IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 385

No. 202102690 B1

Royal Courts of Justice

Friday, 11 March 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE GRIFFITHS
HER HONOUR JUDGE WALDEN-SMITH

REGINA

v

BRM

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REPORTING RESTRICTIONS APPLY:
SECTION 45 OF THE YOUTH JUSTICE AND CRIMANL EVIDENCE ACT 1999

MR T. RAGGATT QC and MR R. J. MOSS appeared on behalf of the Applicant.

The Crown was not represented, did not attend.

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J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

1 The applicant was born on 25 February 2007. He has just passed his fifteenth birthday. In July 2021 he, together with another boy of similar age, was convicted after a trial in the Crown Court at Reading before Her Honour Judge Norton and a jury of one count of murder. A 14-year old girl was also charged with murder. She pleaded guilty to manslaughter prior to the commencement of the trial. That plea was accepted by the prosecution.

2 The provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 were engaged in regard to all three accused. An order under section 45 was made in relation to proceedings in the Crown Court in the following terms:

> "No matter in respect of [the three accused whose names are in the order] shall, whilst he or she is under the age of 18, be included in any publication, whether in print or online if it is likely to lead members of the public to identify him or her as a person concerned in proceedings."

The Crown Court ordered that the order should remain in force until further order. We do not interfere with it. It follows that the order in relation to publicity remains. This case will be reported as R v BRM. We shall refer to BRM as the applicant throughout the judgment. We shall refer to the male co-accused as X and the female co-accused as Y.

3 The applicant was convicted on 27 July 2021. He had already pleaded guilty to the offence of perverting the course of justice, namely disposing of clothing and the like linking him to the principal offence. He was sentenced to detention during Her Majesty's pleasure, the minimum term being specified as 13 years. His co-accused was ordered to serve a similar term but with a shorter minimum period, namely 12 years. The female co-accused, Y, was initially sentenced to three years and two months' detention. That was increased by this court after a Reference by the Attorney-General pursuant to Section 36 of the Criminal Justice Act 1988 to five years' detention.

4 The applicant's application for leave to appeal against conviction was refused by the single judge. He now renews that application. He has been represented in court today by trial counsel Mr Raggatt QC and Mr Moss. We are very grateful to them for their attendance and their assistance. They have added oral submissions to the substantial written material already provided to the court.

5 Application is also made for public funding to instruct a consultant psychiatrist in place of the consultant instructed at the trial together with a request for a transcript of the applicant's evidence at trial. We shall consider these applications in the course of our consideration of the substantive issues.

6 The circumstances of the offence were that on 3 January 2021 a 13-year old boy named Olly Stevens was lured to a park in Reading by Y. At some point she had been a girlfriend of his. She did that in order for Stevens to be confronted by X. X was annoyed at what Stevens had said about him on social media. Prior to the time at which Stevens was lured to the park, the applicant became involved. He also had some form of gripe with Stevens. He was asked to attend by X. Once at the park, Stevens and X had a fight. It was a fight with fists. There came a stage when the applicant took out a knife which he had brought with him. The

applicant stabbed Stevens twice, once to the chest and once to the back. Both stabs were deep and caused major internal bleeding. Either would have been fatal.

7 The prosecution case was that the applicant, together with X, planned to attack Stevens on 3 January and that the applicant went to the scene armed with a knife for that purpose. Their case was that X was fully aware of the applicant's possession of a knife. The prosecution case was that the applicant quite deliberately and unlawfully stabbed the deceased twice as we have described. He intended at the very least to cause really serious harm. Their case was that, whilst it was the applicant who had inflicted the fatal injuries, the case was one of joint enterprise. Thus it was that X was indicted with murder.

8 Given the issues which concern us on this application, it is not necessary to review the various strands of circumstantial evidence on which the prosecution relied. It is of relevance to note the evidence that was adduced by both the prosecution and defence from consultant forensic pathologists. There was agreed evidence that both the wound to the chest and to the back went from the deceased's left to his right and that both blows would have required moderate force equivalent to a firm push. Both wounds were what the pathologists called "pure" wounds. The knife had gone straight in and out along the same track which was consistent with a deliberate stabbing.

