THE COURT OF APPEAL

CIVIL

UNAPPROVED **NO REDACTION NEEDED**

Neutral Citation Number [2021] IECA 237

[2020/202]

The President

Edwards J

Kennedy J

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOROF PUBLIC PROSECUTIONS

APPELLANT

AND

YUSUF ALI ABDI

RESPONDENT

JUDGMENT of Mr. Justice Birmingham, President of the Court of Appeal, delivered (electronically) on the 23rd day of August 2021

1. On 17th April 2001, the respondent killed his infant son, Nathan. On 2nd September 2020, the High Court (Owens J.) certified that the conviction of the respondent in the Central Criminal Court in May 2003 of the offence of murder amounted to a miscarriage of justice. The appellant has appealed against the decision to so certify.

2. To put the issues that arise in this appeal in context, it is necessary to say more about the sequence of events that has occurred.

Background Events

3. There has never really been any dispute about the fact that on 17th April 2001, the respondent was responsible for actions which culminated in the death of his 20-month old son, as a result of head injuries arising from multiple blows to the head. In 2003, the respondent stood trial, charged with murder, before the Central Criminal Court. The issue before the Court was whether the accused should be convicted of murder or whether the appropriate verdict was one of guilty but insane, to use the language then applicable. As might be expected, when there was no real dispute about the facts surrounding the killing, and where the real issue at trial was whether the respondent was legally sane or insane at the time he killed his son, psychiatric evidence was a significant aspect of the trial, with evidence called from two psychiatrists by the defence to the effect that the then accused was a paranoid schizophrenic and was legally insane when he killed his son. Evidence to that effect was given by Dr. Brian McCaffrey and Dr. Aggrey Washington Burke. Evidence on behalf of the prosecution was given by Dr. Damien Mohan, a forensic psychiatrist from the Central Mental Hospital, whose assessment it was that the accused was not suffering from schizophrenia.

4. Faced with conflicting expert evidence, the jury would appear to have preferred the evidence of Dr. Mohan and returned a verdict of guilty of murder on 28th May 2003 by a majority of 10:2.

The Appeal Against Conviction

5. The convicted man appealed to the Court of Criminal Appeal. On 6th December 2004, the Court of Criminal Appeal, in a judgment delivered by Hardiman J., dismissed the appeal against conviction. In the course of that judgment, it was observed that the most fundamental clash between Dr. Mohan and his colleagues who gave evidence for the defence was in relation to the degree of credibility that they attached to the proposition that the defendant had killed the child because he heard voices telling him to do so. The Court noted that all of the doctors were agreed that delusion and voices were a psychotic symptom, but that while

Drs. McCaffrey and Burke were prepared to accept the respondent's history of hearing voices as both honest and accurate, Dr. Mohan was extremely sceptical on the subject. The Court of Criminal Appeal went on to comment that it cannot, in their view, be said that Dr. Mohan lacked a factual basis for his opinion. He had prepared a very detailed 19-page report which was available to both sides. He had formed the view that the respondent was "an unreliable historian, with many inconsistencies in the history that he gave me and furthermore his account is at odds with others that I have read in the witness statements". The Court referred to the fact that the report of Dr. Mohan had made reference to a report of Dr. Ivor Shortts, clinical psychologist, which had concluded:

> "Mr. Abdi's performance suggests the possibility that he may be exaggerating some of his psychiatric symptoms. This indicates that his self report may be unreliable and thus he may be an unreliable informant regarding the nature and extent of his actual symptomatology. This does not mean of course that he may not be experiencing some psycho pathology, only that he may feel the need to exaggerate various aspects of it, such as its actual nature, severity or the generality or possibly even the need to manufacture some features. His results in part may also possibly represent a cry for help and/or may be to some extent contributed to by low self evaluation, severe depression as well as a high level of apprehension regarding the legal consequences for him"

6. The Court of Criminal Appeal refers to the fact that Dr. Mohan had described in his report, and had repeated in evidence, many indications which, to him, suggested unreliability, noting the lateness of the accused's claim of "hearing voices" and the lack of complaint of this problem at earlier times back to 1998 when it was now alleged to have been present.

