Neutral Citation Number: [2018] EWCA Crim 2816

Case No: 2016 01365 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CARDIFF
His Honour Judge Richards

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

Before:

LORD JUSTICE SIMON
MRS JUSTICE CARR DBE
and
HIS HONOUR JUDGE PICTON
(sitting as a Judge of the Court of Appeal Criminal Division)

- -

Between:

Regina	**Respondent**
and	
Gareth William Jones	**Appellant**

- -
- -

Mr Philip Evans QC and Mr Tim Naylor for the Appellant
Mr William Hughes QC for the Respondent
(none of whom were trial counsel)

Hearing date: 22 November 2018

- -

Approved Judgment

Lord Justice Simon:

Introduction

1. On 9 July 2008, the appellant (Gareth Jones) was found guilty in the Crown Court at Cardiff, following an 8-day trial, of an offence contrary to s.38 of the Sexual Offences Act 2003: sexual activity by a care worker with a person with a mental disability.

2. On 29 July he was sentenced by the trial judge, HHJ Philip Richards, to 9 years' imprisonment, reduced on appeal to a term of 7 years.

3. This is an appeal against his conviction brought out of time by leave of the Full Court, linked to an application to adduce fresh evidence under s.23 of the Criminal Appeal Act 1968.

4. Those facts which were not in issue can be summarised shortly.

5. In February 2007, Joan Perriman (who was then aged 77) was a resident at The Mountains Nursing Home, Libanus, Brecon. She suffered from severe dementia; and was doubly incontinent, wearing incontinence pads at all times. She shared room 30 in the nursing home with another elderly woman.

6. The appellant was a care assistant there. It is now common ground that he had learning difficulties. The extent of those learning difficulties, and their impact on the fairness of the trial and the safety of his conviction, is one of the main issues raised on the appeal.

7. On 13 February, he was scheduled to work a 12-hour shift from 8.00 pm with another care assistant, Jana Junasova. The procedures at the Nursing Home were such that care assistants were required to work in pairs.

8. At about 10.10 pm the appellant was seen taking Mrs Perriman from the living-room on the ground floor, upstairs to her bed in room 30. He remained with her there for approximately 4 minutes until he sounded an alarm.

9. A number of members of staff responded to the alarm. Among these were Jana Junasova and Rebecca Morante (a senior care worker). On entering the room, Ms Morante saw Mrs Perriman wearing a short nightie with her backside exposed. She was bleeding very badly. Ms Morante noticed an incontinence pad on the bed and another on the table, as well as some bloodstained wet wipes on the table.

10. The appellant said that the pad on the table was the one he had removed from Mrs Perriman and that it was blood stained; although neither Ms Morante nor Ms Junasova who both examined the pad saw blood on it. The appellant said, 'Rebecca, I took the pad off and the blood just started to flow down from her'.

11. The emergency services were called; and at about 11.10 pm a paramedic arrived at the scene. A short time later Mrs Perriman was taken to the Accident & Emergency Department, and thence to the Gynaecology Ward, at the Prince Charles Hospital in Merthyr Tydfil. The appellant accompanied her.

12. She was examined in hospital, initially by Dr Sanjay Curpad and subsequently by a Consultant Obstetrician and Gynaecologist at the hospital, Mr Sanjay Chawathe.

13. She was discovered to have injuries which included a perineal tear between the vaginal opening and the anus, which extended towards the anal margin, together with a 6-8 cm vaginal tear. Mr Chawathe said he had never previously seen such a condition in a person of Mrs Perriman's age. She had also suffered extensive vaginal bleeding.

14. The appellant returned to the nursing home. At about 7.35 am the following day, 14 February 2007, he spoke to Elizabeth Shone, the team leader. This was shortly before he went off duty and after she started her shift. He said that he had taken the pad off Mrs Perriman and that it was covered in blood. He had put another one on and she was still passing blood. He said he had been working with Jana. On the same day he spoke to Jana Junasova and said that, if she were asked about the situation, she was to say that 'we were at all times together'. This request figured during the trial and was relied on by the Prosecution.

15. The appellant was aged 24 at trial and was of good character.

16. On 24 February 2007, the appellant was arrested at his home where he lived with his parents. He was subsequently interviewed on five occasions. On each such occasion his father was present in the role of an Appropriate Adult.

17. He provided details of his movements during the day and evening in question. He said he had prepared Mrs Perriman for bed and was in the process of changing her pad when he noticed fresh blood. He put the old pad back on her and walked her towards her bed. He turned her onto her side to find where the bleeding was coming from. He raised the alarm when he saw the blood coming out quickly. He used wet wipes to try to clean up the blood.