9 The applicant's case was that he was not part of any planning to attack the deceased. He was aware that X was prepared to fight Stevens if the response of Stevens to the complaints against him had not been suitably apologetic. This fight, said the applicant, would have been a one-on-one fight. The applicant's case is that, as he was standing watching the fight, it became necessary and appropriate for him to act in lawful defence of X. That is why he stabbed the deceased to the chest. The wound to the back was accidental. In any event, there was no intention either to kill the deceased or to cause him really serious injury.

10 The applicant's evidence was summed up in detail by the trial judge. In particular, she set out the applicant's account of events immediately surrounding the fight and how he came to use a knife.

11 We are satisfied that the material we have is quite sufficient to reach appropriate and proper conclusions on the issues that arise without having a full transcript of the applicant's evidence. It follows that the application for such a transcript, whatever the outcome of the renewed application for leave, must fail.

12 The applicant's evidence was that the fight began when Stevens swung at X with his fist. The two hit each other a couple of times but Stevens's punches affected X more than the other way around. Stevens appeared to be winning. The applicant had no intention of getting involved but X was his good friend so, on seeing him getting hurt, he had to save him. The applicant's evidence was that he felt stressed and on edge. He thought about leaving but he did not want to leave X behind.

13 However, he did not take out the knife during this part of the fight. Rather, there came a point when X hit the side of Stevens's face. That looked as if it hurt Stevens. The applicant said that he saw Stevens reaching down towards his waistband. By that action he thought that Stevens was about to pull a knife. He reached that view, in part, because he had seen Stevens with knives on many other occasions. He had seen him with a knife in his waistband before. (We interpose to say that the jury had evidence of at least one photograph of Stevens showing him with a knife tucked in his waistband on an occasion prior to 3 January.)

14 The applicant thought that X was going to get stabbed. He, the applicant, pulled out his own

knife which he had in his right sleeve. He took his knife out with his left hand although he is, in fact, right-handed. His evidence was that he wanted to scare Stevens. He said that his idea was to stab Stevens somewhere where it would not do much damage. With that in mind he aimed a stab at Stevens's arm. It was a deliberate stab but his purpose when doing that was simply to stop Stevens from pulling out his knife. He neither intended to kill nor to cause really serious injury. He had no intention to stab Stevens in the chest though he accepted that must be what he did. His evidence was that, at the time, he did not fully realise that he had actually stabbed Stevens at all.

15 The applicant's evidence was that after he had lunged out at Stevens with the knife the fight continued between X and Stevens. Stevens punched X in the upper body. X then pushed or punched Stevens. That caused Stevens to fall on to the applicant. The applicant still had his knife in his left hand. The applicant's evidence was that he could not remember how he was holding it. He said this must have been when the second stab wound was inflicted. He said he had no knowledge or proper realisation that Stevens had been stabbed until he was at the police station being interviewed. His evidence was that he put the knife back in his waistband. He saw no blood on the knife. He had no idea that Stevens was injured. In fact, Stevens was fatally injured and after a very few minutes, if that, he collapsed. He died very shortly afterwards.

16 This account as given by the applicant in evidence was in line with his account of events as set out by him in his defence statement. The issues being raised by the applicant were clear to all parties and clear to the judge.

17 The applicant was 14 at the date of trial. When he was much younger he had been diagnosed with what then was called Asperger Syndrome. We are told by Mr Raggatt that it is more accurately referred to now as ASD. However, during the trial, Asperger Syndrome, or Asperger's (for short), was how more often than not it was referred to and we shall use that nomenclature. The evidence available to the judge indicated that the applicant was particularly sensitive to noise and that he was likely to have difficulty decoding messages transmitted during interactions. There was a full psychological report which set out the position in detail. The applicant was able to function reasonably well but he did have a significant disability. We know that special measures were granted for the duration of the trial. The applicant was assisted by an intermediary throughout. An explanation was given to the jury as to what the function of the intermediary was either at the outset or when the applicant came to give evidence when the intermediary was in the witness box with the applicant. We are told that that explanation, whatever the detail of it was, did not refer specifically to any diagnosis of Asperger Syndrome.

