Neutral Citation Number: [2024] EWCA Crim 301

Case No: 202203046 B5
202203047 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEICESTER
T20207069 and T20207078

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2024

Before :

LADY JUSTICE THIRLWALL
MR JUSTICE JAY
and
HHJ TRACEY LLOYD-CLARKE

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Between :

REX	**Appellant**
- and -	
KAMALADIN ISMAEL	**Respondent**

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- -

Patrick Maggs (instructed by **Fosse Law Solicitors**) for the **Appellant**
Brett Weaver (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates : 24.01.2024

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Approved Judgment

This judgment was handed down remotely at 2pm on Wednesday, 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Thirlwall :

1. These are out of time applications for leave to appeal against conviction and sentence. The principal ground of appeal against conviction is that at the time he entered his guilty pleas Ismael was unfit to plead. The extensions required are 874 and 615 days, respectively. There are also applications to rely on fresh evidence namely reports from Dr Alexandra Blackman and Dr Stephen Attard, consultant psychiatrists both of whom opine that Ismael, to whom we shall refer as the appellant, was unfit to plead at the time he pleaded guilty. We considered the reports de bene esse.

2. The appellant's first appearance before the courts was just after his 16th birthday, on 20 January 2020. For assault on an emergency worker (a police officer) on 22 December 2019 when he was still 15, the youth court imposed a six months' referral order. At that time, he was represented by Messrs Oliver D'Sa, solicitors who represented him throughout the criminal proceedings with which we are concerned, up to and including sentence in January 2021. He had been known to social services from 2003. He was diagnosed with Autism Spectrum Disorder (ASD) in 2011 when he was 6. The diagnosis has been confirmed on several occasions since then. His mother had difficulty dealing with his behaviours for some years. From 2016 he was reviewed by the Child Adolescent and Mental Health Service. By that stage, his behaviour had deteriorated significantly and by 2019 he was described as much more aggressive towards his mother and siblings. He became a looked after child on 3 March 2020 as a result of an incident in his family home.

3. On 27 April 2020 at a plea and trial preparation hearing (PTPH) before the Crown Court at Leicester, the appellant pleaded guilty to 12 offences on two indictments. On the first indictment there were eight counts. Theft (count 1), four offences of Robbery (counts 2, 3, 4 and 7), and three counts of having an offensive weapon (counts 5, 6 and 8). On the second indictment there was a further offence of theft, another robbery, a further offence of having an offensive weapon and an offence of assault occasioning actual bodily harm. In the circumstances we shall describe sentence was adjourned and then deferred. On 11 January 2021, the appellant was made the subject of a 12 month Youth Rehabilitation order with a 12 month Supervision Requirement. There was a much older co-defendant on the first indictment (Kavanagh) who was sentenced, for the same and other offences, to a total of 38 months' imprisonment.

4. In March 2021 he was arrested for further offences. From April 2021 he was represented by Fosse Law. From her discussions with him the solicitor, Ms Ferdinand, was concerned about his mental and cognitive abilities and immediately commissioned reports from forensic psychiatrists, Dr Attard and Dr Blackman. The reports are dated 26 July 2021 and 15 August 2021, respectively. In the light of the reports the youth court found that the appellant was unfit to plead, having (it seems) already concluded that he had carried out the acts forming the offences at three separate hearings of fact in September 2021. The court ordered an absolute discharge on 6 October 2021.

5. Further proceedings were brought in early 2022 following the appellant's arrest for assault occasioning actual bodily harm and a number of assaults on emergency worker (police officer). Further reports were obtained from Dr Blackman and Dr Attard. On 20 October 2022 at Nottingham Crown Court the judge found the defendant unfit to plead, having considered all the psychiatric reports obtained by Ms Ferdinand.

6. Eventually there were 6 indictments which were joined into a single nine count indictment. On 3 to 5 July 2023, a jury heard the evidence on counts 1, 2, 3, and 4. They found that the appellant had done the acts constituting counts 1 and 4 (while under a disability), but not the acts constituting counts 2 and 3 of which he was acquitted. The Crown did not seek to prove the acts set out in counts 5-9 and they were left on the file on the usual terms. The proceedings were then further delayed and on 21 November 2023 a judge at Nottingham Crown Court made a Hospital Order. We were informed this order was made under section 37 of the Mental Health Act 1983. This was incorrect. It is plain on the face of the order that it was made, correctly, under section 5(2)(a) of the Criminal Procedure (Insanity) Act 1964, as amended. The order records that the Court found (in accordance with sections 4 and 4A of that act) that "the accused is under a disability such as to render him unfit to be tried, and the jury found that he did the acts… charged against him as offences, namely: Assault Occasioning Actual Bodily harm and Assault by beating of emergency worker."

7. In the meantime, on 13 October 2022, Fosse Law submitted to the Court of Appeal Office the advice on appeal against conviction and sentence on the matters with which we are concerned together with the three medical reports. There were two grounds of appeal against conviction: that the appellant was unfit to plead when he pleaded guilty to the offences and that the legal representatives had failed in their representation of him. They are two facets of the same issue.

8. The case was referred to the full court and directions were given. After some delay, responses to requests made under the McCook procedure were received from the original solicitors, Oliver D'Sa, and from counsel.

9. This court now has, we believe, a complete set of the relevant papers from the solicitor's criminal files, along with letters from Mr D'Sa and two letters and some attendance notes from counsel, Mr Majid, who represented the appellant in the Crown Court. We also received papers from the Court of Protection and from the Family Division of the High Court sitting in Leicester where the appellant was the subject of care proceedings and, eventually, an order for the deprivation of liberty.