18. In his third interview he admitted that in panic he had asked Jana Junasova to lie on his behalf. He accepted that he had been alone with Mrs Perriman at the time; but could not say how she sustained the injury.

19. In his fifth interview he answered 'no comment' when it was put to him that neither Ms Morante nor Ms Junasova had seen blood stained pads.

20. The prosecution case was that the appellant had caused the genital injuries to Mrs Perriman. There was no direct or forensic evidence, no CCTV and, due to her dementia, no evidence from Mrs Perriman. The prosecution therefore relied on circumstantial evidence: agreed medical evidence that the injuries were at least consistent with forceful penetration by a penis or penis sized object; the fact that there was no evidence that Mrs Perriman had been injured before she was (effectively) alone with the appellant in her room; the admitted lies told by the appellant and the jury's view of his evidence before them.

21. The appellant gave evidence in his defence. He maintained the accounts he had given in interview. He said that when he discovered that Mrs Perriman was bleeding from her vagina, he pressed the emergency button. He did not know how the injury was caused.

The grounds of appeal

22. The first ground of appeal was that the appellant was unfit to plead or unable to participate in his trial. Leave to appeal was refused on that ground; and three grounds remain, each of which is the subject of applications to call fresh evidence. The remaining grounds fall into two categories. The first relates to the impact of the appellant's learning disability and the fairness of the trial (grounds 2 and 3); the second relates to medical evidence directed to Mrs Perriman's injury (ground 4). Both categories are relied on to impugn the safety of the appellant's conviction.

A summary of the fresh evidence on grounds 2 and 3

23. Ground 2 is a contention that inadequate consideration was given to the appellant's learning disability by trial defence counsel and by the Judge. Ground 3 is a related complaint that the Judge failed to provide any direction to the jury in relation to those learning difficulties.

24. It is now common ground that the appellant suffers from a learning disability associated with a diagnosis of Von Recklinghausen's disease (neurofibromatosis type 1), whose symptoms include memory deficiency, problems with articulation, and confusion.

25. The appellant seeks leave to adduce evidence which was not called at trial from a number of witnesses: reports from two psychologists (Dr Steven Killick and Dr Keith Coaley**)** and two reports from a neuropsychologist (Dr Tanya Edmonds). We have considered the contents of these reports, as well as that of a consultant forensic psychiatrist (Dr Ian Cummings) placed before the Court by the prosecution, with a view to deciding whether the evidence should be admitted under s.23 of the Criminal Appeal Act 1968.

26. There is a further witness statement from Ms Paula Morgan who has known the appellant for many years. The statement describes the appellant's longstanding learning difficulties, which, she says were made known to the appellant's trial solicitor.

27. Dr Killick, Dr Coaley and Dr Edmonds are in agreement that the appellant has a significant learning difficulty and is highly vulnerable. The evidence of Dr Coaley and Dr Edmonds is that he has been assessed with scores of 63 and 60 respectively applying the WAIS-IV criterion for 'learning disability', and that such scores place him within the first percentile of the population.

A summary of the fresh evidence on ground 4

28. This consists of reports from two medical witnesses (Dr Sally Wood and Ms Sylvie Hampton). This evidence is relied on by the appellant as throwing light on the potential causes of Mrs Perriman's injuries. The prosecution and defence each instructed experts at trial: Dr Catherine White (for the prosecution) and Dr Beata Cybulska (for the defence). Both were well qualified by training and experience to give expert gynecological evidence as to the possible causes of Mrs Perriman's injuries; and each produced a report.

29. The jury never heard them give oral evidence, because their evidence was reduced to a joint written statement dated 2 July 2008. This joint statement was placed before the jury. The initial criticism of Mr Evans QC is that the joint statement was deeply flawed and of no real assistance to the jury, and that, consequently, alternative explanations for the injuries suffered by Mrs Perriman were never properly explored.

30. Dr Sally Wood is a Forensic Medical Examiner, whose report is dated August 2012. Ms Sylvie Hampton is a Senior Tissue Viability Clinician, whose report is dated December 2015. They have provided evidence suggesting that, in certain factual circumstances, medical mishaps or poor care may have accounted for Mrs Perriman's injuries.

The evidence at trial

31. Before considering the arguments on each side, it is necessary to set out some of the evidence heard at trial, as summarized in the summing-up. Not all of it favoured the prosecution case.

32. First, it was common ground that the opportunity to commit the offence was confined to a period of approximately 4 minutes between the time the appellant was seen taking Mrs Perriman to room 30 and the time he sounded the alarm.