7. The Court of Criminal Appeal was of the view that Dr. Mohan's evidence was admissible in principle, and sufficiently grounded in fact to allow the jury to reach a

conclusion on it. The Court commented that Dr. Mohan's evidence was fully and amply supported by closely reasoned arguments and properly drawn inferences, and was presented with a minimum of technicality, and such technicality as there was, was comprehensively explained.

The Section 2 Miscarriage of Justice Application

8. The respondent brought proceedings before this Court pursuant to s. 2 of the Criminal Procedure Act 1993 (as amended). The judgment of the Court was delivered on 13th February 2019 by Edwards J. Before the appeal court, counsel for the respondent submitted that the "newly discovered facts" were the respondent's psychiatric presentation and history in the years subsequent to his sentencing, and in particular, the symptoms and signs exhibited by him over the years which, when taken into account and considered with his overall psychiatric history, had led to his diagnosis being changed from one of depression and non-psychotic paranoid state to one of paranoid schizophrenia following a fourth admission to the Central Mental Hospital in 2013. The case on behalf of the respondent was that his actual condition was not new; rather, it was a changed diagnosis with respect to same, consequent upon the additional symptoms and the signs of paranoid schizophrenia exhibited in the years since sentencing, necessitating several admissions to the Central Mental Hospital which was new. At paras. 58 and 90 of his judgment, Edwards J offers this overview:

> "58. […] It is contended that heretofore he was misdiagnosed by the psychiatrist who initially was treating him, Professor Harry Kennedy, and also by Dr. Mohan who independently assessed him on behalf of the State; and that in truth he was suffering from paranoid schizophrenia both at the time of the killing and at the time of his trial. It is not suggested that those who provided the incorrect diagnoses were negligent, dishonest, incompetent or biased; or that their diagnoses were offered

other than in good faith, but merely that they were wrong and that subsequent events have established that they were wrong.

[…]

90. In our view the applicant's psychiatric symptomology, presentation and treatment since he was sentenced are undoubtedly newly-discovered facts. Moreover, his current diagnosis of schizophrenia is also a newly discovered fact, because it is not based on an investigation of the same symptoms and history as underpinned the previous diagnoses, be it that of Professor Kennedy's diagnosis of depression and non-psychotic paranoid state, with which Dr. Mohan was in agreement, or that of Dr. Washington-Bourke's and Dr. Caffrey's respective diagnoses of paranoid schizophrenia. Moreover, that the applicant's treating doctors now regard his earlier diagnosis made at the same hospital as having been incorrect, is itself a newly discovered fact in our judgment; and the opinion evidence of Dr. Washington-Bourke and Dr. Quinn that in the light of the applicant's subsequent psychiatric history, the symptoms and signs with which he had presented before his trial were possibly incorrectly interpreted and wrongly classified as not being psychotic by his former treating doctor, Professor Kennedy, and by Dr. Mohan who independently assessed him, is a newly-discovered fact."

9. In 2013, Dr. Paul O'Connell of the Central Mental Hospital indicated that, in his view, the appropriate diagnosis was one of schizophrenia. The response of the Director to this was to commission a further report from Dr. Alex Quinn, based in Edinburgh. The report prepared by Dr. Quinn was addressed by the Court of Appeal in its earlier judgment between paras. 36 and 56. For ease of reference, we propose to set out here what the Court had to say in that regard on that occasion:

"36. At the outset it should be recorded that Dr. Quinn's report is an impressive document, and it is ostensibly the product of a very thorough review of the applicant's forensic medical history. He has considered, *inter alia*: the Book of Evidence; the complete transcript of the trial; Dr. Washington-Burke's recent report; Mr. McGuill's grounding affidavit; and the Court of Criminal Appeal's judgment, delivered by Hardiman J. on 6th December 2004, and alluded to earlier in this judgment. In addition, he lists 22 individual documents – or categories of documents – from the applicant's mental health records, all generated between 2001 and 2016, considered by him. He states his understanding of the circumstances surrounding the death of the applicant's son, and then reviews in detail the evidence given at the trial by Ms. Bailey, the applicant's wife.

