Neutral Citation Number: [2023] EWCA Crim 1021

Case No: 202101375/202101376

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT CAMBRIDGE
His Honour Judge Farrell QC
20187194

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2023

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE BRYAN
and
HIS HONOUR JUDGE SLOAN KC

- -

Between :

MARTYNA OGONOWSKA	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Ben Cooper KC, Amanda Clift-Matthews and Rabah Kherbane (instructed by **EBR Attridge LLP Solicitors)** for the **Appellant**
Louis Mably KC (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing date: 29 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WILLIAM DAVIS:

1. On 25 April 2019 in the Crown Court at Cambridge Martyna Ogonowska was convicted of murder and of having an article with a blade or point. She then was aged 18. She was sentenced to custody for life for the offence of murder, the minimum term being 17 years less 121 days to take account of time spent on remand or subject to an electronically monitored curfew. A concurrent sentence of 18 months' detention in a young offender institution was imposed in respect of the bladed article offence.

2. She applied for leave to appeal against her conviction and sentence for murder. Her application was made 717 days out of time. The single judge refused to extend time in respect of the appeal against conviction. He considered the substantive merits of the application and concluded that there was no element of the trial which rendered the conviction unsafe. The single judge referred the application in relation to sentence to the full court.

3. Ms Ogonowska renewed her application in relation to conviction before the full Court. The full Court adjourned that application and ordered that it should be considered together with the application in relation to sentence referred by the single judge. The parties were required to be ready at the adjourned hearing to deal with all issues relating to both conviction and sentence and, in the event of leave being granted, the substantive appeals.

4. On 29 June 2023 we heard the application in relation to conviction. The case was fully argued and we treated the hearing as if it were the hearing of the appeal. Ms Ogonowska was represented by Ben Cooper KC, Amanda Clift-Matthews and Rabah Kherbane. The prosecution were represented by Louis Mably KC. None had appeared at the trial. The hearing occupied a full court day. We were assisted by written submissions and by oral submissions from Mr Cooper and Mr Mably. Following the hearing Mr Cooper on 7 July 2023 submitted a note in respect of what was said to be disclosure made only after the hearing on 29 June 2023. It was argued that this disclosure threw new light on one of the grounds of appeal argued before us. We required the prosecution to respond in writing to this note. Mr Mably did so on 19 July 2023. Thereafter on 28 July 2023 Mr Cooper provided further written submissions. He invited us to consider whether we should hear additional oral argument on the issues raised since the hearing. We determined that this was not necessary. We were able to consider those issues on the basis of the written materials.

5. The applicant's victim was a man named Jaskiewicz. He was aged 23 when he was killed. He had met the applicant on Thursday 18 October 2018 which was four days before he died. They saw each other on the following day. Jaskiewicz told a friend that he and the applicant had had sex on the evening of that day. In her evidence the applicant denied that she had. On the evening of Saturday 20 October the applicant went out with Jaskiewicz together with a girl called Zofie, Zofie's boyfriend Peter and the applicant's mother. They were celebrating Peter's birthday. Zofie and the applicant had met at school in about 2013 when the applicant had come to the UK with her mother and older brother. They were good friends. Save for Jaskiewicz, they gathered in the early evening at the applicant's home in Peterborough. Jaskiewicz arrived at about 9.00 p.m. Alcohol was drunk at the house. The mood was good. Later in the evening the group went out to a nightclub. Before they left, a medium sized kitchen knife was taken from the house. At the trial there was a dispute

as to who had taken the knife. The applicant said that it was Zofie. Zofie denied this. By inference her evidence was that the applicant had removed the knife. By reference to the judge's directions, the jury's verdict in respect of the count of having a bladed article determined that the applicant was the person who had taken the knife from the house. There has been no appeal against the conviction in respect of that offence. Zofie also gave evidence that the applicant had admitted to her that on previous occasions she had been in possession of a knife when out and about in public.

6. There came a time when the applicant left the nightclub and met an ex-boyfriend outside. They had an argument. By this time the applicant's mother had gone home. Zofie came out of the club to find the applicant. When they tried to go back into the nightclub, they were refused entry. As a result everyone left and went to where Jaskiewicz had parked his car. The plan was for him to drive the others home. Zofie suggested that they should go for a ride around Peterborough, which is what they did. They drove off with the applicant in the front passenger seat. ANPR evidence showed that they visited various parts of Peterborough. Drink was consumed during the journey. There came a point when Jaskiewicz began to drive the car at excessive speed. The applicant, Zofie and Peter were scared. They told him to slow down. He eventually stopped in Oakdale Avenue. By now the time was approximately 5.00 a.m. The applicant got out of the car and ran off. Jaskiewicz ran after her. He caught up with her. He grabbed her by the throat and pulled her to the ground. He placed his hand on the zip of his trousers. As this was happening, Zofie and Peter got out of the car. They intervened to help the applicant. Peter told Jaskiewicz to calm down. The applicant was helped up from the ground. The situation did calm down. Everyone got back into the car. As they were doing so, the applicant told Zofie that Jaskiewicz had said that he wanted to get rid of Peter so that he could shut the applicant and Zofie into a room for his friends to "play with" i.e. engage in non-consensual sexual activity. Zofie had thought that Jaskiewicz's placing of his hand on the zip of his trousers might have been the prelude to a serious sexual assault.