33. Second, a number of witnesses entered the room in response to the alarm. There was no evidence from these witnesses of the appellant being in a state of undress, or of the lower part of his body or of his hands showing signs of blood, such as might reasonably be expected if he had caused the injury, nor evidence of any instrument that might have been used in an assault.

34. Third, there was no scientific evidence linking the appellant to Mrs Perriman's injury, apart from blood on the lower part of one of his trouser leg. That evidence of blood was accepted as being consistent with his description of what occurred.

35. Fourth, the appellant accepted that he had asked Jana Junasova to say that they had been together when he had discovered Mrs Perriman's injury and raised the alarm. This was the lie that the prosecution relied on to support its case.

36. Fifth, on arrival at A & E, Dr Sanjay Curpad had cleaned the patient and described seeing a vulva vaginal tear extending from the fourchette, on the posterior wall all the way up to the left voltam in the vagina. He said that the tear was skin deep in the vagina and it did not impact the muscles, but it was bleeding very actively and for that reason he requested assistance from the consultant Dr. Chawathe. He described suturing two tears. He said, 'I have personally not encountered such an injury in this age group before this. However, I have encountered perineal tears of various degrees whilst working on the labour ward following childbirth.'

37. Sixth, Mr Sanjay Chawathe was a Consultant obstetrician and Gynecologist whose statement was read to the jury. He joined Dr Curpad in surgery. In addition to the perineal tear, he described a 6 to 8cm vaginal tear. He expressed the view that 'it was likely that the tear was caused by a traumatic injury, either by a sharp or blunt object.' He ruled out self-harm due to the patient's history. He could not rule out the possibility of a traumatic fall on a sharp or a blunt object but said he was unable to

identify any other marks or injury on her body suggestive of an accidental fall. He added he had seen similar vaginal tears on teenage girls following forceful sexual intercourse but never in an elderly person of Mrs Perriman's age. For reasons that are not clear, his evidence which included material opinion evidence was placed before the jury, without him being called to give evidence. It followed that he was not asked about the resilience of Mrs Perriman's skin in the light of her age.

38. Seventh, the expert reports of Dr White and Dr Cybulska were reduced to four short paragraphs in a joint statement.

(a) Paragraph 1, related to the possible timing of the injury.

> We are in agreement that, if it is correct that the pad Mrs Perriman had been wearing, prior to entering the bedroom [room 30] with Gareth Jones was not blood stained, then this makes it unlikely that she sustained the injury, prior to entering the bedroom.

(b) Paragraph 2, related to a bruise on Mrs Perriman's left buttock. It does not figure in the appeal and it is unnecessary to say anything further about it.
(c) Paragraph 3 referred to 'straddle injuries' (injuries caused when someone falls on an object or surface).

> We are both in agreement that in the reported literature regarding straddle injuries in children that the type of vulval, vaginal, perineal laceration seen in this case is usually as a result of some type of penetration whether accidental or not. We have not identified any literature which deals specifically with straddle injuries in the elderly.

(d) Paragraph 4 referred to the nature of the lacerations.

> We have come to a joint understanding of the extent of the laceration. We understand it to start at the anal margin, go across the perineum then up into the vagina as far as the left fornix, at the perineum the laceration went into the muscle layer, it did not go into the vagina. The length of the laceration in the vagina was around 6 to 8 cm.

39. The jury would not have been greatly assisted by this document. The observations were either a matter of common-sense (paragraph 1), were equivocal (paragraph 2) or did little more than summarise other evidence (paragraph 3). This was unfortunate because the written expert reports had addressed a number of possible causes of the injuries. So far as material, these were: (1) whether the injuries could have been caused by Mrs Perriman having fallen onto something; (2) whether the injuries could have been caused by Gareth Jones accidentally; and (3) whether the injuries could have been caused by Gareth Jones intentionally?

40. As to question (1), Dr White thought it very unlikely. There was no history of a fall. She was wearing clothes and an incontinence pad. These would have protected her, and there was no sign of damage to either clothes or pad. No other bodily injuries were noted, for example to the limbs. Straddle injuries commonly cause injuries more to one side. Mrs Perriman's injuries were 'unilateral'. There were reported cases of

penetrating injuries, but these are usually associated with a firm history of falling onto something sharp. Mrs Perriman's injuries were not typical of this.

