for seeking to do so are wide-ranging. But the essence of the complaint is, among other things, that the decision of the Full Court was incapable of rational justification and involved ignoring or wholly misunderstanding the applicant's arguments; was vitiated by procedural unfairness; and/or was the product of bias (whether apparent or actual or both). Consequently, it is said, there has been manifest injustice.

5. Following initial directions given on the papers, this application came on for hearing before this court on 27 January 2022. Very full written and oral arguments were presented. At the conclusion of the hearing it was announced that judgment was reserved.

6. This is the considered judgment of the court.

Background

7. The background facts are, on any view, most unusual. A full statement of those facts, and an outline of the respective cases advanced at trial, are to be found in the judgment of the Full Court, which can be taken to be incorporated into this judgment: [2021] EWCA Crim 380, [2021] 1 WLR 3543, at paragraphs 7 to 39 of the judgment. Consequently, we set out only a relatively short summary here.

8. As was not disputed, the applicant over a considerable period of time had pretended to be in a genuinely loving and caring relationship, first with Peter Farquhar (PF) and then, subsequently but concurrently, with Anne Moore-Martin (AMM). PF was a retired teacher: a lonely man, wrestling with reconciling his Christian beliefs with his gay sexuality, and described as craving love and affection. In 2013 he commenced a relationship with the applicant, who had set about seducing him. In due course, PF changed his will, as the applicant had wished and intended, so that the applicant would receive a large inheritance. Whilst the applicant was presenting a picture of caring for PF, in actuality he was (as he was to accept) covertly drugging him. The applicant also sought to present PF as drinking far too much and as developing suicidal intentions. Further, the applicant engaged persistently in what was described as "gaslighting" PF, in the sense of manipulating and brainwashing him, so as to increase PF's dependence on him and to instil a diminished sense of perception, identity and worth.

9. The Crown's case at trial was that what occurred was done by the applicant with a view to killing, and with an intention to kill, PF, so that he could then receive the large inheritance. In this respect the Crown was able to rely, among other things, on detailed entries in the applicant's own journals and notes, recording his plans, intentions and acts. Much of this was undisputed by the applicant when he came to give his evidence at trial. For example, as recorded by the judge in his summing up, the applicant's own evidence was to this effect:

> "…. that for those years from late 2012 through to mid-2017 he had lived by deception and deceit and was plainly a well-practised and able liar, whether it be to [PF], [AMM] or others, in furtherance of pretending that he was in a genuine and caring relationship with them…. He also explained to you how he could manipulate and manoeuvre people to achieve his own ends without actually ever asking them to do what he wanted them to do. Indeed, he explained to you how he was able to build pressure on his victims to believe what he needed them to believe and thus to do whatever he needed them to do without ever specifically asking for it, no matter how sceptical they might otherwise have been."

The judge also noted that the applicant had described himself as a "snake talker" during the various frauds which he admitted committing with regard to PF and AMM.

10. As to the entries in the applicant's own journal and notes (which were before the jury, as also were those kept by PF), the flavour of them can be extracted from a selection. For example, one such note read: "I moved in so that he could die." Others recorded an intention that PF be induced to commit suicide (but "it became clear that he suicides

not."). Whether such notes were in whole or in part fantasy, as the defence said, was a jury matter.

11. PF was found dead at his home on the morning of 26 October 2015. He had in the preceding period been taking the prescribed drug Dalmane, to help with his insomnia: alcohol should not be taken with Dalmane and in fact there was evidence that PF had, prior to this, been trying to abstain from drinking. A bottle of 60% proof malt whisky, however, was found next to him, of which less than a third remained. The bottle had the applicant's fingerprints on it. Subsequent pathological reports indicated a blood-alcohol level of around three times the drink-driving limit. The initial post-mortem report recorded the cause of death as "acute alcohol toxicity". A subsequent post-mortem report recorded the cause of death as acute alcohol toxicity and Dalmane use. There was no pathological evidence of any smothering or of any violence.

12. The Crown's case was that the events of this evening were, in effect, the culmination of the applicant's plans, fully recorded in his journals and notes. Particular reliance was placed on notes recording the applicant's research into whisky and so on. In particular (although by no means the only note of particular relevance) one such note stated among other things:

> "High percentage malt £. Suffocation only a mistake if either survival or evidence ensues. Feed 'Dalmane' and more alcohol and less air."

The applicant accepted that he had purchased the whisky for PF's use. However, he denied being present at PF's house on the evening/night of 25/26 October 2015 and denied having any intent to kill him then. As to this particular note, he claimed that that (as had been certain others) was written after, and not before, PF's death. It was not in substance disputed, however, on the appeal to the Full Court that the jury were to be taken as having rejected his evidence in these respects. But even if that were so, the applicant's case, at trial and on appeal, was to the effect that the Crown could not make the jury sure of an act on the part of the applicant causative of death: rather, death had been or may have been caused by PF's voluntary decision to consume the whisky (at a time when he had also voluntarily been taking Dalmane).

13. As to AMM, it is sufficient to say that the applicant had also established a sexual relationship with her (a retired teacher aged 83, with strong moral standards): again, by exploiting her loneliness and vulnerability. He falsely pretended that he loved her, procured various cash gifts from her and sought to persuade her to change her will in his favour. In the event, she died from natural causes at around the end of 2017; but the investigations into the conduct of the applicant with regard to her caused the police to reinvestigate the death of PF. The applicant, apart from a short prepared statement, made no comment to questions asked in interview. We need not detail the other matters to which the applicant in due course pleaded guilty: the various frauds all related to PF and AMM.