7. The applicant's evidence was that she was handed the knife with which Jaskiewicz was killed as she was with Zofie just before she got back into the car. As we have said, the jury's verdict in respect of the bladed article offence rebuts that account. In any event, the applicant returned to the front passenger seat. Jaskiewicz was in the driver's seat. According to Zofie, Jaskiewicz put his hand inside the applicant's top and onto her breast. She pushed his hand away sharply. He then put his hand on her thigh. The applicant put her hand on top of his. It was at this point that the applicant delivered a single stab wound to the chest of Jaskiewicz with the knife that she had brought from her home. Neither Zofie nor Peter who were sitting in the back seat saw the knife and its use. Rather, they heard a sound as if someone had been hit hard in the face. The knife went into Jaskiewicz's chest at a slight diagonal angle. At least moderate force was required to inflict what was an injury which passed completely through the left ventricle of his heart. Jaskiewicz was unconscious within a matter of seconds and died within minutes.

8. The applicant's account of her use of the knife was that she produced it when Jaskiewicz was in the driving seat of the car and was pushing her and calling her names. They then started shoving each other. The shoving developed into a fight. Jaskiewicz was slapping her on the face and the body. She said this: "I don't know how the knife went into him….I did lots of movements to push him away. I was just

scared. I didn't think about the knife. First I noticed was I was not holding the knife in my hand. Then I noticed it in his chest. I removed it for safety. I wanted to help him. I wanted to call an ambulance. I was in shock." She explained that during the fight she had been holding the knife so that it came out of the back of her hand.

9. Once she had stabbed Jaskiewicz, the applicant got out of the car and ran away shouting "let's go, let's go". Zofie and Peter followed her. They caught up with her and tried to calm her down. The applicant was shaking and stammering. She showed them the knife which was covered with blood. She said that she had stabbed him i.e. Jaskiewicz. She told Peter that she had not meant to do it. She telephoned her ex-boyfriend and got him to arrange for a taxi to pick her up.

10. The taxi took the applicant, Zofie and Peter to the home of the ex-boyfriend. The applicant still had the knife which she had hidden inside her clothing. At the home of the ex-boyfriend she, together with Zofie, washed the knife. The applicant messaged her mother saying "fucked him with a knife, the whole knife went into his heart". She then called another taxi to take her to Thorpe Wood Police Station in Peterborough where she arrived at around 7.15 a.m. She had taken the knife with her. She was interviewed by the police. Nothing of significance turns on what she said in her interview.

11. At her trial, the applicant's case was that she had not deliberately used the knife. The jury were directed that, were they not to be sure of a deliberate use of the knife, the verdict on the count of murder would be not guilty. In the event that the jury decided that there had been a deliberate use of the knife by the applicant, they were directed to consider three issues in succession. First, were they sure that the applicant's use of the knife was unlawful i.e. had the prosecution disproved the defence of self-defence? Second, if the applicant's use of the knife was unlawful, did she use it with intent to kill or to cause really serious harm? Third, if the applicant had the intent necessary for murder, had she satisfied the jury on a balance of probabilities that her responsibility for the killing was so diminished as to render her guilty of manslaughter rather than murder? This issue required the jury to consider the evidence of two psychiatrists to which we shall return in due course.

12. Four grounds of appeal were pursued at the hearing. Grounds two and three relate directly or indirectly to the issue of diminished responsibility. We shall consider them when we have reviewed the psychiatric evidence and other surrounding material. There is an application to rely on evidence not called at the trial on this issue which we will determine in our consideration of grounds two and three.

13. The first ground of appeal is that the judge erred in failing to leave to the jury the partial defence of loss of control. The defence was not raised by counsel representing the applicant. He did not ask that it be left to the jury. The judge nonetheless considered the point and delivered a short ruling. He noted that the prosecution case was that the stabbing was deliberate and controlled whereas the defence case was that the applicant's only deliberate act was to push out at or punch Jaskiewicz. When she did so, she had forgotten that she had a knife in her hand. Given those competing accounts, the judge determined that there was no sufficient evidence for the jury to conclude that the applicant had lost her self-control. The judge further identified that, for the defence of loss of control to succeed, a person of the applicant's age and sex with a normal degree of tolerance and restraint in the applicant's circumstances might

have reacted in the same or similar way as she did. The judge found that there was no sufficient evidence which would justify the jury reaching that conclusion.