10. We extend time to bring the application for leave to appeal against conviction.

Summary

11. The history of this case is profoundly dispiriting. As we shall explain, we are satisfied that the appellant was unfit to plead at the time he entered his pleas of guilty. A review of the papers reveals that before, at the time of, very shortly after the pleas of guilty were entered and for months afterwards there was reason, which became overwhelmingly good reason, to question the appellant's fitness to plead. Nonetheless, the case proceeded through several court hearings without the issue being raised by anyone. This is highly regrettable. The result was repeated adjournments for further information leading, eventually, to an unworkable sentence based on unsafe convictions. Whilst the effects of the Covid pandemic played a part (directly and indirectly) in the unhappy course the case took, there is no avoiding the failure by all those involved (in particular the defence legal team) to act on the information before them.

The Law

12. The test for unfitness to plead was first set out in **Pritchard (1836)** 7 Car. &P. 303 and reaffirmed in **R v Podola (1959)** 43 Cr.App R 220 at 238. The question was whether the prisoner "is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence – to know that he might challenge [the jurors] to whom he may object – and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue therefore, if you think that there is no certain mode of communicating details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind." The explanation of the test to a jury by HHJ Roberts QC was approved by the Court of Appeal in **R v John (M)** [2003] EWCA Crim 3452 (and on several occasions since). In summary, a person is unfit to plead if he is unable to do any one of the following:-

    To understand the charges

    To decide whether to plead guilty or not

    To exercise his right to challenge jurors

    To follow the course of proceedings

    To give evidence in his own defence

    To instruct his legal representatives

    It is for the trial judge to explain the approach to each of these matters.

13. The Pritchard test, even as expressed in **John (M)**, has been the subject of significant criticism, not least from the Law Commission. In **R v Marcantonio and another** [2016] EWCA Crim 14, the court questioned whether there should be a distinction drawn between the ability to follow proceedings at trial and the ability to make a decision about pleading guilty (see paragraph 8 of the judgment). No conclusion was expressed. We are satisfied that such a refinement of the test would make no difference to the outcome on the facts of this case.

14. In **R v Walls [2011]** EWCA Crim 443 Thomas LJ, as he then was, emphasises that criticism notwithstanding, the **Pritchard** criteria remain the law. He notes the approval of this court of the detailed directions of the judge in **John (M)**. The court in **Walls** heard evidence from a psychiatrist who had not addressed the **Pritchard** criteria. He accepted that the appellant was able to give an explanation of what had happened and maintain a consistent account. He maintained that the appellant was unfit to plead but, as Thomas LJ found, he was unable to explain the basis upon which he had come to that conclusion. The court dismissed the appeal and made clear that a finding of unfitness to plead deprives the defendant of significant rights – in particular to give instructions and to give his account. Thomas LJ also pointed out that where people have learning disabilities, consideration should be given to the use of an intermediary under the court's inherent powers. Finally, he observed that the court's

powers are very limited where a defendant is found unfit to plead and is found to have carried out the act complained of – namely a hospital order, a supervision order of no more than two years or an absolute discharge – see section 5 of the Criminal Procedure (Insanity) Act 1964. This limits the extent to which the public can be protected. He urged judges therefore to carry out a rigorous examination of the evidence and proper testing against the **Pritchard** criteria as interpreted in **R v Podola [1959**] 1QB 325.

15. This court approaches after the event challenges to fitness to plead with caution. In **R v Erskine; R v Williams [2009]** EWCA Crim 1425, Lord Judge CJ underlined the importance of a contemporary assessment and the duty of the trial judge. At paragraph 89 of the judgment, he said,

> "Assuming that the defendant is legally represented … his legal representatives are the persons best placed to decide whether to raise the issue of fitness to plead, and indeed to seek medical assistance to resolve the problem. There is a separate and distinct judicial responsibility to oversee the process so that if there is any question of the defendant's fitness to plead, the judge can raise it directly with his legal advisers. Unless there is contemporaneous evidence to suggest that notwithstanding his plea and the apparent satisfaction of his legal advisers and the judge that he was fit to tender it, and participate in the trial, it will be very rare indeed for a later reconstruction, even by distinguished psychiatrists who did not examine the appellant at the time of trial to persuade the court that, notwithstanding the earlier trial process and the safeguards built into it, the appellant was unfit to plead, or close to being unfit or that his decision to deny the offence and not advance diminished responsibility can properly be explained on this basis. The situation is, of course, different if, as in the Erskine case, serious questions about his fitness to plead were raised in writing or expressly before the judge at the trial."

16. We were not taken to any case in which a defendant had pleaded guilty and was later found to have been unfit to plead. It is necessary to set out the history of this case in detail.

The Offences

17. The offences on both indictments arose out of planned shoplifting expeditions. For reasons that will become clear it is unlikely that the appellant was involved in planning. It is likely that he did what he was told by others.

18. On 2 February 2020 the appellant, Kavanagh and a woman went into a Peacock clothing store. Kavanagh and the woman filled two baskets with items worth £200. They put the baskets on the floor. The appellant picked them up and ran out of the store. A month later, on 9 March, he went into a children's clothing store, selected items valued at just under £1000. As he reached the exit, he produced a claw hammer from his pocket and smashed the counter. He then barged past the shop assistants, ran out of the store, and got into a white van that was waiting for him. It drove off. The

same day he was seen pushing a full trolley out of an Asda store. He was stopped by a security guard. He produced a claw hammer and started waving it around. He ran out of the shop, leaving the trolley and got into a white van which drove off. The same day he went into the Peacock clothing store again. He selected several large handbags, worth £350 and headed towards the exit. A supervisor tried to stop him. He pushed her out of the way, left the store and got into the same white van, which drove off.

19. Five days later, on 14 March he was seen to get out of the same van. He went into Blacks store and selected a number of jackets, priced in total at just under £2000. He was challenged by a shop assistant, produced the claw hammer, and then ran out of the store with the jackets and got back into the van which drove off.

20. During the same period, on 24 February, he filled a trolley at Aldi. The goods were worth £257.93. He walked out without paying. On 6 March 2020, he went into Laura Ashley and took a rug, valued at £244. As he picked it up the store manager challenged him. He produced a claw hammer and held it above his head, telling her not to get any closer. He left the shop and hit the door twice with the hammer, apparently because the door was slow to open.