The trial

14. The trial lasted several weeks. It no doubt will have been a difficult and complex trial. Before he came to sum up to the jury on the law, the judge discussed matters with counsel. Differing routes to verdict with regard to the count of murder were proposed:

the judge rejected that proffered by the defence (and which was shown to us at the hearing before us). He then summed up first on the law and, in due course, on the evidence. After the jury retired, they put in a note on the issue of causation, as dealt with in the summing-up. The judge, following discussions with counsel, gave further, quite lengthy, instructions to the jury on that issue. Although Mr Jeremy particularly desired this court to have regard to the transcripts of the discussions between judge and counsel before the various directions were given (and we have done), we think that what really mattered was how the jury were actually directed: and that was the approach of the Full Court on the appeal.

15. The relevant legal directions variously given by the judge to the jury are fully set out in paragraphs 51 to 58 of the judgment of the Full Court, to which reference can be made.

16. In the result, the jury (by unanimous verdict) convicted on the count of murder of PF.

The appeal hearing

17. The appeal cannot exactly be said to have been under-argued. The grounds of appeal ran to 15 pages. The applicant's written argument extended to 105 paragraphs and 39 pages. The Crown put in a Respondent's Notice extending to 29 pages and subsequently a written argument of 95 paragraphs and 26 pages. Further, each side at the hearing put in a written "speaking note"; and, at the request of the court, Mr Jeremy after the hearing also put in a further note of his oral arguments. The appeal hearing itself lasted for most of the allocated day. Because of the pandemic, counsel were appearing by video link: and although this court was provided with a transcript of the oral arguments, issues of audibility made it (through the fault of nobody) of limited value.

18. Four grounds of appeal were advanced before the Full Court. They all related to the issue of causation and to the legal adequacy of the judge's directions to the jury on that issue. It was said:

> (i) The directions failed to make sufficiently clear that, before the jury could convict, they had to be sure that the alleged actions of the applicant amounted to more than a minimal cause of PF's death.
>
> (ii) The directions failed to make clear that the voluntary action of PF in consuming the whisky and Dalmane would be capable of breaking any chain of causation initiated by the applicant in supplying the whisky.
>
> (iii) The directions failed to identify the evidence from which the jury could conclude that the consumption of alcohol or drugs by PF was involuntary.
>
> (iv) The directions failed to direct the jury as to how the alleged deception on the part of the applicant was the cause of PF's decision to consume alcohol and/or drugs and that, but for that deception, PF would not have consumed them.

19. At the outset of the written argument, put before the Full Court, the overarching question of law had been formulated on behalf of the applicant as being:

> "When is it appropriate to find someone guilty of murder where that person has given another alcohol and/or a lawfully

> prescribed drug, which is then voluntarily consumed by that other causing his death and when at the time of doing so he intends that the other should die but the other is ignorant of that intention?"

20. The applicant's suggested answer to that question was: never. The written argument, reflected in subsequent oral argument, then developed at length the four criticisms of the legal directions in the summing-up. In doing so, however, it was not sought to be said that a defendant's undisclosed intention would *never* be relevant. The applicant's position on an undisclosed intention was addressed in the following passage at paragraph 22 of the written argument:

> "That is not to say that a defendant's intention will always be irrelevant to the risk attaching to a course of action. For example, were a defendant to encourage the victim, a weak swimmer, to swim, on the promise that he would rescue him if he got into difficulties, but in fact had no intention of doing so and did not do so, resulting in the victim's death by drowning, then he could be the causer of the victim's death. The victim had volunteered to swim on the false assurance of rescue, if necessary. He had had not volunteered to take his own, unaided, chances. The victim's uninformed state as to the defendant's actual intention would have changed the nature of the act embarked upon and rendered it more dangerous."

The core submission on the appeal nevertheless was that that was not the position here and the asserted misdirections, both individually and cumulatively, were determinative of the appeal; and, indeed, the suggested correct answer to the formulated legal issue as set out above in paragraph 19 was of itself said to be determinative.

21. The detailed arguments of the Crown on the appeal were, predictably, to contrary effect. It emphasised that the events of 25 October 2015 had to be set against the background of "gaslighting" and so on, as manifested by, for example, the applicant's own notes. It was, among other things, argued that a lack of knowledge on the part of PF of the applicant's alleged true intention to kill was, when set against the background of this case, plainly sufficient to deprive PF's acts of the character of being free, voluntary and informed. It was submitted that if PF drank the whisky supplied by the applicant not knowing of the applicant's plan to kill him, PF's decision to consume it was not capable of breaking the chain of causation.

22. The central legal authority for the purposes of the arguments was agreed, for the purposes of the appeal, to be the decision of the House of Lords in the case of *Kennedy (No.2)* [2007] UKHL 38, [2008] AC 269. (We record that no reliance was sought to be placed by either party on legal authorities concerning consent procured by deception in sexual offending cases.)

23. The factual context of the case of *Kennedy (No.2)* was different from the present case. It was a manslaughter, not murder, case. The defendant Kennedy was told by the deceased, a man called Bosque, that Bosque (who had been drinking) wanted a "hit" to make him sleep. Kennedy warned him to take care that he did not go to sleep permanently. Kennedy then, as requested, prepared a dose of heroin for Bosque and

gave him the syringe ready for injection. Bosque then injected himself and returned the syringe to Kennedy, who left the room. Bosque thereafter died. Kennedy was convicted both of supplying heroin and of manslaughter. His appeal against his conviction for manslaughter was dismissed by the Court of Appeal in 1998: see (*Kennedy (No.1)* [1999] Crim LR 65). Following doubts raised, particularly in the light of subsequent appellate decisions in other cases, the matter was referred back to the Court of Appeal by the Criminal Cases Review Commission (CCRC). The appeal was again dismissed by the Court of Appeal. But it was allowed by the House of Lords: *Kennedy (No.2).*

24. In *Kennedy (No.2)* the search was for the unlawful act causative of death necessary to ground a conviction for manslaughter. The sole act relied on by the Crown was the supply of the heroin-filled syringe: this was argued to comprise "administering" for the purposes of s.23 of the Offences Against the Person Act 1861, properly construed. The House of Lords, however, held that Kennedy had not "administered" the heroin so as to cause of death. Rather, Kennedy had simply supplied the drug to Bosque who then had the choice, knowing the facts, whether then to inject himself or not. Accordingly Kennedy had not "administered" the drug and could not be guilty of manslaughter.