14. The statutory provisions relating to the partial defence of loss of control are in sections 54 and 55 of the Coroners and Justice Act 2009. For our purposes it is only section 54 which is relevant:

> *54 Partial defence to murder: loss of control*
>
> *(1) Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if—*
>
> *(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control*
>
> *(b)the loss of self-control had a qualifying trigger, and*
>
> *(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.*
>
> *(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.*
>
> *(3) In subsection (1)(c) the reference to 'the circumstances of D' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.*
>
> *(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.*
>
> *(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.*
>
> *(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.*
>
> *(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter….*

15. Section 55 is concerned with the meaning of "qualifying trigger". The judge did not find that there was no sufficient evidence of such a trigger. He implicitly decided that the behaviour of Jaskiewicz in the minutes leading up to the stabbing was sufficient evidence of a qualifying trigger. There is no reason for us to review that decision. It was one open to the judge on the evidence.

16. Guidance on how a judge should approach the question of whether to leave the defence of loss of control was given in *R v Goodwin* [2018] EWCA Crim 2287, the guidance pulling together several earlier authorities. At [33] the court said:

> *(1) The required opinion is to be formed as a common sense judgment based on an analysis of all the evidence.*
>
> *(2) If there is sufficient evidence to raise an issue with respect to the defence of loss of control, then it is to be left the jury whether or not the issue had been expressly advanced as part of the defence case at trial.*
>
> *(3) The appellate court will give due weight to the evaluation ("the opinion") of the trial judge, who will have had the considerable advantage of conducting the trial and hearing all the evidence and having the feel of the case. As has been said, the appellate court "will not readily interfere with that judgment".*
>
> *(4) However, that evaluation is not to be equated with an exercise of discretion such that the appellant court is only concerned with whether the decision was within a reasonable range of responses on the part of the trial judge. Rather, the judge's evaluation has to be appraised as either being right or wrong: it is a "yes" or "no" matter.*
>
> *(5) The 2009 Act is specific by section 54(5) and (6) that the evidence must be "sufficient" to raise an issue. It is not enough if there is simply some evidence falling short of sufficient evidence.*
>
> *(6) The existence of a qualifying trigger does not necessarily connote that there will have been a loss of control.*
>
> *(7) For the purpose of forming his or her opinion, the trial judge, whilst of course entitled to assess the quality and weight of the evidence, ordinarily should not reject evidence which the jury could reasonably accept. It must be recognised that a jury may accept the evidence which is most favourable to a defendant.*
>
> *(8) The statutory defence of loss of control is significantly differently from and more restrictive than the previous defence of provocation which it has entirely superseded.*
>
> *(9) Perhaps in consequence of all the foregoing, "a much more rigorous evaluation" on the part of the trial judge is called for than might have been the case under the previous law of provocation.*
>
> *(10) The statutory components of the defence are to be appraised sequentially and separately; and*
>
> *(11) And not least, each case is to be assessed by reference to its own particular facts and circumstances.*

17. The significant factors relevant to this case are: the weight to be given to the evaluation of the trial judge who has heard all the evidence; the existence of a qualifying trigger does not necessarily connote a loss of control; a rigorous evaluation of the evidence is required since the statutory defence of loss of control is more

restrictive than the previous defence of provocation. We consider that a loss of self-control is not to be equated with reacting in a flash of anger or out of retribution in the course of otherwise considered and deliberate behaviour. Whilst it will not be determinative that a defendant says that they had not lost self-control, it is a factor of significance in the overall assessment of the sufficiency of the evidence of loss of control.

18. The judge was required to make his assessment by reference to the view of the evidence most favourable to the applicant. The prosecution evidence of the events leading up to the stabbing showed that the applicant, having been attacked by Jaskiewicz outside the car, got back into the passenger seat next to him. Jaskiewicz touched her breast. She pushed his hand away. He put his hand on her thigh. She put her hand onto his hand. She then stabbed Jaskiewicz once in the chest. On the evidence called by the prosecution it could not be said when the knife had been produced. The appellant's evidence was that Jaskiewicz started pushing her and calling her names at which point she produced the knife. There was a fight between them. The applicant tried to push Jaskiewicz away. In doing so the knife went into his chest. None of that evidence indicated any loss of control. On the prosecution case there was a single deliberate stab wound. It probably was inflicted in anger. The circumstances did not provide any evidence of loss of control. On the defence case the stab wound was not inflicted deliberately. The applicant was simply pushing Jaskiewicz away. Insofar as there was a deliberate use of the knife, it was in self-defence or it did not involve a murderous intent. The applicant did not lose self-control.