21. The appellant was arrested in the van on 15 March 2020. He was interviewed in the presence of his mother and answered no comment to all questions. A letter written on 16 March 2020 by the solicitor responsible for his case records that the appellant told him (they met in person) that "you were not feeling mentally well, and you cannot think straight." The solicitor also wrote, "We acknowledge your age and the fact that you have your mother as an appropriate adult, and we have also fully discussed with your mother the fact that for someone in your particular position we think it is prudent that you do get some medical attention. We have little choice but to respect your mother's wishes and your wishes not to ask for medical help." The solicitor recorded on the file that the appellant was able to conduct a conversation and opined that there was "nothing to indicate that mental health issues exist." The appellant was released on bail at the Magistrates' court on 17 March. Again, his solicitor was in attendance.

22. In his letter to the Registrar Mr D'Sa says that a decision to seek a psychological assessment was considered on 16 March. Counsel was asked about it, then there was a problem finding suitable experts, he says. The problems arose because of Covid. Nonetheless, in early April they decided they did want a psychologist to assess suggestibility and IQ.

23. In the meantime, on 21 March 2020, the appellant and a man described as a friend entered a One Stop supermarket. After the friend had left the store, the appellant dropped a basket in which he had placed items and left the store too. He went up to a sales assistant who was outside berating his friend. He pointed his finger at the sales assistant and kicked him in the left knee causing slight pain. He was interviewed about this on 1 April 2020 in the presence of his solicitor and his mother. Again, he answered no comment. He was further interviewed on 14 April 2020. As before, he answered no comment to all questions.

24. The appellant was brought before the Youth Court from Secure Accommodation on 15 April 2020. The solicitor's contemporaneous note records that before the District Judge the following issues were raised: "Is the Defendant capable of forming criminal intent? Is the Defendant being exploited – Modern Day Slavery." On a document

containing actions required the solicitor has written "Get a Youth psychiatric report – re fitness to plead." He notes that bail was refused. The solicitors wrote to the appellant as follows "We confirm the District Judge recollected you from the previous hearing and she was raised [sic] regarding your ability to form a criminal intent and whether indeed you have been exploited under the modern-day slavery legislation and as such this would afford you a defence……" Later in the letter the solicitor wrote "the District Judge has acknowledged that there are some concerns raised even by the Youth Offending Service and the defence relating to your exploitation and whether you are capable of criminal intent. The District Judge has left that matter to be determined at the Crown Court should the defence instruct a psychiatrist to assess your fitness to plead." There is an attendance note for the 16 April 2020 where the solicitor records that he spoke to Mr Majid, saying, "We urgently require the advices in favour of instruction of a psychologist and psychiatrist. He says that he will send those advices to Mr Oliver D'Sa. I ask for Mr Majid to please book a conference to see the client in custody he says that he will try to get a conference."

25. According to Mr D'Sa, in the telephone meetings between the appellant and Mr Sanghera in the period up to the PTPH there had been no detailed discussion of the evidence before the hearing because the intention was to seek an adjournment so that medical reports could be prepared. He says in terms "We cannot say absolutely whether Mr Ismael understood the charges on [16 March, 17 March and 15 April 2020]…we did not go through all of the case papers with him prior to the hearing on 27 April 2020."

26. The solicitor spoke to Mr Majid again on 24 April. He records "explaining to him the client's concerns regarding him being not well in the head. Also discussed the case has Modern Day Slavery issues, mental health issues We also wish to have a psychology report on the client as I am concerned that the client is very young. Counsel is instructed to inform the Court of these issues and to seek an adjournment." Later in the note the solicitor records "We still need for Defence counsel to provide us with the advices in favour of instructing psychologists and psychiatrists. Defence Counsel apologises for not having provided these so far and will send them to Oliver." Counsel wrote a short advice on evidence, which he provided to this Court and is on the solicitor's file. It dealt with the need to obtain the footage from the various CCTV cameras together with a proof of evidence from the appellant. There was no reference in the advice to medical issues, nor is there any response to the advice on the file. The solicitor's attendance note for 24 April records, that he had instructed Mr Majid to seek an adjournment so that reports could be obtained. He also records a conversation with the appellant in which he tells him he will not need to say anything at the hearing as the barrister will speak and ask for an adjournment. In his letter to this court Mr Majid makes no reference to being instructed to seek an adjournment. There were no written instructions and no brief. That was, according to the solicitor, because counsel used to work for the solicitor's firm. Instead, there was a telephone call and an invitation to sign into the DCS. This is not acceptable. Nonetheless there is a formal written acknowledgment of the brief from counsel's chambers.

27. The PTPH took place on 26 April 2020, a month into the first Covid lockdown. The judge was in the courtroom, using CVP. Also online was Ms Sheila Singh, the team manager of the Disabled Traumas Team at the Local Authority. She had had extensive

dealings with the appellant. The appellant appeared online from secure accommodation. No one from the solicitors was present. Counsel appeared via CVP from his home. He had not previously seen or spoken to his client. Given that the appellant was only 16 this was regrettable. It was not, unfortunately, unusual at this stage of the pandemic. It appears from his second letter to this court that Mr Majid never met his client in person, notwithstanding that there were four hearings, the last of which was in January 2021.