18 There are four grounds of appeal. As they appear in the original grounds, they read as follows:

(1) the judge erred in ruling that psychiatric evidence relating to the applicant's diagnosis of Asperger's/ASD was not admissible to the issue of intent;

(2) the judge erred in ruling that the served psychiatric evidence was inadmissible as to the first limb of self-defence;

(3) the judge erred in not allowing the defence to adduce through the defendant that he was diagnosed with Asperger's/ASD;

(4) the judge erred in not granting an adjournment for the defence to obtain a further report from the instructed psychiatrist.

19 We deal with the grounds in slightly different order. Chronologically ground 3 comes first. Thereafter, we shall deal with the arguments in the order set out in the grounds.

20 In relation to ground 3, the applicant was called to give evidence on 8 and 9 July 2021. By this time the judge had already ruled on the admissibility of psychiatric evidence served on behalf of the applicant. That evidence was concerned principally with the applicant's diagnosis of Asperger Syndrome. The judge ruled on 27 June 2021 that the evidence as it stood then was inadmissible. We shall have to come to the detail of the ruling in due course. In short, the judge decided that (a) the reports had failed to comply with Part 19 of the Criminal Procedure Rules, (b) that the psychiatric evidence could not be relevant to the issue of intent and (c) that, whilst that evidence might be relevant to the subjective element of the legal test for self-defence or defence of another, the psychiatric evidence, as served, did not address that issue. It is to be noted that, as at 8 July, namely the date when the applicant was about to give his evidence, it was known that a further report from the instructed psychiatrist was likely to be served. The idea was that a further report would remedy the deficiencies in the initial report.

21 Before the applicant began his evidence, Mr Raggatt sought a ruling on one aspect of his evidence. We note that he did so very properly in advance so as to alert all parties as to what his intentions were. Mr Raggatt said that on his instructions the applicant knew that he had Asperger Syndrome and that he believed that it affected aspects of his behaviour, for example, his reactions to loud noise, shouting and being touched. We observe that these instructions are contrary to what the applicant was reported as having said to the psychologist who assessed him. To her, he said that he did not know what Asperger Syndrome meant. His comment to her was that it might affect him after he got angry and lost his temper. The psychologist, according to her report, raised with him the possibility of noise and touch making him unable to cope. The applicant said he was unable to identify with this notion other than when he was younger. The psychologist said this at 5.57 of her report:

> "In summary, although [the applicant] is aware that he has a diagnosis of Asperger Syndrome, he has no idea of what this actually means. He has no understanding of his diagnosis."

22 In any event, Mr Raggatt invited the judge to approve the course he intended to take with the applicant. He was intending to adduce from the applicant the fact of the diagnosis of Asperger Syndrome and then to ask him questions such as "If people shout at you, what do you feel about that?" and "If you are around loud noises, how do you react?"

23 The Crown objected to the first part of that exercise, namely adducing evidence from the applicant that he suffered from Asperger Syndrome, and linking that to the specific behavioural traits. That link was not something about which the applicant was qualified to give evidence. Mr Raggatt's response was that he did not propose to draw any link. He simply proposed to adduce the evidence of the diagnosis and then ask questions about particular behaviour.

24 Though the judge did not deliver a detailed ruling, the discussion in court, of which we have a full transcript, made it clear that she accepted the questions about the applicant's reaction to particular stimuli were permissible. So far as we are aware, questions of that sort were asked and answered. She did not permit Mr Raggatt to adduce evidence from the applicant

about his diagnosis. Mr Raggatt's closing gambit was to say that this was "relevant to him" (i.e. the applicant) "as a witness and a person; it puts him into context as an individual" for the jury.

25 That argument, essentially, is repeated before us. Mr Raggatt submits that limiting his examination of the applicant created a crucial unfairness. The jury were deprived of a proper context for assessing the applicant's evidence. Mr Raggatt points to the fact that the judge directed the jury about the need to consider all of the circumstances as they were at the relevant time when considering the applicant's intent. Mr Raggatt's argument is a diagnosis was part of the circumstances.

26 We respectfully disagree. We consider that Mr Raggatt's closing submission to the judge was and is flawed. The applicant's diagnosis of Asperger Syndrome, whatever his knowledge and understanding of it was, may have been relevant to an overall view of the applicant as a factor in his personality. But it was not relevant to the issues that the jury had to decide, whether at the point just before he gave evidence or in the light of the evidence as it emerged. The mere fact of the diagnosis took the jury nowhere. Juries are not to be burdened with evidence unless it is probative of an issue in the case. The applicant's evidence as to his diagnosis was not probative of any issue in the case.