19. Mr Cooper argued that the evidence of how the applicant behaved after she had run from the car after the stabbing demonstrated that she had lost her self-control. Zofie and Peter described her as shaking and stammering. They said she was hysterical and in shock. Further, the police officer who arrested the applicant some two hours after the stabbing described her as very pale and showing signs of having been crying. Mr Cooper submitted that this evidence was consistent with the applicant having lost self-control. There was evidence of a qualifying trigger. What the applicant did was something which a person of normal degree of tolerance and restraint might have done given the actions of Jaskiewicz. Thus, the judge ought to have left the defence to the jury.

20. In our judgment the actions of the applicant after the event would only have probative force if they could be combined with sufficient evidence of a loss of self-control immediately prior to and at the time of the stabbing. There was no such sufficient evidence. In our view there was no evidence at all of a loss of self-control at that point. The mere fact that someone stabs another person cannot connote loss of control. There must be some probative evidence from the surrounding circumstances as described by witnesses or from the perpetrator's own account. Here there was none. How the applicant behaved after the event was consistent with someone having stabbed Jaskiewicz in anger and then reacting to what they had done. The judge was correct when he concluded that there was no sufficient evidence of a loss of self-control. That conclusion was sufficient to dispose of the issue. If there was no loss of self-control, the other factors did not need to be considered. The judge went on to consider whether a person with a normal degree of restraint and tolerance would have acted as the applicant did. At one point in his oral submissions Mr Cooper argued that

the fact that the applicant was suffering from PTSD, a matter to which we shall return in relation to the grounds relating to the defence of diminished responsibility, was a circumstance to be taken into account. That argument was contrary to the proper interpretation of section 54(3) of the 2009 Act as explained in *R v Rejmanski* [2017] EWCA Crim 2061. In his responding submissions before us, Mr Cooper acknowledged that any PTSD from which the applicant was suffering was irrelevant. He nonetheless submitted that there was sufficient evidence to require the judge to leave the decision in relation to what a person of normal restraint and tolerance would have done to the jury. We disagree. Even if there were sufficient evidence of a loss of self-control, the judge was correct in his conclusion that there was no sufficient evidence that stabbing Jaskiewicz was something a person with a normal degree of restraint and tolerance might have done.

21. We move to the fourth ground of appeal. This is directed at the way in which the judge summed up the applicant's case in relation to self-defence. This was not a ground put before the single judge. It was raised before the full Court. Leave was given to raise the argument. We do not have to grapple with the issues raised in *R v James and others* [2018] EWCA Crim 285.

22. The judge gave a conventional direction of law in respect of self-defence. It is not necessary for us to set it out since it was not the focus of the submission made by Mr Cooper. His arguments were directed more to what the judge did not say. First, the judge failed to direct the jury that any finding they might make about the applicant's propensity to carry knives or about her having taken the knife used to stab Jaskiewicz earlier in the evening from her home was not relevant to the issue of self-defence. Second, the judge failed to direct the jury that whether the applicant's intent was to kill or was to cause really serious harm was relevant to the question of whether she had used reasonable force in self-defence. Third, the direction of law was unbalanced by the later reference by the judge to the possibility that the applicant could have got out of the car rather than used the knife to stab Jaskiewicz.

23. The judge's direction in relation to the carrying of knives and propensity was principally directed at the relevance of this evidence to the count of having a bladed article. However, he directed the jury that, if they were sure that the applicant did have a propensity to carry knives, such propensity would be part of the circumstances which they could take into account when deciding whether the applicant committed the two offences. The judge emphasised that evidence of propensity was not directly probative of guilt and that it only formed a small part of the evidence in the case.

24. Was the judge required to say that the evidence of propensity was irrelevant to the count of murder? We do not consider that he was. This evidence went to the issue of whether the applicant had armed herself before she went out for the evening. If she did arm herself in advance, that was relevant to issues raised in relation to the count of murder. It would have said something about whether the use of the knife was deliberate. It would have been relevant to the reasonableness of the use of the knife, in particular the issue of instinctive response. It follows that we reject the first limb of Mr Cooper's submission.

25. The judge's direction in relation to the reasonableness of the force used by the applicant in self-defence was that the jury had to consider whether the force used was proportionate to the nature of the threat the applicant honestly believed she was

facing. The judge identified that a person under attack may not be able to judge precisely what is needed in response and that, if the applicant only did what she honestly believed was necessary to defend herself, this would be strong evidence that the response was reasonable. The proposition is that the judge ought to have gone on to say that the applicant's intent was relevant to the reasonableness of the response. We do not agree. Insofar as a person intends to do serious harm rather than to kill, that may be relevant to the issue of reasonableness. But a judge is not required to spell that out. It is encompassed in the general direction about a person only doing what they honestly believe is necessary to defend themselves. There may be any number of factors which impinge on a defendant's honest belief as to what is necessary. It will be for the jury to determine the extent to which any one of them is significant. On the facts of this case, it would have been impossible for the judge to give the kind of direction for which Mr Cooper argues. The issue for the jury was whether the applicant deliberately stabbed Jankiewicz, the applicant herself saying that she did not. The jury would not have been occupied with the issue of intent when deciding whether the prosecution had proved that the stabbing was unlawful.