41. Dr Cybulska accepted that straddle-type genital injuries without a clear history of a fall was suspicious; but she did not exclude the possibility of an accidental fall onto an object (for example the armrest of a chair). She pointed out that a bruise on the left buttock was noted 4 days later. Although she accepted that an incontinence pad would have provided some protection from injury caused by falling onto a sharp object, it did not exclude the possibility. She noted that: 'elderly tissues are fragile and non-elastic, which makes them more prone to injury.' In her view, the midline injuries found did not exclude the possibility of falling on an object; and that straddle injuries are the most common accidental injuries in the genitor-anal region in children; but not much was known about straddle injuries in the elderly. Such injuries were most commonly found in children.

42. As to question (2), Dr White thought it unlikely. The injuries were extensive and included a deep wound (6-8 cms). They could not have been caused by catching the area accidentally while changing the pad. Dr Cybulska agreed.

43. As to question (3), Dr White noted that 'there is no account from [the appellant]'. That was inaccurate, since he had, in fact, answered questions in his police interviews in which he denied assaulting Mrs Perriman in any way. Dr White's view was that the severity of the injuries was typical of the type of injuries seen with forceful penetration. Dr Cybulska limited her response to observing that if so, it was caused by a larger rather that a smaller object.

The trial

44. Before the summing up began, prosecuting counsel complained about a part of trial defence counsel's closing speech to the jury in which he had raised the possibility that Mrs Perriman had sustained her injury from a fall which, because of the frailty of her skin, resulted in a tear inside the vagina. Defence counsel explained the point he was making, by reference to what the experts had said about penetration injuries similar to this in children, and to the fact that there was no similar literature in relation to 'straddle injuries in the elderly.'

45. The Judge said this, in the absence of the jury:

> There is no medical evidence supporting any theories on either side. Perhaps it is regrettable that we did not hear from the medical experts and perhaps I too readily agreed to the matter proceeding on the basis of the joint statement, but the jury now have to do the best on the evidence they have got.

46. Mr Evans submitted that the Judge was right. The joint statement did not assist the jury on the cause of the injuries. It failed to deal with a number of issues raised in the reports of the experts, as well as matters that are now raised in the fresh medical evidence of Dr Wood and Ms Hampton.

47. The Judge subsequently gave a standard direction as to the jury's approach to expert evidence (s/u p.13C-F); and invited them to take the joint statement with them when they retired to consider their verdict. No objection was taken to that course.

The appellant's evidence at trial

48. It is not possible on an appeal to replicate the impression that a defendant makes before the jury. Particularly, as in this case, where there is no transcript of the evidence. The summing up indicates that he gave a coherent account of his care of Mrs Perriman from the moment he took charge of her to the moment when the alarm was answered by other staff. The Judge summed up this part of the evidence:

> … she was facing the mirror … I went behind her. I undid the straps on the incontinent pad to allow me to remove the pad. I hadn't taken it off completely. It was still under her legs. Half the pad was blood, it was half full of blood, half full of urine. I just froze and said, 'What's gone on?' and I put the same pad back on. I put her towards the bed to lie down and did it again. I pulled the front of the pad down. There was bleeding coming from her vagina … I thought when I took the pad off, when she was standing up, that she may have scratched herself. I saw her scratching herself down onto the vagina when she was stood up. I didn't see anything else which may have explained her injury.

49. He explained why he had asked Jana Junasova to lie. 'I did that because I'd been told off so many times. I was scared for my job. At the time I didn't realise the police would get involved. I wanted to lie to Stephanie, not to the police.'

50. During his cross-examination, however, his evidence took a different turn.

51. The cross-examination began with prosecuting counsel suggesting to him that Mrs Perriman's injury could not have happened as a result of a knock against the arm of a chair. As we have already noted, the prosecution expert report (of Dr White) had raised this as a possibility, although she thought it unlikely. Dr Cybulska had said that it was a possible cause. The matter was not resolved by paragraph 3 of joint statement. The question therefore invited comment on a matter of expert evidence.

52. The Judge's summing up of the cross-examination continued:

> He was accused … of making empty allegations to divert the evidence against him. Well, you will wish to consider that. You will also consider [defence counsel's'] response to that, that when you do not know what has caused an injury, it is natural to think of any possible explanation ... [prosecuting counsel] put it to him that the truth was that he had done this. He said, 'the truth is that I didn't do anything. I didn't lose my temper.' He said, 'I have [patience], Joan's as good as gold. I didn't lose my self-control.'

53. It is clear that the appellant lost his temper at one point; and the Judge directed the jury that they should not take a great deal of notice of that. 'It is a very pressurised situation in giving evidence in your own defence.'

54. The Judge reminded the jury that the appellant had agreed that by and large that the home was a safe environment, adding:

> [Prosecution counsel] pressed him as to how, in those circumstances, the injury could have happened, and he was not able to help further than he had.