37. He considers her account of the incident on the 13th of November 1999 leading to the assault conviction subsequently recorded against the applicant. He further describes Ms. Bailey's evidence concerning perceived racism experienced by herself and the applicant when she was pregnant with the applicant's child; her evidence concerning his apparent mental state in mid-2000; her evidence concerning the applicant's abrupt departure to the UK and onward travel to Uganda in November 2000 without notice to her; and then concerning how the applicant appeared to her to be, and his seemingly strange and paranoid behaviour following his return in December 2000, including, amongst other things; accusing her of trying to have him deported; of ringing the Mosque and saying bad things about him; of planning against him; and of poisoning his food with "Stain Devils" which were kept in a kitchen cupboard.

38. Dr. Quinn further reviews Ms. Bailey's evidence concerning her leaving the applicant for the first time on the 21st of February 2000, and concerning the events

of that day, and her eventual return. He considers her evidence that the applicant continued to behave strangely; that he slept a lot; that he appeared to be depressed; that he sought to isolate himself away from the world, keeping the curtains closed 24 hours a day. He reviewed her evidence concerning an occasion on which she was hit with a telephone following which she had locked herself in a bedroom and called her father. Other incidents of physical and verbal aggression that had been described were also considered; and also evidence concerning a belief asserted by the applicant that his phone and the smoke alarm in their residence were “bugged”. This belief led the applicant to dismantle the smoke alarm in search of a camera – he then demanded that Ms. Bailey telephone Eircom to ask them how one could determine if one's telephone was bugged, a demand with which Ms Bailey ultimately complied with under duress.

39. Dr. Quinn further considered Ms Bailey's evidence that on an occasion in early April (of 2003, it is understood) she returned home to find many of the internal doors of their apartment to be locked; and her evidence about her worries and concerns at the time, one of which was that the applicant might be suicidal; and the assurances she received from him when he eventually emerged from a locked room that although he had thought about suicide he had not gone through with it, and didn't think that he would go through with it, because it was against his religion. Her evidence was that he appeared to believe that everyone was against him and conspiring behind his back to have him deported and to do him injustice and badness.

40. He considered in very great detail Ms. Bailey's evidence concerning events on the day of the killing, including the fact that she had told the applicant that she wanted to leave, and concerning the discussion they had had relating to the custody

of their son. She confirmed that although she feared that the applicant would try and take the boy from her, he had never been violent towards him, and that he had in fact always been a caring, sensitive and loving father. She described how later on that afternoon the applicant had been upset by receiving some racial abuse from a child when getting money out of an ATM; how he had been so upset on his return that he had thrown a mug at the fireplace; how he had complained of being tired of living in the village in which they were residing; how she had informed him that if he wanted to move out she would help him to find somewhere else, and how she had decided to stay the night after all. Dr. Quinn then considered her recollection of the central event in which the applicant came to kill his son. Ms. Bailey had not witnessed the killing but had been awoken in the early hours by the applicant coming into the bedroom and picking up Nathan (who was also sleeping in that room) from his bed. She followed him to the living room but was unable to enter as he had locked the door. She then went to the bathroom and whilst there heard a "thud" coming from the kitchen. She then emerged and looked through a glass panel in the locked living room door, and could see the applicant kneeling and praying through the partially opened door leading in turn from the living room to the kitchen. She began knocking on the door but this elicited no response. She then heard the applicant on the telephone, initially believing that he was calling a taxi, before realising it was a call to somebody else. The applicant had then opened the door; upon entering the room Ms. Bailey had found Nathan lying on the living room couch and in extremis.

41. Dr. Quinn further considered the record of the applicant's interviews with gardaí in which he was asked to account for his actions. He comments[:]

> 'Mr Abdi has given a changing account of the events of the 17th of April 2001 over the course of the investigation, the trial and the following years.

He has described being unable to remember the events when first detained by police. He later described Nathan having fallen and struck his head in a way that caused the injuries. Latterly he attributed symptoms of mental health to the events, and during my assessment of him in March of 2018 he gave a description of profound symptoms of mental illness which may have been responsible for the commissioning of the events in hand.'

42. Dr. Quinn further considered the account given by the applicant to Dr. Damien Mohan on the 19th of January 2013, and then the account given by the applicant to him on the 14th of March 2018.