26. The final argument of Mr Cooper is that the judge's summing up was unbalanced. At the conclusion of that part of the summing up relating to the facts immediately surrounding the stabbing of Jaskiewicz, the judge summarised the issues for the jury i.e. whether the stabbing was deliberate, whether the prosecution had disproved self-defence and whether the applicant intended at least to cause really serious harm. In relation to self-defence, the judge said "if you form the view that she may have believed that she needed to defend herself, was it then, applying that direction (i.e. the direction of law relating to self-defence), reasonable to stab an unarmed man in the chest with a knife rather than, say, leave the vehicle or take some other action? You will apply the direction I have given you." It is argued that, if anything were to be said beyond the original direction, the judge should have referred to the fact that the applicant had previously tried to leave the car without success and to the difference in the physical strengths of the applicant and Jaskiewicz. That complaint might have had some purchase if the observation of the judge had been included in the direction of law or if the judge had said anything which served to undermine that direction. The observation complained of was made in passing in that part of the summing up delivered orally. It concluded with the requirement that the jury had to apply the direction of law already given which they had in writing. In our view any lack of balance in the summing up was marginal. It could not begin to affect the safety of the conviction.

27. We turn then to the grounds of appeal which relate to the defence of diminished responsibility. The applicant relied on the evidence of Dr Iankov, a consultant psychiatrist specialising in dealing with women with mental health trauma resulting from sexual assaults and domestic abuse. His opinion was that, at the time of the killing of Jaskiewicz, the applicant was suffering from post-traumatic stress disorder ("PTSD"). This resulted from two events. The first, and the more significant, was the rape of the applicant when she was four days short of her fifteenth birthday. The account given by the applicant to Dr Iankov was that she had gone out with a male friend for a beer. They had been getting on well. Suddenly she felt weird and passed out. When she awoke, she was lying in a forest naked from the waist down with her clothing around her. There was blood on the ground. She dressed and went to a friend's house. The next day she reported the matter to the police. Nothing came of

the police investigation. The male returned to Poland. The applicant told Dr Iankov that for more than six months she was severely affected by what had happened to her. She tried to self-harm. She took an overdose. She would not go out. Thereafter, she resumed some kind of normal life but continued to suffer nightmares and flashbacks. She would often feel unsafe when out with friends.

28. The second significant event was the birth of her child when she was aged 17. Following the birth, the applicant reported that she had suffered severe depression. For about three to four months she was unable to cope and her mother took care of the baby. Thereafter, her symptoms improved.

29. Dr Iankov considered that the applicant, who Dr Iankov found to be functioning at a low intellectual level, continued to suffer symptoms of PTSD. She had flashbacks and nightmares. She continued to be uneasy when out with friends. He classified the PTSD as severe. He said that her condition substantially impaired her ability to judge the nature of her conduct. He cited as an example taking the knife from Zofie shortly before the killing. In his opinion the applicant was in a severely dissociated state which led her to be unable to process what was happening and what she was doing. He said that she was unable to form a rational judgment or exercise self-control. The circumstances in which she found herself and the effects of the PTSD led her to believe that she was about to be raped.

30. The applicant gave evidence the day before Dr Iankov. He was able to listen to her evidence. Her description of the rape was consistent with the account she gave to Dr Iankov. The applicant was cross-examined about Facebook messages that had passed between her and the man who was said to have raped her. On the day of the rape during the morning the messages involved an arrangement to meet in a park. There was a gap in the messaging between about 1 p.m. and 8 p.m. The messaging recommenced with a message from the applicant to the man in which she asked if he was sleeping coupled with an emoji of a kiss. Messages were exchanged regularly during the evening in which the man apologised because he had been unable to get it up because he had been drunk. The applicant said that they had both gone for it and they had both wanted it. The messaging was apparently friendly with some sexual innuendo. The next morning the applicant and the man resumed their messaging. It remained friendly with a suggestion that they would meet at some point. The mood changed later in the day when there was mention of pictures the man had taken of the applicant when she was naked. It was on the evening of that day, 1 June 2015, that the applicant went to the police. It was suggested to the applicant that her complaint of rape was because she was angry in relation to the pictures which she understood had been posted on Facebook.

31. Dr Iankov was asked about the effect of the evidence of the Facebook messages on his conclusion. He had not had sight of the material when he had prepared his report. He said that they did not alter his view as to the existence of PTSD. A fifteen-year old girl would have difficulty processing her first sexual experience. She might ask herself whether it was consensual or not. Dr Iankov pointed out that the applicant was apparently four years younger than the man. He did not consider that it was of significance to the diagnosis of PTSD whether the sexual encounter was rape or some kind of consensual activity but with an older man.