28. The transcript of the PTPH shows that at the beginning of the hearing the judge asked counsel whether the indictment could be put. Counsel said yes. The indictment was put, and the appellant pleaded guilty to all counts against him and to a count on another indictment with which he was not charged which was put to him by the clerk in error. It related only to his co accused. The judge noticed what had happened and directed that the plea on that count be vacated. The judge observed to Mr Majid that a number of reports would be required, an observation with which Mr Majid agreed. Mr Majid suggested a report from the Youth Offending Team and then said, "I'm going to have to speak to instructing solicitors, because there was mention of some sort of a psychiatric report to be done on Mr Ismael, but I think it's going to be more of a case of some sort of psychological report, just to see what his situation is, which obviously, can be dealt with by the Youth Offending Team, but I think we've got to look more into his background and see." The judge acknowledged that and said he would leave it to counsel, pointing out that Ms Singh would have some input. He adjourned for a report from the Youth Offending Team, "and psychological or psychiatric as advised by the defence." Ms Phelan, for the Crown said that the guilty pleas had taken her by surprise. In his letter to this court in November 2022 Mr Majid said that the pleas took him by surprise and that he raised this with the judge who asked the appellant "if he was entering his pleas of his own accord, and also asked if he understood what he was pleading to and the repercussions of the same." This is not reflected in the transcript, although we would accept that omissions from transcripts do occur. Mr Majid also said that at the PTPH he was "still not aware of Mr Ismael's mental health issues." Whilst the extent of those issues may not have been clear at the time, that they were recognised is clear from Mr Majid's reference during the PTPH to the solicitors' mention of some sort of psychiatric report.

29. The judge referred to the NRM. He referred in terms to the fact that Counsel on both sides were experienced from which we infer that they would understand he was prepared to rely on their judgment as to the type of reports needed. The judge explained in commendably clear and simple terms to the appellant that he was putting the case off and why he was doing that. He alerted the appellant to the fact that it may be that a doctor would come and see him or talk to him over the telephone.

30. Mr Majid produced a note of the hearing which began with the line "D entered Guilty plea to all counts." Afterwards he wrote in his attendance note for the solicitor, "We need to get a psychologist or psychiatrist to see Ismael over the video line and prepare a report." He urged haste as the next hearing was six weeks later. He finished as follows, "I would strongly advise that you arrange a visit in person with Mr Ismael, as he appears to be vulnerable in nature."

31. There followed (according to the solicitor's note) what seems to have been a heated discussion between solicitor and counsel. The solicitor was concerned that no application for an adjournment had been made and he records that he wanted to

inform the court that there had been an error and the indictment should not have been put. Counsel considered that the better course was to obtain a psychological report which could be used for the sentencing hearing. This approach was agreed after the solicitor had discussed what to do with Mr D'Sa. Curiously, Mr D'Sa (not the solicitor responsible for the case) wrote to the appellant. He refers to the guilty pleas and the fact that reports are being obtained. He then says this, "By pleading guilty at the earliest possible opportunity you will get the maximum credit. The Barrister went through all the offences with you, and you accepted responsibility and you wished to plead guilty." This was clearly incorrect. It is inconsistent with his letter to the Court of Appeal in which he says, as was obviously the case, that the pleas of guilty were unexpected. It is also inconsistent with the attendance notes of the solicitor responsible for the case which records a telephone call with the appellant on 27 April 2020 after the hearing in which he said "I reassured the client that the decision that he has taken at Court and the fact that he wanted to plead guilty, I respect….the client states that his Barrister didn't speak to him before or after the hearing and he did not have any telephone communication with him or video link communications." If the letter from Mr D'Sa ever reached the appellant, which is not clear, he did not reply.

32. On 29th April, Ms Singh emailed the solicitors to say, amongst other things, that her team had been involved with the appellant for years and had good insight into his needs. They were pursuing a mental health and cognitive assessment followed by a mental capacity assessment. She added that it was her view that the appellant "was not fit to plea [sic]" on 27 April 2020 and that she had been surprised that the charges were put to him. She also said that the Local Authority were preparing the papers for care proceedings.

33. It is clear from the file notes that there was some irritation about Ms Singh's intervention, the lawyers seemingly of the view that in the absence of any medical or other evidence the appellant must be treated as fit to plead. He had chosen to plead guilty and so they were acting accordingly. The point is made by Mr D'Sa that they had represented the appellant before (i.e., in January 2020) and did not have concerns at that time. Whether or not that is the case it is inescapable that they did have some concerns as at April 2020, hence the intention before the PTPH to seek reports. It is not easy to see how those concerns dissipated in the light of the pleas of guilty. It might be thought they would have become more acute. Mr D'Sa says that the guilty pleas were discussed with the appellant by the solicitor, "The end decision of the client was that he wanted to maintain those pleas of guilt. He was very vocal about his thoughts as will be noted from the telephone notes provided [this is obviously a reference to his complaints about the way he was being treated by social services and the police]. If he was not happy about maintaining his pleas of guilty, we do believe he would have taken action about his concerns." This observation is predicated on the assumption that there was no issue about the appellant's ability to understand the nature of the proceedings or the decisions needed. In the light of their view that medical reports were needed before plea and what is now known about the appellant, this observation is surprising.

34. On 18 May the appellant spoke to his solicitor on the telephone. He was concerned about having pleaded guilty but, according to the note, he was not sure why he thought he may be not guilty. The solicitor contacted counsel. The attendance note records a discussion about what to do. The solicitor was prepared to contact the court

to alert it to the appellant's possible change of mind. Counsel advised against that since he would lose credit for his guilty pleas. He advised that they should "assess the situation as it progresses." It was agreed that conferences would take place with both the solicitor and the barrister.

35. We should add that the solicitor responsible for the case was assiduous in keeping in touch with his client. Frequent and regular letters were written after telephone calls, explaining what had been discussed and what was to be done. The letters were usually several pages long. On occasion the appellant would ask that the letters be sent to his mother so she could explain them. This was a clear indication that he was struggling to understand the letters. The letters continued as before.

36. On 19 May, at the solicitors' request, Ms Singh explained her concerns about the appellant's lack of capacity. This was followed on 20 May by a lengthy email setting out her views that the appellant "lacks age-appropriate understanding. Does not understand actions and consequences." On 21 May 2020, Counsel noted in an email that Ms Singh had raised "his cognitive understanding of his offending behaviour and that he may also be autistic." Counsel advised that it was imperative that the sentencing judge had a good understanding of the appellant's level of cognitive functioning. That such an understanding may include a consideration of the reliability of the pleas of guilty does not seem to have been considered.