25. Thus, the salient facts of that case were very different from the present. Further, it may be noted that, in the opinion of the Committee delivered by Lord Bingham, it was stated at paragraph 15 that:

> "…causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises."

In a similar vein, the Supreme Court had stated in the course of the decision in *Hughes* [2013] UKSC 56, [2013] IWLR 2461 – a case also cited to the Full Court in the present appeal-

> "…it is trite law…that the meaning of causation is heavily context specific…it is not always safe to suppose that there is a settled or 'stable' concept of causation which can be applied in every case."

The Supreme Court in *Hughes* went on to observe:

> "In the case law there is a well-recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common-sense view is regarded as instrumental in bringing about the occurrence."

26. For the purposes of the argument on the appeal in this case, however, the main focus had been on the general statements of principle set out in paragraph 14 of the opinion delivered by Lord Bingham in *Kennedy (No.2)*:

> "The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But,

> generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article "*Finis for Novus Actus?*" (1989) 48(3) CLJ 391, 392, Professor Glanville Williams wrote:
>
> "I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before."
>
> In chapter XII of *Causation in the Law*, 2nd ed (1985), p 326, Hart and Honoré wrote:
>
> "The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."
>
> This statement was cited by the House with approval in *R v Latif* [1996] 1 WLR 104, 115. The principle is fundamental and not controversial."

Particular reliance was placed before the Full Court, on behalf of the applicant, on this entire passage, and on the endorsement of the quoted statements of Professor Glanville Williams.

Events Preceding Handing Down

27. When the Full Court, at the conclusion of the hearing, reserved judgment, the Vice-President orally indicated, in conventional terms: "Can you please respond in the usual way in relation to any factual errors or typographical errors." A draft judgment was in due course sent out by email on this basis to the parties (with the usual statement in the box at the top of the front page) on 3 March 2021: with any corrections required to be submitted by 8 March 2021.

28. On 7 March 2021 Mr Wakerley sent, in neutral terms, a short email to the clerk to the Vice-President. Four corrections were proposed. One related to the spelling of Dalmane. In paragraph 49 of the draft judgment it was proposed that the word "could" be substituted for the word "would". In paragraph 59, the draft judgment had read:

> "Mr Jeremy accepts that, in his weak swimmer example, it would be appropriate for the Judge to give the jury a direction on

> causation referable to the victim's knowledge or ignorance of the accused's intentions"

As to that Mr Wakerley said:

> "This has never been accepted in written or oral argument."

Certain modifications were also proposed to lines 4, 7 and 8 of paragraph 60 of the draft judgment. The email concluded with an indicated intention to seek permission to appeal to the Supreme Court.

29. On 12 March 2021 counsel for the applicant enquired by email whether there would be sight of the final judgment before handing-down. The clerk to the Vice-President responded that it was hoped that judgment would be handed down on 16 March 2021 and that he would revert to counsel about the amended judgment on 15 March 2021. That did not happen, because a written 35 paragraph application, drafted by Mr Jeremy and Mr Wakerley, for a re-hearing of the appeal was sent on that day. The application sought in part to build on the previously identified errors alleged to be contained in the draft judgment and in part on a further advancement of the applicant's grounds and on an assertion that the reliance (to which we will come) on the "weak swimmer" example was "fundamentally mistaken". It was also, among other things, said that "the premise of the reasoning on which the draft judgment is founded is demonstrated to be a false one" and that "its logic collapses". It was said that there had been "no reasoned determination of an appellate court" on the legal aspects of the case and "the appellant has been denied fair process." A re-hearing was sought.

30. The decision of the court on this application for a re-hearing was sent (by email) on 16 March 2021. It read as follows:

> "**Decision on the Application for a Hearing 16 March 2021**
>
> 1. After this judgment was sent to the parties in draft but before it was handed down, Mr Jeremy QC and Mr Wakerley applied for a hearing. We refuse that application.
>
> 2. Their main argument is that the Court failed to give the parties a proper opportunity to deal with the weak swimmer example and anyway misunderstood that example. We are satisfied that the Court's acceptance of the weak swimmer example reflected submissions on behalf of the appellant, both in writing and at the hearing. Further, there was no misunderstanding. The Court accepted that the person who encouraged the weak swimmer *could* (not *would*) be criminally liable, see paras 49 ("could be"), 59 ("was potentially") and 62. Whether causation was established in such a case would be for the jury, to be decided as a matter of fact, subject to careful direction by the Judge (see para 59).
>
> 3. They make a separate criticism to the effect that the Court has mischaracterised as matters of law certain matters of fact which should properly be left to the jury, namely whether the

> deceit in any given case did cause the death. The Court does not accept that it has fallen into error in that way, but it recognises that confusion has crept in. The Court as a consequence has clarified its conclusions at para 61 and 63.
>
> 4. Those paragraphs having been clarified, there is no need for any further hearing in this appeal.
>
> The judgment has now been listed for hand down at 1030 on Thursday 18th March 2021…"

31. Judgment was then formally handed down on 18 March 2021. Mr Jeremy then sent an email asking for a judgment on the application for a re--hearing. The court's response to that was that there was no right to a re-hearing and that the reasons for refusing the application for a re-hearing had sufficiently been given by the decision sent on 16 March 2021. Subsequently, as we have said, an application for permission to appeal and for the grant of a certificate of a point of law of general public importance was refused. Consequently, an appeal to the Supreme Court is not available to the applicant.