32. The prosecution called a consultant forensic psychiatrist, Dr Ho. He had prepared a report for the purpose of the trial. In that report he set out the account of the rape as given to him by the applicant. It was brief though consistent with the fuller account she gave to Dr Iankov. Dr Ho reported that the applicant did not display any evidence of psychotic thought disorder. She did not report any features of severe depression. Dr Ho said that the applicant had reported features consistent with PTSD – sleep disturbance, flashbacks, anxiety and avoidance – but he did not consider that her PTSD was severe. He noted that the applicant had had sexual relationships after the point at which she said that she had been raped, a factor he considered to be of significance when considering what kind of sexual activity had taken place in 2015. He referred throughout his report to "the alleged rape". He concluded that her PTSD did not amount to a significant abnormality of mental functioning. In addition, the level of PTSD present would not have substantially impaired the applicant's ability to judge the nature of her conduct, to form a rational judgment or to exercise self-control. He relied inter alia on the applicant's behaviour after the killing.

33. Dr Ho made no reference to the Facebook messaging material in his report. By the time he came to give evidence, which was after Dr Iankov, he had heard the cross-examination of the applicant in relation to that material. He was asked by prosecution counsel whether he would have expected messaging of the kind revealed by the Facebook entries had the applicant experienced a traumatic event shortly before which had led to PTSD. He said that he would not. He disagreed with the analysis of Dr Iankov in respect of that material. He said that his report was written before he had had the benefit of analysing the Facebook evidence which had been adduced the day before. Having done that, he was less convinced that the applicant suffered from PTSD or even that she had experienced the sexual trauma she alleged. He said that, if the applicant suffered from PTSD, it was only mild. He was asked about dissociation. He said that the account she was able to give to the police shortly after the event indicated that she had a recollection of events. That was inconsistent with a dissociated state. He concluded his oral evidence with his opinion that a single stab wound indicated that the perpetrator was in control of what they were doing.

34. When cross-examined Dr Ho had to concede that his assertion about a single stab wound being inconsistent with loss of control was not contained in his report. It was something he had first said in his oral evidence. Dr Ho agreed that, in the joint statement he had prepared with Dr Iankov, he had said that the applicant was suffering from moderate PTSD at worst whereas in oral evidence he had amended the level to mild PTSD at worst. He claimed that this was because of the Facebook material which had emerged in the course of the applicant's evidence. Dr Ho was shown a police document relating to the allegation of rape which he had had at the time he had prepared his report. It contained a section headed "Facebook undermining factor" which referred to substantial parts of the messaging material including the message from the applicant saying that they had both gone for it and they both had wanted it. Dr Ho was asked to explain why this report had not had the same effect that supposedly had been created by hearing the evidence in court. He said that the full content of the messaging gave a better sense of when the messages were sent and their frequency. Dr Ho was not cross-examined about the apparent inconsistency between what he had said during his evidence in chief and the fact that he had always had sight of the police document. The inconsistency was apparent on the face of his evidence. Dr Ho agreed that the applicant gave a description of

flashbacks and nightmares which were symptomatic of PTSD. He thought that it was unconvincing that this was due to rape. His view was that the applicant was dreaming of an unpleasant first sexual experience. He acknowledged that the only specific sexual partner whom he could identify from the applicant's account was the person who had made her pregnant and that this was a one-off encounter.

35. The evidence before the jury in relation to the rape said to have occurred in 2015 came from the applicant. She gave that evidence because the medical evidence on which she relied to substantiate a diagnosis of severe PTSD assumed that she had been raped. The jury also had the Facebook messages which had passed between the applicant and the man said to have raped her. This material was relevant since it was contemporaneous with the incident. The jury had an agreed fact that the police had not referred the case to the CPS and had not charged the man in question with rape. This was formal confirmation of what the applicant had told Dr Iankov and had repeated in evidence.

36. The second ground of appeal concerns the way in which the evidence relating to the rape in 2015 was dealt with by the judge, the prosecution and Dr Ho. The ground has various strands.

37. Mr Cooper argued that the evidence in relation to the rape allegation was mishandled. He submitted that the prosecution should have applied to adduce evidence of bad character pursuant to section 101(1)(d) of the Criminal Justice Act 2003 if they proposed to allege that the applicant's allegation of rape was false by reference to the Facebook messages. Had they done so, the defence would have been in a position to argue that admission of those messages would have undermined the fairness of the proceedings pursuant to section 101(3) of the 2003 Act. Further, had the prosecution made the application, submissions could have been made to the judge in respect of other material which should have been placed before the jury, namely the fact that the man had admitted having penetrative sex with the applicant, the crime reports relating to the offence and independent evidence of the decline in the applicant's mental well-being after the time of the rape.