27 We turn to ground 1. There was and is no suggestion that Asperger Syndrome as it applied to the applicant had an effect on his ability to form the relevant intent. That is not how the case was put. The argument was and is that expert evidence could be admissible on the bare issue of intent depending on the facts of the case. Mr Raggatt cites two authorities, to which we shall come in a moment.

28 Before doing so, we should remind ourselves of what the competing factual cases were. The prosecution said that the applicant delivered two firm in-and-out thrusts with the knife, each of them relatively deep. The only proper inference was that the wounds must have been caused with an intent at least to cause really serious harm. The applicant's case was that he had only aimed one deliberate blow with his knife; that was directed at Stevens's arm. He had not intended serious injury otherwise he would have directed his blow somewhere else. The wound to the back was not a deliberate blow at all. It was not delivered with any intent. It must have happened when Stevens was pushed on to the applicant as he held the knife. The injury was caused accidentally.

29 In our view the effects of Asperger Syndrome could not have been of any relevance to either of those factual cases.

30 The applicant relies on *TS* [2008] EWCA Crim 6 and *Thompson* [2014] EWCA Crim 836 to support the submission that expert evidence in relation to Asperger Syndrome may be admissible on the issue of intent. In the course of oral submissions Mr Raggatt suggested that the judge considered whether the evidence was relevant to intent too soon in the trial. Whether that is right or not is of no consequence. It made no difference to the eventual outcome.

31 In *TS* the appellant had been convicted of rape. The issue was consent, or, to be more specific, the appellant's state of mind in relation to consent. The issue in the case was this: did the appellant know that the complainant did not consent to sexual intercourse or was he reckless as to whether she consented? The expert evidence was that Asperger Syndrome as suffered by the appellant in that case could lead someone in the appellant's case to misunderstand the signs being given by another. So the evidence was relevant and admissible in relation to a live issue in the case.

32 In our view that issue was not intent in the true sense. Rather, it was the subjective belief of the appellant. It mirrors a quite separate issue that arose in this case, namely the subjective element in relation to the defence of defence of another. That also is not a matter of intent.

33 The appellant in *Thompson* was convicted of sexual assault. There was no issue but that the appellant had touched a number of young boys in a way that objectively could be recognised as sexual. The appellant had Asperger Syndrome. On appeal, this court concluded that the issue in relation to which evidence of the appellant's condition was significant was whether the sexual assault in the particular case was sexually motivated. Evidence of the appellant's condition could have explained the nature of the act and its purpose. Again, in our view, intent in the true sense of the word was not the issue.

34 In her ruling, the judge distinguished these cases from the facts relating to the applicant. We are satisfied she was correct to do so. On the other side of the coin there is ample authority for the proposition that as a general rule expert evidence is not relevant to the issue of intent. We refer to the discussion in *Hassan* [2018] EWCA Crim 498 simply by way of example. We are satisfied that the evidence in relation to Asperger Syndrome was not admissible on the issue of intent in this case.

35 We turn to ground 2. The applicant's case was that, in so far as he deliberately stabbed Stevens, this was in reasonable defence of another. Expert evidence may be admissible on the subjective limb of this defence, namely did the applicant honestly believe that it was necessary to use force to defend somebody else? There may be cases where a defendant has a condition which causes him to have delusional beliefs. That does not apply here. There may also be cases where a psychiatric or psychological condition causes a defendant to be hyper-sensitive to threatening situations so as to affect his honest belief. One example of such a case is *Press and Thompson* [2013] EWCA Crim 1849. There, evidence was properly admitted in relation to the defendant's post-traumatic stress disorder because it was relevant to the issue of his honest belief.