The Judgment of the Court of Appeal

32. The reserved judgment of the Full Court extended to 66 paragraphs.

33. The opening sections set out the background facts very fully. These were followed by a detailed account of the prosecution case and the defence case at trial. There then followed an extensive summary of the grounds of appeal and the arguments advanced on behalf of the applicant in criticism of the summing-up of the trial judge, at paragraphs 40 to 49 of the judgment. It was not suggested to us that that summary of the applicant's case on appeal was incorrect or unbalanced. We do not here set out in full those parts of the judgment, though of course we bear them in mind; but the closing two paragraphs of this section of the judgment perhaps are worth expressly setting out:

> "48. If – says Mr Jeremy – the victim, therefore, is informed (viz. knows the facts that are relevant, most particularly as regards the contingent risks of harm) the decision will be voluntary. The fact that he or she is unaware of other facts that were not relevant to the nature of the act, and the risks attaching to it, would not remove the voluntary nature of the act. PF's ignorance of the appellant's secret intention thus did not change the nature of PF's act or his perception of the risk of harm attaching to it. Accordingly, on the appellant's submissions PF's decision to take drink was informed and voluntary.
>
> 49. It is accepted by Mr Jeremy that a defendant's intention can, in certain circumstances, be relevant to the risk attaching to a course of action. He gave this example. If an accused, for instance, encouraged a weak swimmer to take to the water having promised to provide assistance if the swimmer encountered difficulties, but privately had no **intention** of doing so and did not do so, the accused could be criminally liable for the victim's death by drowning in these circumstances. The victim had

> volunteered to swim on the false assurance of rescue if the need arose. The victim's uninformed state as to the defendant's actual intention would have changed the nature of the act embarked upon and rendered it more dangerous."

34. There then followed, at paragraphs 50 to 64 of the judgment, a full exposition of the trial judge's directions (both before and after the jury note) and the Full Court's reasons for its decision. This section of the judgment commenced with the court holding (at paragraph 50) that ultimately "this appeal turns on whether the judge's directions to the jury were legally correct." The judgment described (at paragraph 58) the decision of the House of Lords in *Kennedy (No.2)* (cited above) as the "critical authority" for the resolution of the issues raised on the appeal. It set out paragraph 14 of the decision in *Kennedy (No.2)* in full.

35. The core of the Court's reasoning is to be found in paragraph 59 to 63 of the judgment. In view of the submissions now made to us it is unavoidable that we set them out in full:

> "59. The concession made by Mr Jeremy in relation to the weak swimmer is both correct in our view and important. As he accepts, the victim's uninformed state of mind in this example as to the accused's real intention would have changed the nature of the undertaking on which the victim embarked, by rendering it more dangerous. The false friend was potentially liable to a conviction for homicide on account of his or her undisclosed intention that the victim should die by not providing assistance in the event of difficulty. This is highly pertinent in the present case. Mr Jeremy's concession also recognises that whether the victim's ignorance of the accused's real intention does relevantly change the nature of the undertaking on which the victim embarks, as in his example, will depend on the specific nature of the individual case. The concession acknowledges, moreover, the appropriateness of the trial judge addressing the nature of the individual case in deciding how to direct the jury. It follows that in situations exemplified by the weak swimmer example, it would be appropriate for the judge to give the jury a direction on causation referable to the victim's knowledge or ignorance of the accused's intentions.
>
> 60. The undisclosed murderous intention of the appellant, in our judgment, substantively changed the nature of the undertaking upon which PF embarked, in this particular case. The jury must have rejected the appellant's account that he was not present when the victim drank this large quantity of whisky which he had supplied. PF, therefore, would have believed that he was drinking 60% proof whisky in the company of someone who loved and would care for him, not someone who wished for his death. As a consequence, PF would not have had an informed appreciation of the truly perilous nature of what was occurring. Being provided with the whisky, he was being encouraged by the appellant to consume a significant quantity of a powerful

alcoholic drink, which inevitably would have started to impair his judgment, most particularly as it interacted with the Dalmane. Engaging in this activity was not, as a consequence, the result of a free, voluntary and informed decision by PF. To the contrary, he was being deliberately led into a dangerous situation, as with the weak swimmer, by someone who pretended to be concerned about his safety: as was undisputed on the evidence in the case, the appellant posed as his lover and partner – someone who PF would undoubtedly have assumed would be solicitous of his wellbeing – whereas, in reality, the appellant simply desired PF's demise. The appellant, therefore, manipulated and encouraged PF into a position of grave danger, given the combination of the sedative effects of the substances risked decreasing the levels of the victim's consciousness, thereby fatally impairing his airway. The appellant's undisclosed homicidal purpose, in these circumstances, changed the nature of the act: PF was to a material extent unwittingly lured into a perilous drunken and drugged position by someone who feigned to be his loving partner. Once the effects of the substances started to affect PF's judgment and as he succumbed, the appellant would have been a mere bystander, or worse. He certainly would not have sought medical assistance, given he admitted he wanted to increase the risk of PF dying.

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

62. Whether or not the deceased acted freely and voluntarily, when in a position to make an informed decision, will always depend on a close analysis of the facts of the case. If, in the context of a decision by the deceased, there is a significant deception by the accused that changes the truth or the reality of what is happening, such as materially to increase the dangerous nature of the act, then he or she may be criminally liable for what occurred. That 'deception' as to the 'nature of the act' may – as in the weak swimmer example – be directly linked to the undisclosed intentions of the accused. The judge incorporated the idea of 'deception' as to 'the nature of the act' thus in a ruling given on 4 July 2019 in relation to the charge of conspiracy to murder AMM by encouraging suicide (count 3 TI):

"[…] a Defendant's conduct may amount to murder if he drives the victim to suicide by force, duress or deception (with the