55. We will return later to what we regard as the objectionable form of parts of this cross-examination.

The new evidence

The medical evidence

56. Dr Sally Wood is a Forensic Medical examiner. A summary of her conclusions was set out in her report:

> 10. This initial report concludes that vaginal tears are most commonly caused by overstretching of the vaginal area. In a woman of this age that overstretching is most likely to be the result of vaginal penetration.
>
> 11. The presence of the bruise to the left buttock does not assist with regard to causation of the vaginal injury It is not possible to say when it was caused, nor how it was caused. It may have been caused at the same time as the laceration, at a different time, or formed as a result of blood tracking through the tissues following the lacerating injury.
>
> 12. I do not believe Mrs Perriman's injury was caused by a straddle injury fall on to the wooden arm of a chair.
>
> 13. I believe it may be possible that an injury was caused to Mrs Perriman's external genitalia by rough removal of an incontinence pad, however appropriate expert opinion should be sought regarding this possibility.
>
> 14. If there was a laceration to the genitalia injury, I believe it is possible that such an injury could have been exacerbated and extended by attempts at treatment in the care home and later by junior hospital staff particularly if a speculum was inserted into the vagina.

57. At paragraph 21 she repeated her view that the tear had possibly been caused by the use of a speculum during the course of the repair operation carried out at the hospital.

58. From paragraph 47, she considered those possible causes of injury which had been identified earlier by Dr White and Dr Cybulska (see [39] above). Question (2),

whether the injuries could have been caused by the appellant accidently, was addressed as follows:

> 60. It is possible that in removing her incontinence pad in a rough manner [the appellant] may have caused a tear to the perineal skin, particularly if the pad was adherent to Mrs Perriman's skin for some reason (e.g. previous wound or dried faeces).
>
> 61. I have no specific knowledge relating to types of pads or napkins, nor what type Mrs Perriman was wearing, nor whether this is relevant.
>
> 62. It is possible that this original injury was extended in the manner discussed, accounting for the later full extent of the injury.

59. Dr Wood also noted that the injury could have been deliberately caused by the appellant, but that if so, she would have expected the wound to bleed and cause blood staining to the appellant's penis. She also recognised that although swabs were taken from him which proved negative for blood, they had been taken 20 hours after he had raised the alarm, and he had therefore had time to wash himself.

60. We note that in his summing up the Judge reminded the jury that the appellant's mother had given evidence that she had not heard the appellant showering at any time before the samples were taken, and that she would have expected to have done so if he had because the pipes rattled downstairs. She had also indicated that it was not his habit to shower frequently.

61. At paragraph 79, Dr Wood acknowledged that the internal vaginal injuries were unlikely to have been caused by pulling off the incontinence pad in a rough manner, although it was possible that the external injuries were so caused.

62. Finally, she addressed the internal vaginal tear:

> 93. During vaginal surgery it is common to use a speculum to gain a view of the internal vagina.
>
> 94. It is possible that the internal tear was extended by Dr Curpad when he initially attempted to repair the tear if he used a speculum to gain a view of the internal vagina.

63. It was to address the matters set out in paragraphs 13 and 60-62 of Dr Wood's report, that the appellant instructed Ms Sylvie Hampton. She is a Registered Nurse, with post-graduate training in rehabilitation, care of the elderly and tissue viability. She is experienced in the prevention and management of pressure injuries and complex wound care.

64. In her short report Ms Hampton raised the possibility that, given his learning difficulties, the offender may have been rough with Mrs Perriman who strongly resisted his attempts to remove the incontinence pad (paragraph 2.2). While accepting that she has no experience of sexual abuse, she noted that if Mrs Perriman had

violently defended herself, she would have expected considerable bruising (paragraph 2.3) adding that 'there may have been damage to the perineum and vagina which was worsened by the removal of the pad … causing the tear to worsen', (see also paragraph 2.8). At paragraph 2.7, she described that the frailty of elderly skin is such that there may never be an explanation of how the wound occurred.

65. Mr Evans recognised that neither Dr Wood nor Ms Hampton was able to exclude penetration as a possible cause of Mrs Perriman's injuries. We agree, but the evidence goes rather further than that: (a) Dr Wood described overstretching of the vaginal area as most likely to be the result of vaginal penetration in a woman of her age; (b) contrary to views of the defence expert at trial, Dr Cybulska, Dr Wood did not consider that the bruise to the left buttock assisted in determining the cause of the vaginal trauma; (c) unlike Dr Cybulska, Dr Wood did not think that Mrs Perriman's injury was caused by a straddle injury fall; (d) Dr Wood suggested that injury may have been caused to Mrs Perriman's external genitalia by rough removal of an incontinence pad, while adding that appropriate expert opinion should be sought regarding this possibility. That expert evidence came from Ms Hampton in the terms we have described.