43. Dr. Mohan had recorded the following account:

'I started by asking him about events leading up to the alleged offence. He said that on the afternoon of the 16th of April Ms Bailey came out to visit him in Clane and she wanted to leave. He said he wanted to spend more time with Nathan. She agreed to stay. Mr Ali said that he was playing football that afternoon with his son Nathan. He said that they then had dinner and Ms Bailey then went to bed. He said he himself was "not feeling well". He said that he was "feeling low by myself". He then went to bed. He said around 4.00am he woke up and wanted to pray. He said when he woke up Ms Bailey's door was open and Nathan was with her. He said "all of a sudden I just hear a voice like-somebody told me to take him, take him". He said he then went into the room and "took him". He then said he "brought the child to the living room and closed the door behind him". The reason for closing the door behind him was that he was "afraid Amanda was going to take Nathan". He said "when he was holding Nathan he felt he was in the middle

of somewhere, I don't know where I was, I heard another voice commanding hit him hit him".

He said he was not aware he was giving these commands. He said he felt like "somebody that was possessed". He said he then "started hitting him on the wall". Mr Ali said he then "came back to normal". He said he then "began to panic" as he did not know how badly Nathan was injured. He said he then phoned the ambulance which brought Nathan to hospital.'

44. The applicant stated to Dr. Quinn on the 14th of March 2018:

'[L]ooking back now I think I was sick…l didn't know at the time…I thought police were after me and wanted to kill me… if I saw police while walking I would think they were trying to harm me.

I had been hearing voices for a number of weeks. I was noticing them more…before I wouldn't pay attention… they were inside my head, some of the voices were people back home and some of the voices had an Irish accent. The voices from back home said things like "we know what you are"… "we're coming to get you".'

45. In his report Dr. Quinn relates how Mr Abdi also described voices running him down and telling him to kill himself. He described unusual experiences coming from the television "people on TV would say things to me…they would make comments like "we're coming to get you once we've finished this. At the time Mr Abdi describes that "I was in a completely different world…I thought this was all completely normal… I could smell dog faeces…or a smell that was like my father".

46. Dr. Quinn remarks that:

‘During my assessment of Mr Abdi he described the finding of his father's body after he had been set on fire. At times he was not able to differentiate whether the smell was that of faeces or of the decomposing body of his father. He described that Ms. and Nathan had left but that they had come to visit him for the day. He described being very confused at the time like he was “in a different land completely”. He remembered eating something and going outside to play football with a group of boys and Nathan. The boys were teenagers and Yusif at the time was a young man. Nathan watched as opposed to taking part. He describes then coming in and that he had a cup of tea but for some reason flung the teacup at the fireplace. He didn't remember what was said and didn't particularly remember an argument. He thought that it was “just me” and that he was “acting out of nowhere”. He describes almost waking up and noticing the broken cup. He collected the pieces and put them in the bin. He is aware that he slept separately to Ms. and Nathan in the living room.

He described no good recollection of the night time. He found it difficult to remember “the whole thing now” that he believes he was hearing a voice from the TV. The voices were saying things such as “we're going to get you…we know who you are”. Mr Ali describes trying to block it all out, that he was frightened and anxious in his emotions.

In the morning he remembers lying down and hearing voices telling him to “wake up, you've got to wake up”. He got up and wanted to go to the toilet which was through a corridor. He went to the toilet and on the way back

was hearing a voice. He looked into the room where Nathan was sleeping next to his mother Amanda, and the voice was telling him to go into the room and saying “take him take him”.

He gave the following account of his following actions;

> 'I went and took him…I didn't know what I was doing…it was like I was being pushed…like someone else was controlling me…I went to the living room…I could hear this voice telling me kill him kill him…all of a sudden I throw him down…and I threw him down once, twice and before I knew it he was cold and afterwards 1 started panicking…voices telling me to pray, that I'd killed him…and I started to pray…pray that he would come to me…it was like I was a zombie on remote control”.

He talked about the locked door and Mr Abdi gave the following account;

> ‘When I was coming into the living room I was thinking that someone else was following me…so I locked the door… the person following me was wanting to attack me and when I threw him down he banged his head against the surface, like a table, twice three times…he hit his head on the surface twice or more than that perhaps’.