36 In the applicant's case, evidence was served from a Dr Osunsamni, a consultant psychiatrist. The ostensible purpose of seeking to adduce this evidence was to link the applicant's diagnosis of Asperger Syndrome to his use of the knife. The psychiatrist's first report was dated 7 June 2021 and there was a short addendum dated 23 June 2021. The judge, as we have indicated, ruled on the admissibility of his evidence as it then stood on 27 June 2021. The judge's first reason for refusing to admit the evidence of Dr Osunsamni was that it failed to comply with Part 19 of the Criminal Procedure Rules. The judge referred in particular to certain paragraphs in Part 19.4 as follows:

> "….an expert's report must—….
>
> (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based;…
>
> (f) where there is a range of opinion on the matters dealt with in the report—
>
> (i) summarise the range of opinion, and
>
> (ii) give reasons for the expert's own opinion;….
>
> (h) include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence;…"

37 The judge found that Dr Osunsamni had not properly considered the evidence in the case. In his first report he had referred only to the police report and the defence statement.

Although he referred to other material in his short addendum report, he had not received this material until two weeks after completing his first report. Insofar as he did have any appreciation of the evidence, he did not explain how that evidence could be related to the diagnosis of Asperger Syndrome. There was no review of how the applicant's diagnosis was relevant in the light of the evidence. In consequence, the judge determined that any views expressed by the expert could not be regarded as objective or reliable. She found that expert evidence which does not provide a discernible basis for the opinion expressed cannot be put before a jury. It was not merely a matter of form. The deficiencies in the reports meant that it was not possible to conclude that they were sufficiently reliable to be admissible.

38 Mr Raggatt, in writing, criticised the judge for adopting a mechanistic view of Part 19. He makes the same broad submission today. He invites us to say that the way in which the judge should have dealt with it, assuming that she was right about Part 19.4 and the deficiencies in the reports, was nonetheless to allow the evidence to be adduced on which cross-examination could take place and appropriate direction given by the judge.

39 That approach is not appropriate. Where a party in a criminal trial proposes to adduce expert evidence, it is for the judge to decide whether the evidence on its face properly can be considered to be objective and reliable. If the expert evidence does not engage with the evidence in the case and does not tether any opinions expressed to the evidence, it will serve only to confuse the jury. The notion that expert evidence can be placed before a jury however disconnected it may be from the issues in the case on the basis that the jury can be left to make what they will of it is misconceived.

40 In the event the judge went on to consider whether, irrespective of the inherent flaws in the psychiatric evidence, it should be admitted in order to do justice to the applicant. She concluded that it should not.

41 Dr Osunsamni dealt with four issues in his principal report of 7 June 2021: (1) the applicant's ability to form an intent; (2) the applicant's appreciation of risk or harm from his own actions; (3) the applicant's understanding of risk or harm from the actions of others; (4) the applicant's ability to regulate his own behaviour in the context of the fight between X and Stevens. None of those issues bore on the matter in relation to which expert evidence might have been admissible. It was put in argument before the judge that questions were posed in an appropriate way and yielded admissible answers. In our view - and this mirrors the view of the judge - the evidence of the psychiatrist did not address the correct question. Moreover, the answers provided by the psychiatrist to questions he posed himself were, in part, with respect, incomprehensible. We quote one passage by way of example:

> "It is ..... more plausible than not that he became extremely dysregulated by the sudden auditory stimuli that may have been generated ..... Olly had been shouting repeatedly at him during the fight. This may have also caused him to become extremely dysregulated and unusually highly disturbed and distressed by the event."

42 On 12 July 2021 Dr Osunsamni provided a further report. It dealt with four issues different to those set out in his first report. The first issue, as he set it out, bore rather more relevance to the issues of the case, at least on the face of it. It asked this question:

> "How does the applicant's diagnosis of Asperger's - and, coupled with his age at the time - may have affected whether he held a genuine belief that he or X

were under such a threat as would require him to use force."

Based on the further report the judge was invited now to admit the evidence.

43 The judge dealt with the answers that the psychiatrist gave to that question at paragraph 17 of her ruling. She said:

> "As was with his first report, the primary difficulty with Dr Osunsamni's second report is that he does not link the applicant's condition to the evidence. Rather, and significantly, his opinions appear to be predicated upon how a person with the applicant's characteristics would respond in a generalised fight situation. The repeated use of the phrases 'would have been' and 'could have been' make this very clear. He does not address the applicant's account given in evidence how the fight had come about and the part he played in it in any way. It is unsurprising, as became apparent in the course of argument, that not only had Dr Osunsamni not heard the applicant's evidence he had not been sent a transcript or a note of his evidence about the fight at all ..... Dr Osunsamni, therefore, appears to be uninformed about what the applicant's evidence was and, therefore, the defence case as revealed by his evidence. As stated, it is hardly surprising, therefore, that he is unable to identify the relevance of ASD to the issues."