37. The case came back before the same judge on 8 June. At that time, the appellant was remanded at Rainsbrook Secure Training Centre. Miss Roberts, the case manager for the Children and Young People's Justice Service (C&YPJS) submitted a report which made no recommendation because there was no cognitive assessment available to inform her assessment. She said, "All services involved with Kamaladin are in agreement that there are significant concerns about his ability to understand and process information. There is a multi-agency consensus that a cognitive assessment is required in order to determine the level of his cognitive functioning." By that stage, the local authority had commissioned a cognitive assessment, but it was not yet completed. A psychiatric report, dated 8 June 2020, had been obtained by the defence solicitors from Dr Thirumalai. He had interviewed the appellant on 5 June 2020 by video. We note that the appellant said to Dr Thirumalai that he had " pleaded guilty to all offences… I just wanted to support myself…to prove to myself…*I am not scared person*…someone told me …they were telling me." (our emphasis). The confusion between being scared and being guilty was repeated in the appellant's interview later with Dr Blackman (see paragraph 57 of this judgment where the word used is afraid). In the interview with Dr Thirumalai the appellant said he had committed some of the offences to purchase cannabis. The psychiatric examination (which did not include an assessment of his cognitive abilities) revealed his difficulty in understanding language. Dr Thirumalai said, "his understanding of words, which are not related to his everyday life is limited." Ms Singh spoke to Dr Thirumalai. She said that the appellant could give the appearance of functioning at a much higher level than he was. She believed he lacked age-appropriate understanding, including of actions and consequences. Ms Singh's assessment of how the appellant presented was echoed in an Educational Health and Care plan prepared in other proceedings (and referred to by Dr Attard later in these proceedings) in September 2020 which included the information that the "defendant can appear as expressively articulate which can lead others to overestimate how much he understands. As such, it is important to

continuously clarify and cross check communication and understanding." At the same time, his "understanding of spoken vocabulary (single words) is within the exceptionally low range."

38. On the basis of his clinical interview Dr Thirumalai opined that the appellant had mild autism which he described as a pervasive developmental disorder which is difficult to treat or change. As a result, the appellant had a reduced capacity for appropriate social interaction. Dr Thirumalai had no specific mental health disposal to recommend.

39. The judge was not satisfied with the reports that had been prepared and adjourned the case for a further 6 weeks for the cognitive assessment to be completed. One such assessment was completed in under three weeks. Dated 26 June 2020, it was prepared by Dr Adam Abdelnoor, a chartered psychologist instructed by Oliver D'Sa. His instructions were to assess the intellectual capacity, suggestibility and understanding of the appellant, to advise as to his appropriate management and assist in his appropriate disposal. This was in the light of the guilty pleas and with a view to sentence.

40. Dr Abdelnoor summarised his opinion thus, "Kamal has a very low IQ (based on his standard score on general ability tests) which indicates a diagnosis of learning disability. His mental functioning is equivalent to that of a child of seven or younger. This is in addition to his Autistic Spectrum Disorder diagnosis." He described the appellant's limited understanding of himself and the world around him. "He does not make the necessary connections between cause and effect or consider and construe the impact of his behaviour on others." At paragraph 6 of the report the following appears, " Kamal does not appear to have a working understanding of his current situation and will not be able to participate meaningfully in court proceedings. He would need an intermediary if required to give evidence. His appearance in court should be avoided if possible. The outcome of these proceedings should be that Kamal receives intensive support and direction with therapeutic intervention." The report is detailed and thoughtful. The battery of tests to assess his cognitive capacity placed the appellant in the lowest possible category (at least 99.9% of 16 year olds would score higher), his scores being reduced by the strangeness of his circumstances, his lack of understanding of the importance of the test, a lack of motivation to do well and probably a mind set to expect failure. Even allowing for these factors Dr Abdelnoor considered that he would still be within the 2nd percentile, well within the threshold for a diagnosis of learning disability.

41. He opined that the appellant did not have "the cognitive capacity to make a decision for himself about whether to plead guilty or not guilty though I believe he will have some memory of what he did. What he remembers, however is likely to be partial and distorted. I don't think he is able to give a coherent account of his actions." He did not think the appellant could meaningfully exercise his right to challenge jurors or to form instructions to solicitors. He would find proceedings tiring and stressful. Even with an intermediary, "he is unlikely to engage effectively with the process."

42. He considered that the appellant would be vulnerable to "befriending" because he would not recognise falsehoods and would agree to carry out offences on behalf of others to preserve what he saw as friendship.

43. It is not easy to understand why an application to vacate the pleas of guilty was not even considered at that stage. Dr Abdelnadoor could not have made the position any clearer. Given the nature of the appellant's limitations it was highly improbable that he had been fit to plead two months earlier at the PTPH.

44. On 24 July 2020, the case came before another judge. At the time of this hearing the appellant was the subject of a deprivation of liberty order and a secure transfer order in childcare proceedings. It is not apparent that at that time there was much communication between the solicitors acting in the family proceedings and those acting in the criminal proceedings, but the appellant's location was known.

45. In addition to the documents produced at the June hearing the judge had a further pre-sentence report and the report from Dr Abdelnoor. Once again, the writer of the PSR (who was not present) made no recommendation. Her report said, "it was the view of the youth justice team that neither a community order nor a custodial sentence should be imposed." She referred in detail to the appellant's complex needs and noted that he had been "assessed as having mental competencies of the age of a seven year old or below." She commented on his lack of understanding of the court process and his lack of understanding of his offences and the severity of the impact they were having on his life. She noted that his complex needs left him "extremely vulnerable to manipulation, coercion and exploitation which is evident in the circumstances of his offending." The consensus of those responsible for the appellant was that he needed a secure therapeutic placement in the community which, by the time of the hearing, the Local Authority had found.