He gave the account that one voice started to tell him that;

> ‘he was dead he was dead he was dead’ on repeat.

When he stopped assaulting him he felt like he was in a “different land completely He panicked and prayed and when finished praying tried to wake

him up and revive him. He couldn't find his pulse and couldn't explain or understand that he'd killed him. He realised he was dead and phoned the ambulance.

On further questioning as to why he perhaps perpetrated the act, he went on to add;

> 'I thought he was evil… I don't know, it felt like I was being controlled… I was looking at him like…I was looking at him and it was like I wasn't looking at my son…I was looking at a devil…when I'm holding him he is not my son…he is a different shape entirely…he is a devil…his face is different, like a devil… everything I was thinking made sense. I can't make sense of it now…people who were threatening me…I believed they were devils….called Jin…they come to you to do something bad to you…they can get inside you and take possession of you… I thought that Jin had come and turned into him… I thought he was going to kill me…I believed he was the devil'.

47. In the next sections of his report Dr. Quinn considered in detail the applicant's ethnic, social and cultural background; his drug and alcohol history; his past psychiatric history as summarised by Dr. Mohan in his report of 2003; the evidence given at trial by Ms. Bailey's own GP, Dr. Claire O' Flynn, concerning a visit to the applicant's home in February 2001, following up on her concerns arising from Ms. Bailey's reports as to the applicant's mental well-being, which had caused her to suspect that the applicant had developed *"some kind of paranoid depression or schizophrenia"*. He also considered in detail the applicant's psychiatric presentation

while in prison; first of all while he was on remand during which time he was assessed on several occasions by Professor Harry Kennedy at both the surgery in Cloverhill Prison and the Central Mental Hospital following an admission there on the 5th of November 2001; and then secondly as a sentenced prisoner following the applicant's conviction of murder in May 2003, when he was admitted to the Central Mental Hospital on three further occasions."

10. In February 2019, the Court of Appeal was of the view that the circumstances in which the appellant sought to introduce evidence of the 2013 diagnosis of schizophrenia were exceptional. It was not simply a question of a further opinion which supported the appellant's case and which sought to contradict the evidence of Dr. Mohan (the prosecution witness at trial). The Court was of the view that counsel for the appellant was correct in saying that this was not a question of a new, divergent or revised scientific opinion, or a new theory of the case based on the same evidence that was available and considered at trial. The 2013 diagnosis certainly had regard to evidence available at the time of the trial, but also took account of the appellant's extensive further psychiatric history post-trial, his continuing and worsening symptomology, hospital admissions and his response to treatment since the trial.

11. The Court of Appeal was of the view that the appellant's symptomology, presentation and treatment since conviction and sentence were undoubtedly newly-discovered facts. The Court found that had the material being relied upon as newly-discovered facts been before the jury at the original trial, it would have had at least the potential to influence the outcome. The Court commented that it might have seen the case either prosecuted or defended materially differently. The Court continued (at para. 96):

"Moreover, the new evidence, if the jury had known of it, might have significantly influenced the jury's view of the reliability of the expert evidence adduced before

them, and the weight to be afforded to the different views being advanced. It is entirely possible that it could have led to a radical recalibration by the jury as to how they should view the evidence. We are in no doubt but that it could potentially have precipitated a different verdict, although clearly we cannot go so far as to say that it would necessarily have done so."

12. The Court commented that the material appeared to the members of the Court to be credible, though it might not be incontrovertible. However, there was no requirement that it be incontrovertible. It was clearly substantial in its potential import and not in any sense trivial.

13. The Court's final paragraph merits quotation in the context of the present proceedings:

> "In the circumstances, we are satisfied on the basis of our review for the purposes of s. 2 of the Act of 1993 that the applicant has established the existence of newly discovered facts and that he alleges and has pleaded that these newly discovered facts show that he was the victim of a miscarriage of justice. While we are not required to determine conclusively whether or not there has in fact been a miscarriage of justice, we harbour a significant level of concern that the newly discovered facts that are being relied upon, if they had been before the jury, might have influenced the outcome of his trial. We therefore feel justified in concluding that the applicant's trial was indeed unsatisfactory and that the verdict of murder that was recorded is unsafe. In the circumstances we consider that we must quash the conviction and direct a re-trial."