The evidence of the appellant's learning difficulties and its impact on the trial process

66. There is substantial agreement between the defence and the prosecution on this issue, and it is unnecessary to set out all the evidence in relation to this aspect of the case. It can be summarised as follows.

67. First, at the time of their assessments (considerably after the trial), the appellant was found to have a significant learning disability, which rendered him (in the words of Dr Edmonds at §5.5) 'a vulnerable suggestible adult, with severe impairments in his ability to understand, process, retain or reason with complex information.'

68. Second, the level of his relevant functioning may have been lower at trial. In the words of Dr Cumming (at §240): 'first … he has received some more education in prison and been able to access education; secondly, there is less stress on him now, thirdly there has also been the opportunity for repeated rehearsal such that he has more knowledge and therefore may appear to be functioning at a higher level.'

69. Third, the experts agree that his learning difficulties may have been masked at the time of his trial. As Dr Killick put it at §6.4 of his report:

> I noticed that [the appellant] did have some positive non-verbal social skills such as good eye contact and expressive gesture. He also had a friendly demeanour. It is possible that these skills mask the more severe difficulties he has in reading and understanding social situations and may lead people to assume that he understands more than he is. [The appellant] would be unlikely to point out that he does not understand the situation, even if he was aware that he doesn't, except with people in whom he has a high degree of trust. However, after more than a superficial conversation it would be apparent that he is having difficulties in following a conversation or line of argument.

70. Fourth, the consequences of the failure to appreciate his learning difficulties were potentially significant. Dr Edmonds expressed the point in her addendum report at p.5:

> [The appellant] would appear far more compliant [and] suggestible, and … would have a tendency to acquiesce with questions, particularly in an adversarial situation and when being exposed to aggressive (or robust) cross-examination.

71. Dr Cummings expressed a similar point at paragraph 244 of his report.

> I would also agree that he would be far more compliant, suggestible and tend to acquiesce with questions particularly in an adversarial situation and being exposed to aggressive cross-examination. He would also tend to get more into a muddle and appear confused with chronology, which might mistakenly give the impression he is lying or being evasive (as I felt occurred in parts of the police interview).

The response of trial counsel and the appellant's solicitor

72. In view of the implicit criticism of those who acted on the appellant's behalf before and at trial, the appellant waived privilege; and the Court has received responses to the grounds of appeal. Trial counsel says that the conclusions of the newly instructed experts (Dr Killick, Dr Edmonds and Dr Coaley) are irreconcilable with his experience of the appellant. It was apparent that he had learning difficulties. However, there were never ever any signs that he failed to understand the allegations, the legal proceedings or that he was incapable of providing instructions. On the contrary, he was able to provide clear and consistent instructions in relation to the two fundamental issues in the case: why the appellant had found himself alone with Mrs Perriman in her room at the time she suffered her injury and how she came to suffer the injury. The appellant acknowledged that he should not have been alone with her; but said that this would happen from time to time when other carers were unavailable to assist. He was unable to account for how the injury was suffered but insisted that he was not responsible in any way, even accidentally.

73. There had been a number of conferences with the appellant, particularly during the course of the trial. Some were conducted with his parents present, but many were with the appellant alone. At no stage was there any indication that he did not understand what was being discussed or the seriousness of the allegations he faced. He was able to provide clear instructions regarding his movements during the evening of 13 February and had challenged parts of the evidence of other carers. There had been a discussion with his instructing solicitor about whether the appellant might benefit from an intermediary being beside him whilst he was giving evidence. As far as trial counsel was concerned, the issue was whether the appellant, especially in a pressure situation, might have difficulties understanding certain words or phrases that were being put to him. He concluded, based on his extensive dealings with the appellant, that he was likely to be able to cope with cross-examination without this support. The matter was discussed with the appellant and with his parents.

74. As to the joint statement of Dr White and Dr Cybulska, defence trial counsel's recollection was that the document had been drafted by prosecution counsel following discussion between the two experts, both of whom were in attendance at court on the day the document was drafted. Since the appellant had been unable to offer any explanation (including an innocent or accidental cause) for how Mrs Perriman's injury might have been caused, the case was presented to the jury on the basis that the cause of the injury was unknown and that they would need to carefully consider all of the remaining features of the case (including the lack of forensic evidence) to determine whether the injury had resulted from sexual activity.