46. The hearing was extremely disjointed with repeated difficulties with the technology as people endeavoured to join. The judge was a model of patience, but it cannot have been easy to navigate through the shambolic presentation of the case, not least because the co-defendant was now involved and deeply frustrated that he had not yet been dealt with. Several pages of the transcript are taken up with people trying to join the hearing, contacting the court by telephone and, I assume, by CVP. The word "inaudible" appears throughout the transcript, which has not aided our understanding of what was going on.

47. The judge had been informed that a judge in the family court had made a Deprivation of Liberty Order, the intention being that the appellant would be taken to a residential setting found by the local authority. This was all dependent on the outcome of the criminal proceedings. Eventually, Mr Majid submitted that this was a case for a hospital order and asked for an adjournment for a second psychiatric report to be prepared. The judge did not want a further psychiatric report and was not at that time considering a hospital order. The judge's exasperation at the lack of progress with the case is palpable on the transcript. No one confronted the consequences of the findings in Dr Abdelnoor's report. The judge was attempting to reach a just sentence in a situation where there was real doubt about the appellant's fitness to plead.

48. The judge deferred sentence for a period of six months to see what progress could be made now that a suitable placement for the appellant had been found. There was a hearing under the slip rule, where the proper procedure for imposition of a deferred sentence was followed correctly. The judge explained the purpose of the deferral with some care. He asked the appellant whether he agreed to the deferral of sentence. The appellant replied, "Yeah, I'm at risk of getting diabetes, so I'm at risk of dying, so…."

49. On 19 August, a further report was received, this time by the Local Authority, from Graham Flatman, chartered psychologist. He reviewed the report of Dr Thirumalai and of Dr Abdelnoor and carried out his own assessment of his cognitive capacity. He too recorded a score well within the 0.1% percentile. He made recommendations on the level of support the appellant would need and whether he would be able to live independently (with support). He concluded that he needs to live in a "supported living environment with a total therapeutic environment."

50. On 16 September 2020, the children's Guardian in the care proceedings wrote to Mr D'Sa. Her letter included the following in respect of the deferred sentence, "It is unclear to me why this deferment was necessary given that Kamaladin does not have the capacity to implement change due to his cognitive ability, and that he is functioning below the age of criminal responsibility, and he will continue to be criminally exploited without the appropriate support. As Kamaldin's Guardian and the views of the Youth Offending worker, Kamaladin in my opinion will not benefit from any form of sentencing, as the Criminal Justice System is not an area that he is able to understand or work with given his complex needs and his ability to understand his offending behaviour…..I would therefore invite the CPS to reconsider this case in light of the above and to have this matter re-listed urgently." The letter was sent on to the sentencing judge in September. His response pointed out that the offences were very serious, that the Crown felt they had a strong case and that the appellant was legally represented at all stages. "If those looking after him can suggest a package of measures under some sort of supervision requirement, the deferred sentence date can be brought forward, and I can consider the position." He copied his reply to the judge in the family proceedings.

51. The case came back to court for sentence on 11 January 2021. The appellant was represented by Mr Majid. Also in attendance online were Ms Singh, a social worker, and a worker from the Secure Children's Home where the appellant was by then living pursuant to an order of the family court. There was a report from another psychologist, Ms Procter, from CAMHS, dated 8 January 2021 and headed "Intellectual Functioning Assessment". The assessment took place over nine in-person sessions in November and December 2021 (unlike the reports of Drs Flatman and Abdelnoor, which were prepared when all contact between them and the appellant took place online). The appellant engaged better with this assessment. The outcome was the same. Again, his full IQ score was in the Extremely Low range when compared to other children his age. He scored lower than the 0.1 percentile. Ms Procter noticed, as Ms Singh had before her that the appellant "is often able to mask his difficulties through conversations about topics of special interest. It is possible at times for Kamaldin to appear knowledgeable and as functioning at a higher level than his ability." She opined that these "pockets of knowledge…are not reflective of Kamaladin's overall ability." This is all well explained. She assessed his ability to exchange information with others at a percentile rank of lower than 1. His daily living skills came into the same percentile. There is no need to set out more of the detail. She assessed the appellant as meeting the criteria for a diagnosis of a learning disability. She pointed out that it was important for adults working with the appellant to understand that he would not be "functioning at an age-appropriate level and that he will require substantive ongoing tailored support across all areas of life."

52. Ms Roberts produced a further report saying, again, that she could make no recommendation since the imposition of a statutory order would be both inappropriate and unworkable given the appellant's low level of cognitive functioning. Ms Singh explained that the intention within the family proceedings was to keep the appellant in a therapeutic environment with close support and a Deprivation of Liberty order. Mr Majid submitted that an order should be made which allowed therapeutic support and pointed out that the appellant had been deprived of his liberty for some time.

53. Ultimately the judge made a 12 month youth rehabilitation order with a 12 month supervision requirement. It is plain from his sentencing remarks that he believed there to be no alternative. Mr Majid advised in writing that the sentence was lenient and there were no grounds for an appeal.

54. In March 2021, as we have said, the appellant was arrested and appeared before the Nottingham Youth Court. He is currently the subject of the Hospital Order made in the Crown Court in November 2023.

55. In the meantime, the proceedings in the family court continued. The Deprivation of Liberty Order was renewed on 23 September 2021 and on 6 December 2021. The new solicitor in the criminal proceedings obtained permission for the release of the information about the family proceedings to be shared with the Crown Court.

56. It is neither necessary nor desirable to set out the further twists and turns of this case. It is sufficient to say that there was a failure by the appellant's lawyers to identify and act effectively in the light of their client's difficulties. Whilst their severity may not have been immediately obvious, given what was said by Ms Singh about the difference between his apparent functioning and the reality, the chronology in this judgment shows there were warning signs before and during the PTPH. Once Ms Singh raised the alarm in stark terms in May 2020, the solicitors should have reconsidered their decision to keep going along the path to sentence. We acknowledge that Dr Thirumalai (who conducted his assessment online) did not specifically alert the solicitors to particular difficulties but the content of the report from Dr Abdelnoor meant that the issue of fitness to plead could no longer properly be avoided. An application should have been made to vacate the pleas and further reports obtained.