14. At that stage, both sides began to prepare for the retrial. In the expectation that the prosecution would call both Dr. Mohan and Dr. Quinn to give evidence, the defence engaged the services of Professor Keith Rix, a UK-based consultant forensic psychiatrist. He

concluded that if the respondent's symptomatology was accepted at face value, that it was highly likely that he was suffering from a form of psychosis or a schizophrenia-like illness and that this had been present since the end of 1999 or the beginning of 2000. He further indicated that if the respondent's account of what happened at the time of the child's death was accepted, then his mental disease so disturbed his mind that he was prevented from knowing that what he was doing was wrong and that he acted in response to an irresistible impulse.

The Retrial

15. The retrial took place in the Central Criminal Court between 9th and 13th December 2019, with Owens J. presiding. The defence called evidence from Professor Rix and Dr. Washington Burke. Dr. McCaffrey had died before the matter came on for a retrial and was not available to give evidence. The prosecution called evidence from Dr. Quinn and from Dr. Mohan. Dr. Mohan indicated that he was persuaded by the arguments put forward by Professor Rix with regard to the clinical plausibility of the respondent's contradictory accounts of his mental state at the material time and was now accepting of the fact that in 2003, there may have been emerging signs of illness. He said that the respondent's presentation within the Prison Service and the fact of his three transfers to the Central Mental Hospital undoubtedly demonstrated that he had developed an illness. He was now in no doubt that the respondent had a history of paranoid schizophrenia. In effect, at the retrial, there was no disagreement between the forensic psychiatrists about the fact that the appropriate verdict was one of not guilty by reason of insanity and that was the verdict returned by the jury after a very short deliberation.

The Application for a Section 9 Certificate

16. Against that background, the respondent, by a Notice of Motion dated 18th February 2020, sought a certificate pursuant to s. 9(1)(a) of the Criminal Procedure Act 1993 (as amended) that a newly-discovered fact showed that there had been a miscarriage of justice.

17. At this stage, it is convenient to set out the terms of s. 9 of the Criminal Procedure Act 1993 (as amended):

> "9.—(1) Where a person has been convicted of an offence and either—
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> (a) (*i*) his conviction has been quashed by the Court on an application under section 2 or on appeal, or he has been acquitted in any re-trial, and
>
> (*ii)* the Court or the court of re-trial, as the case may be, has certified that a newly-discovered fact shows that there has been a miscarriage of justice,
>
> or
>
> (b) (*i*) he has been pardoned as a result of a petition under section 7, and
>
> (*ii*) the Minister for Justice is of opinion that a newly-discovered fact shows that there has been a miscarriage of justice,
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> the Minister shall, subject to subsections (2) and (3), pay compensation to the convicted person or, if he is dead, to his legal personal representatives unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person.
>
> (2) A person to whom subsection (1) relates shall have the option of applying for compensation or of instituting an action for damages arising out of the conviction.
>
> (3) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Minister for Justice.
>
> (4) The compensation shall be of such amount as may be determined by the Minister for Justice.

(5) Any person who is dissatisfied with the amount of compensation determined by the Minister may apply to the High Court to determine the amount which the Minister shall pay under this section and the award of the High Court shall be final.

(6) In subsection (1) 'newly-discovered fact' means—

(*a*) where a conviction was quashed by the Court on an application under section 2 or a convicted person was pardoned as a result of a petition under section 7 , or has been acquitted in any re-trial, a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings, and

(*b*) where a conviction was quashed by that Court on appeal, a fact which was discovered by the convicted person or came to his notice after the conviction to which the appeal relates or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial."

18. In the High Court, two issues were raised in submissions; it was queried whether there had been an acquittal in the retrial and the question was asked as to whether it had been demonstrated to the satisfaction of the Court that any newly-discovered fact showed that there had been a miscarriage of justice. Dealing with the issue of acquittal, the judge pointed to the fact that in the course of argument, it had been accepted that the verdict returned by the jury amounted in law to an acquittal. He also noted that it had been accepted that had a special verdict been entered in 2003, that this too would have amounted to an acquittal, but counsel suggested that the nature of the activity which the respondent was proved to have

engaged in showed that the respondent was not 'acquitted' within the sense of that term as used in section 9. The judge had little difficulty in rejecting that submission and made clear that he would not have accepted the proposition even if the matter had come up for determination prior to the commencement of the Criminal Law (Insanity) Act 2006. The judge was firmly of the view that there were only two outcomes in any completed criminal trial where there had not been a jury disagreement: the first being a conviction and the second being an acquittal. The judge proceeded to support his view by referring to the history of the defence of insanity, going back to the trial of James Hadfield in 1800.