38. We consider that these submissions are misconceived. The applicant's case in relation to diminished responsibility depended upon the fact of the rape in 2015. The evidence relating to the incident in 2015 had to do with the facts of the offence of murder with which the applicant was charged: section 98 of the 2003 Act. On the applicant's case, as elucidated by Dr Iankov, she killed Jaskiewicz because her responsibility was substantially diminished due to PTSD caused by the rape. The bad character provisions in section 101 of the 2003 Act did not apply. Evidence that the incident in 2015 had not occurred as described by the applicant was relevant to the issue of diminished responsibility. It could not possibly have been unfair to adduce such evidence. The other material which it is said could have been placed before the jury had an application under section 101 of the 2003 Act been made was equally relevant once the Facebook material had been admitted – if it was relevant at all. The crime reports might have been the source of agreed facts if there were any material in them of relevance. We have not been directed to any particular material which would have been of relevance. They could not have been admitted simply as crime reports. The evidence of the applicant's decline after the incident in 2015 would have been admissible irrespective of any challenge to the truth of the allegation. Dr Iankov gave evidence that there had been such a decline in the period following the incident. This

evidence was not challenged. Evidence that the man under investigation had admitted that he had had penetrative sex with the applicant would have taken the matter nowhere. The issue was whether sexual intercourse was consensual.

39. Mr Cooper also submitted that the prosecution at trial had misused the evidence said to undermine the applicant's account of the rape. In his closing address prosecution counsel had asserted, by reference to the Facebook messages, that her account was a lie. He thereby attacked the credibility of the applicant alleging that she had a propensity to be untruthful. This having happened the judge did nothing to remedy the position. He ought to have directed the jury that they would have to be sure that the allegation was false before finding any such propensity and that a propensity to be untruthful could not prove the case against the applicant.

40. We do not consider that any unfairness resulted from the approach taken by prosecution counsel. He was entitled to suggest that the applicant's account of being raped was not true. The Facebook messages provided an evidential basis for doing so. The jury were directed that, if the appellant's account of the rape might be true, they could take into account the conclusions drawn by Dr Iankov in relation to that event. Therefore, the burden was placed on the prosecution to prove that the account was untrue. Arguably that was a generous approach since the burden of proving the partial defence of diminished responsibility lay on the applicant. Further, the applicant had the benefit of a full good character direction which was tailored only in respect of her alleged tendency to carry a knife. That was more than sufficient to ensure that the jury approached the issue of the veracity of the applicant's evidence regarding the rape in 2015 properly.

41. Mr Cooper asserted that the evidence that the police had not referred the rape allegation to the CPS and/or that the man in question had not been charged was inadmissible. It amounted to opinion evidence in respect of the credibility of the allegation. Its purpose was to support the suggestion that the allegation of rape was false. That proposition is not made out. The jury were told about the outcome of the investigation simply to avoid any speculation on their part. It was wholly neutral. It was never put forward as evidence to support the case that the applicant had not been raped.

42. The final submission made by Mr Cooper in respect of the way in which the allegation of rape was approached in the course of the trial is that Dr Ho went beyond the bounds of his expertise when he expressed a view as to whether the applicant had been raped in 2015. He was entitled to give evidence about the symptoms displayed by the applicant, both historical and current, and to give his opinion as to the severity of those symptoms including whether they substantially diminished the applicant's responsibility for what she did in October 2018. He should not have expressed any view about what had happened to the applicant in 2015.

43. We consider that this proposition fails to grasp the significance of the history provided by someone in the applicant's position for a psychiatrist evaluating that person's condition. A patient's history is a vital part of diagnosis for any medical practitioner. In the medico-legal context a clinician will consider whether the history is consistent with the symptoms complained of by the patient. Dr Ho was certainly entitled to consider the severity of the symptoms as he found them to be and to assess what kind of trauma would have been necessary to create those symptoms. The

applicant's case was that her condition was such that she was unable to form a rational judgment and to exercise self-control at the time of the killing. According to the medical evidence on which she relied, this extreme reaction flowed from the fact that she had been raped in 2015. Psychiatric evidence that her symptoms were not sufficient to support the proposition that she had suffered severe trauma in 2015 was admissible. Dr Ho also was entitled to consider contemporaneous material – in this case the Facebook messaging – in assessing what, if any, trauma had occurred at the time.

44. Dr Iankov also used extraneous evidence to support his conclusions. In his case he relied on the fact that Zofie had given the applicant the knife very shortly before she used it to stab Jankiewicz. He said that this was good evidence that the applicant was not able to judge the nature of her conduct. That was a matter in dispute just as, on the prosecution case, the nature of the incident in 2015 was in dispute. It was not impermissible for Dr Iankov to rely on it.

45. It was for the jury to come to a conclusion about the facts including the nature of the incident in 2015 and how the applicant had come into possession of the knife. That could not prevent the psychiatrists giving their opinion based on the evidence they believed was available.