> deception being as to the nature of the act encouraged) such that the suicide was not the voluntary act of the victim. […]"
>
> 63. For these reasons we consider that the approach of the judge was correct. He left it to the jury to determine whether the appellant's actions were a more than minimal cause of PF's death. He told the jury if they were sure that, with intent to kill, the appellant in person gave PF drink, and PF drank it, it was open to them to conclude that the giving of drink was a cause of the death; but he told them that conclusion would not be open to them if PF knew the drink being offered was intended to cause his death. He also told them that if PF agreed to drink – not knowing that it was intended by the appellant that it was to kill him – it would be open to them to conclude that the appellant's giving of drink was a cause of death. These directions rightly recognised that in this particular case the jury had to be sure that the drink was given to the deceased with intent to kill, that the drink was a (more than minimal) cause of death and that PF's act of drinking was not a free, voluntary and informed decision such as to break the chain of causation. The judge's directions captured the essence of the issue in a clear and admirably succinct manner. Those directions were, moreover, given in the broader context of the supposedly caring and protective nature of the relationship, whose falsehood lay at the centre of the undisputed evidence in the case, as the jury undoubtedly understood."

36. It is to be observed, as the ruling of 16 March 2021 makes clear, that the final judgment had included adjustments to the previous draft in the light of Mr Wakerley's observations, and that in addition the court had of its own motion made certain other adjustments prior to handing-down. Mr Jeremy was very critical of all those adjustments, his most particular (though not sole) complaint being directed at the alteration to paragraph 63. In the fourth sentence, the draft judgment had read:

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

In the judgment as handed down (as set out above) this passage was replaced with the sentences starting with "He also told them" and ending with "such as to break the chain of causation."

The Jurisdiction Under Crim PR 36.15

37. Rule 36.15 (to a considerable extent reflecting corresponding provisions under the Civil Procedure Rules) provides, in the relevant respects, as follows with regard to an application to reopen the determination of an appeal:

> "(1) This rule applies where—
>
> (a) a party wants the court to reopen a decision which determines an appeal or reference to which this Part applies (including a decision on an application for permission to appeal or refer); or
>
> (b) the Registrar refers such a decision to the court for the court to consider reopening it.
>
> ...
>
> (3) The application must—
> (a) specify the decision which the applicant wants the court to reopen; and
>
> (b) explain—
>
> (i) why it is necessary for the court to reopen that decision in order to avoid real injustice,
>
> (ii) how the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality,
>
> (iii) why there is no alternative effective remedy among any potentially available, and
>
> (iv) any delay in making the application."
>
> ...

The Note at the end of the Rule states:

> "[Note. The Court of Appeal has power only in exceptional circumstances to reopen a decision to which this rule applies.]"

38. The underpinning rationale for this rule is, of course, the avoidance of injustice. But that has to be set in the context of the need for finality in judicial decision making. A legal system would be unworkable if a party, having no further right of appeal under the Rules, could simply seek to open up a final decision, after a hearing where the respective arguments have been presented and debated, on the ground that that party considers the reasoning and outcome wrong and unjust. Moreover, the interests of the losing party are not the only interests to be considered. The wider public interest in the good administration of justice and in finality and the interests of the victim and victim's family also have to be taken into account: as reflected in the language of the Rule.

39. It is essentially for these reasons that an application to open up a final decision is regarded as an exceptional step. In the context of criminal appeals, the position has been discussed in a number of cases. Some antedate Crim PR 36.15; but all authoritatively set out, in consistent terms, the approach required to be adopted and stress that such applications can succeed only in exceptional circumstances.

40. Some instances where a final decision may be reopened involve cases where there has been a fundamental defect in procedure giving rise to real injustice or where a decision can be treated as equivalent to a nullity: for example, where an applicant has stated a

wish to renew an application for leave to appeal against sentence through counsel but by error counsel is not notified of the hearing date: *Daniel* [1977] QB 364. The position generally is discussed further in *Yasain* [2015] EWCA Crim 1277, [2016] QB 146.

41. In *Gohil* [2018] EWCA Crim 140, [2018] 1 WLR 3697 the position was fully reviewed. It was held, at paragraph 110, that the Court of Appeal (Criminal Division) will not reopen a final determination of an appeal unless (i) it is necessary to do so in order to avoid real injustice; (ii) the circumstance are exceptional and make it appropriate to reopen the appeal; and (iii) there is no alternative effective remedy. (These criteria, of course, were subsequently reflected in Crim PR 36.15). The court went on to hold that these were what might be described as "necessary conditions" for the exercise of the jurisdiction and that, almost invariably, they had to be cumulatively satisfied. The court further went to on to suggest (at paragraph 129) that the jurisdiction was "probably best confined to 'procedural errors' " – the court contemplating that such errors were to be "clear and undisputed".

42. The courts' reluctance to reopen final determinations is further illustrated by the approach taken in *Hockey* [2017] EWCA Crim 742, [2018] 1 WLR 343. An application, some years after the original decision, to reopen a confiscation order was made on the footing that subsequent appellate authority had showed that the original confiscation order had been made on a misinterpretation of the proper application of the Proceeds of Crime Act 2002. The court refused the application. It emphasised the "very limited" nature of the jurisdiction. It went on to say (at paragraph 14) that the jurisdiction was "absolutely not available" where it was said that the proper construction of the relevant legislation had been misunderstood.

43. Finally, it should be added that the exceptional jurisdiction to reopen a final appellate determination perhaps may not necessarily be confined to cases of nullity or of procedural errors, as (with qualification) had been suggested in *Gohil*. Thus in *Cunningham and Di Stefano* [2019] EWCA Crim 2101, the court, whilst endorsing the decision in *Gohil*, stated (at paragraph 22):

> "…… we do not wish to close the door entirely on exceptional circumstances, when the lack of an alternative remedy, or some other reason, may lead the court to reopen a decision to avoid a manifest injustice".

Submissions

44. Very full written and oral submissions were provided on the application. We do not intend in this judgment to go into detail on every point or nuance of argument raised: although we have borne them all in mind.