75. The appellant's solicitor responded in a document dated 19 September 2016. He had been informed of the appellant's learning difficulties through his contact with his parents between charge and trial. He had been told that the appellant had been educated alongside children with Down's syndrome and other 'challenged individuals'. He had engaged with the appellant and had noticed no difficulties regarding his ability to understand and communicate, or indeed regarding his general functioning. However, he had been concerned about the agreement over the medical evidence.

76. The appellant's new legal representatives have observed that trial counsel's observations about the appellant's ability to function in a forensic setting do not meet the essential point: that the extent of his learning difficulties, and thus his vulnerability as a witness, were not appreciated at the time of his trial. Indeed, trial counsel's recollection of his demeanour, the extent of his engagement and his ability to give instructions illustrates the dangers implicit from his condition: he is able to mask the true extent of his difficulties. His trial solicitor's conclusion that the appellant's apparent communication skills masked underlying serious deficiencies was correct and was entirely consistent with the findings of the clinical psychologists.

Submissions

77. As noted above, the prosecution relied on the fact of the injury, the medical evidence in relation to it, admitted lies told by the appellant and his evidence before the jury. The issues on the appeal relate to each of these areas of evidence, and how they were dealt with during the course of the trial.

78. Mr Evans submitted that given the circumstantial nature of the case, the evidence given by the appellant and the jury's assessment of him, were central to their verdict. Although he was treated as a normally functioning adult at trial, it is now clear that he is not. His trial took place without any allowance being made for his disability and the Jury was not given any guidance as to how they should approach his evidence.

79. He argued that the joint statement of the medical experts was unhelpful to the jury, and new medical evidence, at the very least, cast grave doubts on the safety of the conviction.

80. For the prosecution, Mr Hughes QC accepted that the appellant had a learning disability at the time of trial; but did not accept that they had any impact upon the fairness of the trial or safety of his conviction. He was represented by an experienced counsel and solicitor, with his family there to give support where necessary. The appellant was able effectively to participate in his trial, and neither his counsel nor his

solicitor felt that a psychological report was merited. His father and an experienced solicitor were present during his interview, and he was able to answer questions asked of him up until the point when he exercised his right to silence.

81. So far as the expert medical evidence was concerned, Mr Hughes submitted that the joint statement was, 'a helpful distillation which could not be improved upon.' It was in cautious terms but emphasised that the cause of the injury was ultimately a matter for the jury. In addition, he raised an obvious question: why were the medical reports produced in 2012 and 2015 not adduced at the time of the trial in 2008?

Decision

82. We have no doubt that if the trial were to take place now, it would take a different form. First, the appellant would be very likely to receive the support and assistance of an intermediary both at the stage of police interviews and at trial. Second, the judge would direct the jury that they should take into account his learning difficulties when considering his evidence. Third, the cross-examination would have to take into account his learning difficulties.

83. However, the issue that must be addressed now is whether his 2008 conviction is safe.

84. The prosecution case was that Mrs Perriman had sustained the injury to her vagina in the short period of time that she was in room alone with the appellant. The prosecution relied on the medical evidence and the lack of an alternative explanation for the injuries, the surrounding circumstances, the fact that the appellant asked others to lie about him being alone with Mrs Perriman and his own account given before the jury.

85. The expert medical evidence that was presented to the jury was limited to the short joint statement signed by the two experts. There was, and is, nothing objectionable about a joint statement as such. CPR Part 19.6(2)(b) envisages a statement for the court from experts, 'of matters on which they agree and disagree, giving their reasons.' However, the joint statement which was placed before the jury in the present case not only failed to identify the areas of disagreement, which should properly have been the subject of live evidence, it failed to address the possible causes of the injury in the clear way that both experts had set out in their reports. Doubtless there were thought to be good reasons for getting an agreed statement but, as the Judge himself belatedly recognised, the joint statement in the present case was not as helpful to the jury as it should have been.

86. We are not, however, persuaded that the fresh evidence that the appellant now wishes to adduce on this subject should be received by the Court. The evidence of Dr Wood and Ms Hampton does not significantly advance the argument, nor does it afford a ground for allowing the appeal, see s.23(2)(b) of the Criminal Appeal Act 1968. Dr Wood disavowed the straddle injury theory advocated by Dr Cybulska; and Ms Hampton explains that the skin of the elderly may be particularly fragile. However, the fragility of the skin of the elderly was a matter raised in Dr Cybulska's report (see [41] above), which did not find its way into the agreed statement. However, the new evidence does not offer an explanation for the 6-8 cm laceration to the inside of the vagina, other than the possibility of it being an injury caused in hospital. If that were a realistic explanation it could and should have been addressed at trial, and there is no

reasonable explanation for the failure to address it then, see s.23(2)(d) of the 1968 Act. It was evidence that plainly could have been adduced at trial with reasonable diligence.