Discussion and Conclusion

19. In my view, the High Court judge was correct in his view that this issue is so clear as to be beyond argument, and I am satisfied that the judge was not in error in rejecting the submission that the respondent had not been acquitted. The second issue addressed by the judge was whether it was established that newly-discovered facts showed that there had been a miscarriage of justice.

20. At para. 26 of the judgment in the High Court, Owens J. commented:

> "In my view, the meaning of the term "miscarriage of justice" in s.9 is the popular meaning which connotes "a failure of the judicial system to attain the ends of justice". This formulation is quoted in the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Hannon* [2009] 4 I.R. 147 at 156 [25]. The words "miscarriage of justice" in s.9(1) are used convey that something has gone seriously wrong in relation to the original trial process which has led to a conviction and not merely that there are misgivings about the result."

The judge went on to refer to some of the cases where certificates had issued, noting that there had been cases involving prosecutorial irregularities or perjured evidence or other

material which demonstrated to the courts in a real way that there had been a miscarriage of justice in the sense that the conviction was wrong in a fundamental aspect. He contrasted such situations by pointing out that these were convictions that were not merely wrong in law because of judicial misdirection or the introduction of inadmissible evidence.

21. Clearly, in the present case, there is no question of prosecutorial irregularity or of perjured evidence. The question for consideration is whether there is material which has demonstrated in a real way that there was a miscarriage of justice, in the sense that the conviction was wrong in a fundamental aspect. The High Court judge commented, correctly, in my view, that he did not regard himself as bound by the views expressed by the Court of Appeal on the s. 2 application as to what may or may not be newly-discovered facts. Things had moved on since the decision of the Court of Appeal. The decisive factor in the retrial was agreement by all psychiatric experts who gave evidence that the respondent was suffering from schizophrenia when he killed his son. As the High Court judge had commented at an earlier stage of his judgment, "diagnosis changed gradually". By the time of the retrial, what had started as a disputed medical opinion that the respondent suffered from schizophrenia, which was the situation at the time of the first trial, had become accepted fact.

22. I have to confess that when I first heard of the application for a certificate, my immediate reaction was not one of sympathy. Indeed, when I first read the papers for the purpose of this appeal, I felt that there was substance in the complaint on behalf of the Director that the High Court judge was too quick to form the view that a certificate should follow in circumstances where there had been a changed diagnosis and there had been insufficient consideration of all the surrounding circumstances. However, on further consideration, it seems to me that sometimes matters are actually more straightforward than they may first appear. Nobody now is in any doubt about the fact that the respondent killed his infant son while suffering from schizophrenia and that the extent of the mental illness that

he suffered from in 2003 was such that he was not legally sane at the time that he killed. That being so, he should never have been convicted. That a conviction for murder was recorded when it should not have been meant, to use the language of the High Court judge, that "the conviction was wrong in a fundamental aspect".

23. I agree with the conclusion of the High Court judge that this was a case where a certificate had to issue. Accordingly, I would dismiss the appeal.

24. As this judgment is being delivered electronically, it is the practice to offer a provisional view on the costs of the appeal, subject to any application on costs which may be brought. My provisional view is the costs of the appeal should be paid by the unsuccessful appellant. If either party wishes to contend otherwise, short written submissions should be forwarded to the Office of the Court of Appeal within 10 days. Alternatively, the party should contact the Office of the Court of Appeal to request a short oral hearing on the costs issue, though any party who requests such a hearing which results in an order in line with that indicated provisionally, may incur the further costs of such a hearing.

Edwards J:

I have had the opportunity to read the judgment delivered by the President and I agree with the conclusions reached therein.

Kennedy J:

I have also read the judgment of the President and I agree with the decision.