45. The over-arching submission on behalf of the applicant was to the effect that it is necessary to re-open the appeal to avoid real injustice and that the circumstances are exceptional. The arguments in support of this over-arching submission were essentially put in four ways (described as inter-related):

> (1) The jury had clearly been misdirected by the trial judge with the result that the applicant had been denied the verdict of the jury as to whether he had caused the death of PF.

(2) The judgment of the Full Court as handed down on 18 March 2021 avoided deciding the issues raised by the appeal and thus fell into obvious error.

(3) The applicant had been denied a fair hearing of his appeal.

(4) The court had displayed bias in that it had let the undesirability of a re-trial prejudice it against the applicant's case and to regard it with unfair disfavour.

46. The essence of the submissions on behalf of the respondent was that the Full Court had indeed properly addressed the issues raised on the appeal; had asked itself whether the trial judge's directions had been correct in law and had concluded that they were, for the reasons which it gave; and that the allegations of procedural unfairness and of bias were wholly unfounded. Accordingly, this simply was not a case which properly could fall within Crim PR 36.15. In truth, it was submitted, this was really an attempt on behalf of the applicant to reargue the merits of the appeal.

47. We will deal with the principal aspects of the arguments in the discussion that follows. But we certainly accept that there can be no question of unreasonable delay in the bringing of this application. It plainly was, in this particular case, reasonable for the applicant first to wait on the decision of the Full Court as to whether to grant permission to appeal to the Supreme Court and whether to certify a point of law of general public importance.

Discussion

48. It is essential to re-emphasise one point (reflected in the authorities) at the outset. The point is fundamental to the availability and application of the Crim PR 36.15 procedure. That is that the procedure cannot properly be invoked simply as a means of having a second go. Were it otherwise, it would wholly subvert the finality of judicial decisions on appeal: hence the need for exceptional circumstances if such an application is to be entertained.

49. To assert "real injustice" simply as a result of an adverse outcome on appeal therefore is nothing to the point. Many unsuccessful defendants whose appeals are rejected may say, and some may sincerely believe, that their lack of success is a grave injustice. Likewise, some advocates may choose to think that because their arguments have failed, it must be that they had not been properly understood. But parties and their advocates, with respect, are not independent or objective and cannot, as it were, self-certify in this way. And for this purpose it adds nothing, save for the insertion of a few pejorative epithets, to describe a final decision not just as "wrong" or "misconceived" but as "utterly" or "wholly" or "demonstrably" wrong or misconceived.

Errors in the Judgment of the Full Court

50. On this basis, the first ground advanced on behalf of the applicant would seem to fail *in limine*. It in effect raises, as a ground for re-opening the determination of the Full Court, the very propositions that the Full Court had by its reserved decision rejected.

On that footing, this court simply will not, on this present application, entertain an attempt to renew or recast the legal arguments previously rejected by the Full Court and will not entertain a critique of the Full Court's factual analysis or legal reasoning.

51. At the outset of his oral argument to this court, Mr Jeremy had seemed to accept that. He stated to us that he had no intention of re-running his arguments as to why the jury directions of the trial judge were wrong. Unhappily, it very soon became apparent that he had every intention of doing so. For he went on thereafter to submit, for example, that the Full Court could not properly conclude in law that the events of that night were not capable of breaking the chain of causation (or, if they were, then the only proper course was for the matter to have been properly left to the jury); fortifying his arguments by saying that the "genesis" of the legal error on causation lay in the trial judge's initial approach in his initial instructions to the jury in assuming that the applicant's supply of whisky could be causative of the death, and then compounded by his further allegedly incorrect directions to the jury after receiving the jury note. But these are the core propositions advanced (and rejected) in the course of the appeal.

52. For the reasons given, we are not prepared to entertain this way of re-presenting the arguments advanced on the previous occasion before the Full Court. And we dismiss as obviously wrong the further assertion under the second ground, that the Full Court had failed to address the arguments of the applicant and had given no reasons for rejecting the applicant's argument to the effect that the decision in *Kennedy (No. 2)* was indistinguishable and mandated an outcome favourable to the applicant. Demonstrably, as the text of the judgment shows, the Full Court had engaged with such matters. It had considered the decision in *Kennedy (No. 2)* and had explained why (in its opinion) the statements of principle by Lord Bingham at paragraph 14 of the opinion did not, on the facts and circumstances of this present case, require that the appeal should be allowed.

Procedural unfairness

53. Consequently, if this application under Crim PR 36.15 is to have any basis it must in reality be grounded on the third and fourth ways in which the arguments were presented: that is to say, by reference to procedural unfairness and/or to bias. We proceed with considerable caution given that these grounds were also used as a platform for re-asserting the alleged legal errors in the Full Court's reasoning and conclusion on the appeal.

53. In this regard, Mr Jeremy complained bitterly (as he also had under his second ground) about the use to which the Full Court had made of the "weak swimmer" example which Mr Jeremy had himself introduced in his written arguments presented to the Full Court. We rather got the impression that Mr Jeremy chastised himself for having introduced that analogy, and for having made the concession in paragraph 22 of his written argument (and as recorded in paragraph 49 of the Full Court's Judgment), given the use that the Full Court thereafter made of it. But, as we see it, he has no reason to chastise himself. It was simply putting forward a convenient (and graphic) *illustration* of the underlying principles. Indeed, before us Mr Jeremy – who did not seek to withdraw the concession made in paragraph 22 of his earlier written argument – provided another convenient example, by way of analogy, from the medical context. At all events, it had not really been in dispute (and in any case the Full Court clearly had held) that an undeclared intention, depending on the circumstances, is indeed capable of bearing on the nature of the act undertaken by the postulated victim.