Fresh Evidence

57. The appellant seeks to rely on reports prepared by Dr Attard and Dr Blackman in July and August 2021 for use in the proceedings in 2021 and 2022 together with addendum reports. Dr Blackman prepared further reports dated 18 September 2022, 18 June 2023, and 8 August 2023. We note that in her first interview with the appellant for her first report, Dr Blackman asked the appellant to explain what the terms "guilty" and "not guilty" meant. He replied that "guilty means you're not afraid and not guilty means that you are afraid." She explained the terms to the appellant. He nodded in agreement. He was then asked to explain the terms again. He repeated "guilty means you're not afraid." He was unable to explain or guess what the possible consequences might be of entering a plea of guilty rather than not guilty, even when the question was explained by her using very simple language. She considered that the appellant did not have sufficient understanding of the meaning behind entering a guilty or not guilty plea to decide how to plead. She then asked a series of questions designed to elicit information to answer the questions underlying the Pritchard test and opined that

the appellant was not currently fit to plead or stand trial. She acknowledged that the Pritchard criteria were not applicable in the Youth Court and explained that due to his significant receptive language difficulties and cognitive deficits "I am of the opinion that he would not be able to understand, weigh or communicate information pertaining to the decision to stand trial." She added that his lack of understanding of the court proceedings, role of counsel and different pleas rendered him unable to weigh the consequences of decisions pertaining to standing trial. She also considered that his difficulties could not be sufficiently mitigated by the presence of an intermediary.

58. In her report of 18 September 2022, Dr Blackman expressed the same view. She was asked to review the case again in June 2023, in the light of directions from this court. She was provided with some additional reports and transcripts of hearings and was asked to opine on fitness to plead as at April 2020. She observed that on 31 March 2020 there is an entry in the medical records that the appellant was "not Gillick competent to give consent". She repeated her view that the appellant was not able to understand the difference between and the consequences of pleading guilty and not guilty. She opines "Given the lifelong nature of his ASD and intellectual disability, this is very likely to have been the case in April 2020." She refers to the guilty plea to a crime he had not committed as evidence in support of her view. She explained in great detail, by reference to her own assessment and those of others to whom we have referred, that he would not have been fit to plead and stand trial in April 2020. Again, she pointed out that his difficulties are too severe to be mitigated by the presence of an intermediary.

59. Dr Blackman was also asked to advise on outcome if this court decided to exercise its powers under s6 of the Criminal Appeals Act 1968. It was her view that a hospital order was not appropriate and that he should be managed by way of the Deprivation of Liberty order in place, with one-to-one care and supervision, the use of restraint and administration of as required sedative medication.

60. In her report of 8 August 2023, she was asked to review the sentencing options in respect of the acts found proved in the proceedings in Nottingham in 2023. She considered that there had been a significant deterioration in the appellant's mental health since the last assessment, possibly caused by the fact that he had been for some time in custody. As a result, he had a negative view of all support workers and carers which may make him violent towards them in the community. She considered that he would benefit from time in a specialist hospital environment with experience of treating patients known to the criminal justice system and with diagnosis of neurodevelopmental conditions. She therefore recommended a hospital order under Section 37 of the Mental Health Act 1983. This was not open to the court. Section 37(1) of the Mental Health Act reads, "Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law… the court may by order authorise his admission to and detention in such hospital as may be specified in the order…".
A finding that a defendant is unfit to plead and has carried out the acts does not constitute a conviction. Section 37 MHA 1983 does not apply. In the event, as we have said, the order was made, correctly, under the Criminal Procedure (Insanity) Act 1964.

61. Dr Attard wrote four reports on 26 July 2021, 16 October 2022, 1 July 2023 (amended 3 August 2023) and 8 August 2023. Like the reports of Dr Blackman, they were prepared initially for the hearings in Nottingham and then relied on, appropriately, for this appeal. Dr Attard demonstrates a clear understanding of the Pritchard criteria and analyses the evidence accurately. He considered the appellant unfit to plead as of July 2021. In his October 2022 report he sets out the relevant passages of the reports of Dr Abdelnadoor, Dr Flaxman, and Ms Procter. He acknowledged the appellant's very limited intellectual functioning but made the important finding that there was nothing in interview or elsewhere in the documents to suggest that at the time of the offences the appellant did not know the nature and quality of his actions or that they were wrong. He did not therefore fulfil the criteria for insanity as defined in the M'Naghten rules. He noted the findings in the Education and Health plan that the appellant could appear to be functioning at a high level even though he was not. In his reports, he recommended a Hospital Order under Section 37 MHA 1983, subject to the requirement of finding an approved clinician. As we have explained an order under section 37 was not open to the court in the absence of a conviction.

62. We are quite sure that psychiatric reports directed to the question of fitness to plead could and should have been obtained by the appellant's lawyers long before sentence. That they were not was not the responsibility of the appellant. The reports provide the foundation for a successful appeal against conviction, and we admit them into evidence. We have considered them along with all the documents to which we have referred.

Conclusion

63. We accept that the appellant was unfit to plead at the PTPH. He has a diagnosis of ASD, which is enduring and lifelong. His very marked cognitive difficulties are also lifelong. We are satisfied that he had the same limitations in April 2020 as he was found to have in June 2020 (see Dr Abdelnoor's report) and repeatedly thereafter. His limitations are such that he does not understand the concept of guilt, still less the difference between being guilty and not guilty with all the consequences each entails. He has no understanding of any of the matters which make up the **Pritchard** test.