The judge offered her view of the correct question to be posed. It read as follows:

> "To what extent, if at all, in the circumstances and context of the fight as described by the applicant, might his underlying ASD have been acting on his perception whether there was a threat posed by Stevens that was such that required him to use force?"

44 The judge gave the defence one last chance to address that point. We shall turn to the outcome of that in a moment. What is quite clear to us is that the judge's second ruling on the admissibility of the evidence as it then stood was correct. She identified the fundamental problem with the psychiatrist's evidence, namely that he did not relate the applicant's diagnosis to what the applicant in fact had done in the course of the fight.

45 Mr Raggatt suggests to us today that, on a proper reading of all the reports taken together, the psychiatric evidence was admissible. The judge should have let the jury hear the evidence of Dr Osunsamni. Again, we respectfully disagree with the premise behind that submission. A jury is not to be burdened with evidence unless its relevance can clearly and properly be understood. The evidence of this psychiatrist fell well short of that requirement.

46 We come to ground 4. Assuming that the judge was correct in refusing to admit the evidence of Dr Osunsamni as it stood, should she have allowed the defence more time to obtain a further report? We are told that by 14 July 2021 Dr Osunsamni had disengaged from the process. It has been explained to us today that he had declined to attend court, whether in person or remotely, in order to listen to the applicant's evidence even though the judge had taken the step of issuing a witness summons. By 14 July Dr Osunsamni had disengaged with the process altogether.

47 Mr Raggatt's submission is that the applicant – who is still a child - should not have been prejudiced by the failings of a medical professional. The applicant undoubtedly had been

diagnosed with Asperger Syndrome. It was acknowledged by the prosecution and by the judge that this diagnosis potentially could have relevance to the question of honest belief in the need to defend another. By refusing to allow the defence more time to instruct a different psychiatrist, the judge removed any prospect of the jury being able to assess the relevance of the diagnosis of Asperger Syndrome to the actions of the applicant. This inevitably led to an injustice. The trial was rendered unfair.

48 Superficially this point has some force. If there were anything at all in the evidence given by the applicant or the other evidence given in the trial, or both, which gave rise to a real prospect that the applicant's mental state would have been relevant to any issue in the case, we would have seen force in Mr Raggatt's argument. We would have had to consider whether this were a case in which the full court should have the opportunity to consider the impact of the departure of the instructed psychiatrist from the case, leaving the defence without any such evidence at all, good, bad or indifferent.

49 However, we have in mind the evidence of the applicant to the detail of which we have already referred. In his evidence the applicant said that he had produced and use his knife because of his honest belief that Stevens was about to pull out a knife. He told the jury that this honest belief arose because Stevens's hand went towards his waistband and because he knew that Stevens was known to carry knives. Nothing in that account was in any way related to the symptoms of Asperger Syndrome as experienced by the applicant. We are aware also of the evidence given to the jury by X. It is not necessary to rehearse that evidence. Suffice it to say that it provided no support for the case being put forward by the applicant either on the facts or in terms of potential defence relating to Asperger Syndrome.

50 At its heart, this was a straightforward case vis-a-vis the applicant. He came to the scene armed with a knife. He saw his friend possibly getting the worst of it. He saw Stevens appear to go towards his waistband. He pulled out a knife and used it. On his account he only did so once and with no murderous intent. Given the nature of the wounds he inflicted, the jury clearly rejected his account. The fact that he had, and still has, Asperger Syndrome, in our judgment, had no relevance and still has no relevance. It follows that notwithstanding the fact that this case was eventually litigated without any psychiatric expert evidence available to the defence, there is no risk in this case that the jury's verdict was unsafe.

51 For those reasons we do not consider that it is appropriate to fund any further psychiatric assessment. Notwithstanding the efforts of Mr Raggatt and Mr Moss on the applicant's behalf, we are satisfied that there are no arguable grounds of appeal. The renewed application for leave to appeal is dismissed.

CERTIFICATE

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