54. It is impossible, in our view, to see how any procedural unfairness or error arises here (let alone a "clear and undisputed" procedural error). The point as to the weak swimmer had been introduced, by way of illustration, on behalf of the applicant himself. It then was accepted and adopted by the respondent in its written argument and speaking note. The applicant in the course of written arguments, had then sought to argue why that example did not correspond to the position in the present case. That therefore became a matter for the Full Court's decision. The Full Court took the view, in essence, that the analogy advanced illustrated a correct legal approach and illustrated that ignorance on the part of the victim, through deceit, of facts (including as to undisclosed intentions) could, depending on the circumstances, change the nature of the act performed and affect the issue of whether such act was "informed". The Full Court went on to decide, by reference to that analogy and rejecting the applicant's arguments to the contrary, that in the circumstances of this case the trial judge's directions to the jury had not been legally erroneous or flawed on the issue of causation. It was thus a matter which was the subject of the Full Court's decision, by reference to the arguments addressed to it.

55. Mr Jeremy nevertheless complained that, given the degree of reliance which he said the Full Court had placed on the weak swimmer example, at the least the Full Court should, as a matter of fairness, have cross-questioned him at the hearing about that example; or at any rate should have given him a further chance to respond on the point before the final judgment was handed down. However, we can see no reason at all why the Full Court was required to do that, in circumstances where the example had been put in play in the arguments at the appeal. Mr Jeremy in fact sought to persuade us that he would have had, and did have, a cast-iron answer to the weak swimmer analogy in this case. But since his assertions involved attempting to reargue points available to be made before the Full court, we were not impressed by this approach.

56. We would however just add, if it be relevant, that we were in any event rather puzzled as to Mr Jeremy's apparent assumption that the weak swimmer argument was conclusively different from the present case, if only by there being in that example an *express* (false) representation of intention with which the giver in truth had no intention of complying. But it is elementary that representations can, depending on the circumstances, be made by implication or by conduct. And in the present case it was a central part of the entire prosecution case (and not in substance in dispute at trial) that the applicant throughout had deceitfully represented to PF that he loved and cared for and had at heart the best interests by PF, when in truth he had engaged in "gaslighting" and when his intentions were entirely otherwise. Indeed, this was the applicant's own boast, when he described himself as a 'snake talker'. On any view, therefore, the events of 25/26 October 2015, as the jury found them to be, had to be placed in the context of all that had gone before. The Full Court had emphasised that all the circumstances had to be taken into account. Ultimately that was a matter for the Full Court; which had made clear that the resolution of the issue would depend on the specific nature of the individual case. It is not for this court, on this application, to trespass into such matters.

57. As a variation on the theme of procedural unfairness, however, it was then sought to be argued that the Full Court should have granted a re-hearing, or given the opportunity for further representations, following the sending out of the draft judgment and in the light of the complaints raised on behalf of the applicant at the time.

58. This was, in our judgment, a matter for the Full Court. It considered the complaints raised. It made clear that it had not misunderstood the arguments. It gave a ruling

(which, *pace* Mr Jeremy, was amply sufficient – indeed, though succinct, was perhaps rather fuller than many courts, we suspect, would have given in such circumstances) rejecting the request for a re-hearing. For obvious reasons a draft judgment sent out with a view to handing down is not to be considered simply as a negotiable document: as, indeed, the conventional instruction that corrections are to be restricted to typographical and other obvious errors makes clear. Accordingly, a request for a reconsideration or re-hearing, following receipt of a draft judgment, can only be acceded to in exceptional circumstances: see, for example, the discussion (in the civil context) and citation of authority in the Civil Procedure Rules at 40.2.1.2. Here, the Full Court had concluded, as it was fully entitled to do, that there were no such circumstances.

59. However, it continued to be maintained before us on behalf of the applicant that unfairness was manifested in the changes made to the draft judgment (which Mr Jeremy sought to categorise as "profound" changes) prior to handing down. This is an untenable submission. Some of the corrections (in the light of Mr Wakerley's observations) adopted what had been proposed; and, whatever is now sought to be said, were not, when set in context, of any very great moment (for example, substituting "could" for "would" in paragraph 49 and the removal of the reference to a concession in the last sentence of paragraph 59). To the extent that other modifications to the draft judgment were made of the court's own motion, that is a relatively commonplace practice and is in no way objectionable: see *R (Binyan Mohammed) v Foreign Secretary* [2010] EWCA Civ 158.

60. Mr Jeremy's particular ire was directed at the adjustment to the fourth sentence of paragraph 63 of the draft judgment (set out above). He complained that whereas the sentence originally included in the draft judgment at least corresponded to and accepted the core submissions of the respondent (albeit, as he would say, entirely wrongly) the new text, he complained, corresponded neither to the respondent's submissions nor to the way in which the jury directions of the trial judge had left matters: and amounted to an injustice and an unwarranted distortion of the case before the Full Court. Indeed, he also relied heavily on this point to support his further allegation of bias.

61. This is not tenable either. Paragraph 63 of the judgment of the Full Court has to be read in context. That context includes what the court stated in the immediately preceding paragraphs of the judgment: not least (but not only) what was held in the first two sentences of paragraph 62. Whether PF's consumption of the whisky was "free, deliberate and informed" had to be placed in the context, among other things, of whether he had retained autonomy and was informed (or deceived) as to the relevant circumstances on the night in question. This part of paragraph 63 of the final judgment was not purporting precisely to summarise the trial judge's directions but was focusing on what (in the opinion of the Full Court) was the effect these directions were taken to have had. The court's conclusion was, that in the context of the facts of this case, the trial judge's directions were legally correct. That being so, on analysis the argument then really becomes, yet again, a means of seeking to debate the correctness or otherwise of the Full Court's legal reasoning and conclusion as to the adequacy of the trial judge's directions.

62. We reject all the allegations of procedural unfairness in all the various ways they are advanced.

Bias

64. We turn finally to the issue of bias. To a very considerable extent, as we have indicated, the arguments here are founded on the same points advanced under the heading of procedural unfairness. Indeed, bias can of itself be taken as an exemplification of procedural unfairness.