87. Despite this, we accept that submissions can be made on the basis of this new material to the extent that it highlights, not so much deficiencies in the contents of the expert reports, but rather the unsatisfactory nature of the reductive drafting of the joint statement and to unexplored possibilities.

88. We are also clear that the evidence of Ms Morgan does not come close to meeting the test for the admission of fresh evidence. It was plainly evidence that could have been produced at trial; and it is fair to note that Mr Evans did not seek to rely on this evidence.

89. We take a different view of the fresh psychological evidence relied on by the appellant, and to the psychiatric evidence of Dr Cumming. This is evidence which meets the tests set out in s.23.

90. The appellant was a young man of substantially good character; and there was no scientific evidence linking him to Mrs Perriman's injuries. There were no traces of his DNA either on Mrs Perriman or anywhere else where it might have been deposited if sexual activity had occurred. Nor was there any trace of her DNA or her blood found on the appellant, except some blood on the lower part of one of his trouser legs where it might have been expected if no offence had been committed. Although there was a delay of 20 hours in taking samples and checking for blood, there was evidence that he had not taken an opportunity to rid himself of incriminating forensic material prior to the sample taking.

91. The prosecution had relied on the appellant asking Jana Junasova to say that they had been together at the material time. The Judge gave a direction on this issue, specifically warning them to take into account the possibility that he may have lied 'in order to protect his position at work.' We do not regard this direction as open to serious criticism, even if it had been the subject of a ground of appeal.

92. However, in the particular circumstances of this case, the impression that the appellant gave to the jury, particularly in the light of the nature of the charge, was crucial. On the prosecution case, he was the only person in a position to inflict what was said to be a serious sexual injury to an incontinent elderly women, suffering from dementia.

93. The Judge gave a conventional direction in favour of the appellant at the start of the summing up:

> You must judge [his] evidence by precisely the same fair standards as you would apply to any other evidence in the case. The fact that he comes from the dock … in no way impacts upon the status of [his] evidence. Everyone starts from the same level playing field and it is for you to decide who is being accurate, who is being truthful and, ultimately, whether these charges … have been proved.

94. As we have noted, the transcript of the summing-up gives the impression that the appellant gave a clear and coherent account in his examination in chief; but that he faltered under cross-examination. This is commonplace in criminal trials; and the process of cross-examination is designed to test a witness's account. However, in the present case there are two interlinked issues that arise.

95. The first is what is now apparent, but which was not known at the time of trial. The appellant suffered from learning difficulties which made him vulnerable in a forensic context, and which tended to conceal or 'mask' that vulnerability from those who should have been made aware of them. We can see why his parents might have wished to present him as someone able to cope but the evidence now available makes it clear that he would have had difficulty in dealing with leading questions asked in cross-examination, and this may have left the jury with a false impression. Contrary to the Judge's direction, the appellant was not someone who was to be regarded as starting 'from the same level playing field' as other witnesses. Although we have noted defence trial counsel's views of the appellant, they are (in his words) 'impossible to reconcile' with what is effectively agreed expert opinion as to the appellant's learning disability and their impact on the trial.

96. The second issue is the nature of some of the prosecution questioning. The questions that we have identified at [51], [52] and [54] above would have been objectionable if asked of a witness without learning disabilities. They were comments which should have been reserved to a closing speech to the Jury. However, when asked of someone suffering from a disability such as the appellant, they can be seen to be unfair, as Mr Hughes very properly accepted. The charged and rhetorical nature of the questions and some of the appellant's responses would have been likely to leave the jury with the impression that he had no answer to the charge. We would also observe that the appellant's last quoted remark in the part of the summing up referred to in [52] suggests that the appellant did not fully understand the sexual nature of the offence about which he was being questioned.

Conclusion

97. Taking all these matters into account, and in, what we would wish to emphasise are the highly unusual circumstances of this case, we have concluded that the appellant's conviction cannot be regarded as safe. However, we would add that the circumstances in which new medical and psychological evidence can be successfully deployed many years after a trial in order to challenge a conviction are likely to be very rare.

98. For the reasons set out above, we allow the appeal and quash the appellant's conviction. The prosecution has not asked that the appellant be retried.

Postscript

99. We would wish to repeat our thanks to counsel on this appeal both for their oral and written submissions, and for reducing a large amount of written material to a 16-page list of the issues and relevant supporting evidence on those issues. We also acknowledge the significant contribution of the Cardiff University Innocence Project which has, through the *pro bono* input of its supporters, advanced this appeal on the appellant's behalf.