64. At the PTPH the defence should have alerted the court to the unexpected pleas and asked for time to speak to the appellant. The result of the decision to keep going to sentence so that the reduction for guilty plea would be preserved meant that the instructions to Dr Thirumalai and Dr Abdelnoor did not alert them to the question of fitness to plead. Fortunately, Dr Abdelnoor dealt with it in any event. Everything that we have read from that date reinforces our view that when the report from Dr Abdelnoor was received in late June 2020, an application should have been made to vacate the pleas. That did not happen, and so further unsatisfactory hearings took place in which no one grappled with the obvious and well identified problem of the appellant's fitness to plead and sentence was passed.

65. After a number of changes of position by both prosecution and defence, at the time of the hearing of the appeal there was agreement at the Bar that the appellant was not fit to plead at the PTPH but there was some confusion about the way forward. There was an agreed submission that Section 6 of the Court of the Criminal Appeal Act 1968 came into play. Later, there was a suggestion that this court should make an order

under section 37. For the reasons we have already given Section 37 MHA 1983 does not apply.

66. **Section 6** so far as is relevant reads,

Substitution of finding of insanity or findings of unfitness to plead etc.

(1) This section applies where, on an appeal against conviction, the Court of Appeal, on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved, are of opinion—

(a) that the proper verdict would have been one of not guilty by reason of insanity; or

(b) that the case is not one where there should have been a verdict of acquittal, but there should have been findings that the accused was under a disability and that he did the act or made the omission charged against him.

(2) The Court of Appeal shall make in respect of the accused—

(a) a hospital order (with or without a restriction order);

(b) a supervision order; or

(c) an order for his absolute discharge.

…

67. Both parties submitted that it was open to this court to apply section 6 (1)(b) and form the opinion that the case is not one where there should have been an acquittal, but there should have been findings that the accused was under a disability and that he did the act or made the omission charged against him. This is the approach taken in all the authorities to which we were referred in which this court applied section 6. We do not accept that this is an approach open to us. In most of the cases to which we were referred this court was in a position to make the finding that the case was not one where there should have been a verdict of acquittal, but there should have been findings that the accused was under a disability and *that he did the act or made the omission charged against him* (our emphasis) because in each case a jury had heard the evidence and had convicted the appellant. Where the court subsequently found that he had been unfit to plead it was entitled to rely on the findings of the jury in support of their finding that the case was not one where there should have been a verdict of acquittal but that he did the act or made the omissions charged against him.

68. Counsel for the appellant took us to the decision in **R v G [2009] EWCA** Crim 692 where the court relied on the views of counsel as to the evidence in respect of the timing of particular offences before concluding, "Having satisfied ourselves that the appellant was fairly and properly found to have committed the acts charged, we must now turn to the question of a finding under section 6" and concluded "that there should have been findings that the appellant was under a disability and that he did the acts charged against him." To the extent that counsel was seeking to suggest that this court make the decision in the absence of a finding by the jury, this is obviously incorrect. The views of counsel were relied on only as to the effect of some evidence about timing.

69. Counsel for the appellant also referred us to the decision of this court in **R v Chitolie** heard and reported with **R v Marcantonio.** He submitted that this court had relied on the accounts of the psychiatrists in coming to its conclusion that the appellant should not be acquitted. It is true that the court relied on the psychiatrists for their determination that the appellant was unfit to plead. He had been convicted by a jury. That he had done the acts was not disputed and the hospital order was made in accordance with section 6 (2) (a). Marcantonio, who had pleaded guilty to burglary and argued that he had been unfit to plead, failed in his appeal.

70. In all but one case where the jury had convicted this court concluded that there should not have been a verdict of acquittal and that the appellant did the acts charged against him. Accordingly, Section 6 was applied, and orders were made.

71. **R v Johnson [2002] EWCA** Crim 1900 was the exception. It was a referral by the CCRC of a conviction after a trial 30 years previously. This court found that the appellant had been unfit to plead. The court was not satisfied that there should be a finding that the appellant did the act charged, still less that there should not have been a verdict of acquittal. In that case the transcripts of evidence were no longer available. There were other reasons for the court, notwithstanding the jury's verdicts, to doubt that the evidence that the appellant carried out the acts alleged was strong enough to support a finding that there should not have been an acquittal. The appeal was allowed, and the convictions quashed.

72. Pleas of guilty, entered by a person who was unfit, are not evidence against him. The appellant's guilty pleas are of no relevance to our task. We are not in a position to determine that the appellant should not be acquitted. It is not for this court to embark upon a consideration of the statements to determine whether the appellant did the acts charged, nor were we invited to do so. Section 6 is of no application in this case.

73. We are satisfied that the convictions are unsafe based as they are on pleas of guilty from a defendant who was not fit to plead. The Crown, rightly, does not seek a retrial. A retrial would require the matter to go back to the Crown Court. There would be a hearing on the question of the appellant's fitness to plead. We are confident that he would, again, be found unfit to plead given the enduring nature of his difficulties. A jury would then be sworn to hear the evidence and determine whether or not the appellant did the acts complained of. In the light of the acquittals at the hearings in Nottingham, it is not a foregone conclusion that a jury would find the appellant to have done all the acts complained of, but assuming for the purposes of this argument that the jury found that he had done some of them, the judge would then be invited to make a hospital order in accordance with sections 5, 4 and 4A of the Criminal Procedure (Insanity) Act 1964 which would run in parallel with the order already in place. We agree with the Crown that a retrial is not in the public interest.

74. Accordingly, we allow the appeal. The convictions are quashed. The sentence imposed falls away. The appellant remains subject to the hospital order made in November 2023.

75. This case should never have reached the point of sentence, still less this court. Fitness to plead does not arise only in the context of homicide or other very serious offences. All involved in criminal cases must be alert to its possibility and know what to do when faced with a defendant who appears cognitively vulnerable. This is so

notwithstanding the very significant pressures on all those in the criminal courts who are dealing with very heavy workloads, large backlogs, and real pressure to deal with cases expeditiously.

76. Judges and lawyers should be aware of the relevant legislation. It is not lengthy, and it is not hard to find. We have referred to much of it in this judgment.