65. In his written grounds, Mr Jeremy relied solely on apparent bias: that is, by reference to the familiar test of the informed and fair-minded observer. However, the manner of expression of some of his written arguments caused the court to ask him at the hearing whether he was alleging actual bias. He told us, as we noted it, that he had "wrestled" with that: it was "close to the line" and he left it to this court to decide. We agree with Mr Saxby's criticism of that as an equivocal and unsatisfactory stance.

66. This Court would wish to make it clear beyond doubt that if counsel consider they can properly argue that a court has acted out of actual bias, it is their duty to do so explicitly. It is also their duty to identify with precision the grounds advanced for such argument. It is in the highest degree unsatisfactory that such an implication should be left hanging in the air, neither explicitly advanced nor explicitly disclaimed. Such an approach will often mean there has been insufficient rigour in considering the case to be advanced in the first place.

67. We propose to proceed nonetheless on the footing that it was indeed being implied that there was here actual bias, if not also apparent bias, on the part of the Full Court. We do so in view of the assertion that the Full Court was influenced against the applicant by reason of his (on any view) reprehensible conduct and thereby was motivated to dismiss his appeal; and in view of various other statements made to us in submissions from the Bar by Mr Jeremy. For example, as we noted, he stated that the judgment of the Full Court "circumvented the application of the law to the facts of the case and circumvented the core function of the court"; the judgment "bypassed the arguments of both sides"; the use of the weak swimmer argument was a "device" to enable the appeal to be dismissed; the court was "determined to dismiss the appeal"; the final judgment delivered without any re-hearing "was not concerned with getting it right but was covering up the fact that it had got it wrong"; "fairness has been a casualty of the need to protect the judgment from scrutiny"; a "court of justice" (twice repeated) should have granted a re-hearing after the draft judgment was sent out (the clear innuendo being that this was a court of injustice). Statements of this kind, not isolated but sustained, are consistent only with an implication of actual bias – indeed connote assertions of an abrogation from the required judicial obligations, in accordance with their judicial oaths, on the part of the three judges comprising the Full Court.

68. We can dispose shortly of the allegation of apparent bias. It can only get off the ground if it is to be taken that the fair-minded and informed observer would share the view that the appeal was unarguably correct and unarguably should have succeeded (Mr Jeremy's stance). But one only has to state that proposition to see that the argument must fail. In truth, the fair-minded and informed observer would doubtless have taken the view taken by the Single Judge – that there were powerful arguments both ways, requiring resolution by a reasoned decision of the Court of Appeal. As to the arguments repeated by reference to what happened following the sending out of the draft judgment, our clear view is (reflecting what we have said above) that no conclusion of apparent bias can properly be drawn from such matters.

69. We can also dispose shortly of the suggestion of actual bias. There is in our opinion, no basis whatsoever for such a suggestion. There is no complaint that the Full Court had manifested evident hostility towards the applicant at the hearing. Consequently, actual bias can only be inferred from the judgment itself and/or from the events occurring after the draft judgment was first sent out. But, really for the reasons we have given with regard to the assertions of procedural unfairness, it is not tenable to seek to draw a conclusion of actual bias from the way in which the adjustments to the draft judgment were made and from the refusal to permit a re-hearing at that stage. Nor is it tenable to seek to draw a conclusion of actual bias from a critique of the quality and sufficiency of the reasoning in the judgment and from a critique of the conclusion to dismiss the appeal. This allegation of bias should not have been made.

70. Accordingly, we reject the submission on behalf of the applicant that the applicant "patently was not given a fair and unbiased hearing."

71. There being, as we conclude, no procedural unfairness, no bias and no real injustice arising, that is enough to dispose of this application. But if more were needed – it is not – there is also this consideration.

72. If (as the applicant contends) the decision of the Full Court is legally flawed and profoundly wrong, then there is a potential remedy: in the form of an application to the CCRC. Mr Jeremy rightly accepted that is so, even in the absence of fresh evidence or fresh legal argument: see s. 13 (2) of the Criminal Appeal Act 1995. Of course, if such an application were to be made to the CCRC it would then be entirely a matter for the CCRC itself to decide whether to entertain it and, if so, whether to direct a reference (and this court expresses absolutely no view on such matters). But the point remains that there is such a potential remedy available to the applicant. At all events, there is no question of this court exercising any residual discretion to reopen the decision in this case, to the extent that there may be such a residual discretion as suggested in *Cunningham* (cited above).

73. Mr Jeremy bluntly submitted that this court should not "kick the can down the road", in his words. But that sort of argument can only gain traction (if at all) if this court had declined to consider the allegations of unfairness and bias: and here we have considered them and rejected them. That then in effect leaves the argument that the Full Court got the decision wrong. It is not then "kicking the can down the road", however, to leave such a matter to an application to the CCRC. On the contrary, it is the required approach, in view of the need to uphold the finality of appeal decisions; in view of the need to ensure that the Crim PR 36.15 procedure should not be allowed to be used simply as a means for having a second go before the Court of Appeal; and in view of the need to ensure that the proper use of the CCRC procedure is not circumvented.

Conclusion

74. For those reasons we refuse this application.

75. We would add, for the future, some more general observations. Parties and practitioners must clearly understand that the jurisdiction conferred by Crim PR 36.15 is extremely limited and that the jurisdiction can indeed only be exercised in exceptional circumstances. Parties may disagree, even profoundly disagree, with the reasoning and conclusion of an appellate decision. But such disagreement gives no basis whatsoever

for an application under this Rule. It is inappropriate and wrong to make such an application, with the ultimate aim of getting another constitution of the court to re-consider the merits of an appeal, by means of claims of procedural unfairness or of bias which have no sustainable basis. To do so will be an abuse of process. The court will be vigilant to ensure that applications under the Rule will be confined to those narrow and exceptional circumstances where the Rule is properly to be invoked.