46. Where Dr Ho strayed beyond his expertise was when he doubted whether the applicant had been raped, a view he expressed in the light of the Facebook messaging. That was a matter for the jury, and they did not need the assistance of an expert witness to evaluate the significance and effect of the messaging. However, Dr Ho's evidence in relation to the significance of the messaging was significantly undermined in the course of cross-examination. When he said that he had amended his opinion as to the severity of the applicant's PTSD from moderate at worst to mild at worst because of the evidence he had heard during the trial about the Facebook messaging, he was presented with a police document which had been in his possession from the outset. This contained the significant parts of the Facebook material which Dr Ho said had led to his change of mind during the trial. What the jury made of Dr Ho's response was a matter for them. The suggestion that the full content of the messaging gave a better sense of when and how often it occurred might be thought to be less than convincing. The jury also would have had to consider the inconsistency between his evidence in chief and what he said in cross-examination in relation to his access to the Facebook material. The jury's consideration of Dr Ho's evidence was subject to the judge's written direction in relation to expert evidence. The direction emphasised that the jury were to reach their verdicts by reference to all of the evidence. Moreover, the evidence of any expert had to be assessed by reference to the quality of the analysis supporting any opinion expressed.

47. In our view, the views expressed by Dr Ho on this point would not have had a material effect on the jury's consideration of the issue. We do not consider that they render the conviction unsafe, not least in the context of the arguably generous direction of the trial judge that the prosecution had to disprove that the applicant had been raped.

48. The third ground of appeal raises wider issues relating to Dr Ho. It involves the consideration of fresh evidence which it is said should be admitted pursuant to section 23 of the Criminal Appeal Act 1968.

49. First, since the trial of the applicant in April 2019, there have been two instances of judicial criticism of Dr Ho. In *R v Choudhuri* [2019] EWCA Crim 2341 there was an application to adduce fresh evidence from two psychiatrists to establish that the defendant had not been fit to plead at the time of his trial. This court heard oral evidence from those psychiatrists, one of whom was Dr Ho. The court's assessment of Dr Ho's evidence is at [74] to [84]. The court considered that his evidence "came nowhere near meeting the criteria" required to show that the applicant was unfit to plead. The court went on to describe his evidence as "confused and unsatisfactory" because it did not grapple with obvious inferences to be drawn from the circumstances.

50. In 2021 a man named Grusza stood trial in the Crown Court at Cambridge on a single count of murder. The only issue in the case was whether he was insane at the time of the killing. In due course a jury found him not guilty by reason of insanity. Two consultant psychiatrists gave evidence in support of the defence of insanity. Prior to the trial the prosecution instructed Dr Ho. Dr Ho did not support the defence of insanity. An issue arose as to the admissibility of his evidence. The defence applied for his evidence to be excluded on the grounds that he had failed to specify and/or to disclose material on which he had relied in reaching his conclusions. In the event no ruling was made by the judge. The prosecution decided not to rely on Dr Ho's evidence. At the conclusion of the trial the trial judge, Mr Justice Fraser, was invited by the defence to require the CPS to conduct an inquiry into Dr Ho and his alleged failings. The judge acceded to the defence invitation. He described the position in relation to Dr Ho as being "of great concern".

51. The CPS reported on the outcome of its inquiry on 5 May 2022. The inquiry found that there had been failings of disclosure on the part of Dr Ho. His failings had been exacerbated by failings on the part of the CPS. There was a finding that "it was at least arguable" that Dr Ho had failed to take account of or give proper weight to relevant information in reaching his conclusion. This raised questions as to his professional competence which required further investigation. The CPS referred the matter to the GMC. The GMC's consideration of Dr Ho's case is ongoing. For the time being, he is not being instructed as a forensic psychiatrist by the CPS.

52. It is argued that these matters should be received as fresh evidence. Clearly they were not available at the time of the trial. They were matters which could have been deployed at any trial in which Dr Ho was involved. It is said that they would have fatally undermined his evidence and that he is now a wholly discredited witness.

53. We consider that the comments made by this court in *Choudhuri* cannot have the effect of discrediting any evidence that might be given by Dr Ho. On the facts of that case his conclusions were criticised. His integrity was not brought into question. The court's judgment provides no basis for any wider criticism of Dr Ho. Dr Ho's position in relation to the case of Grusza is different. After an inquiry by the CPS to which he was able to contribute, it was found that he had failed to disclose matters which he should have done. That finding would be relevant were there to be an issue of disclosure in this case. As to the wider criticism of his professional competence, the position is unresolved. The CPS inquiry found that it was arguable that Dr Ho's competence was open to question. Unsurprisingly, the CPS went no further than that and referred the matter to Dr Ho's professional regulatory body, the GMC.

54. We conclude that no issue of disclosure in respect of Dr Ho arises in this case. The note of 7 July 2023 from Mr Cooper raised two substantive issues. These were developed at considerable length in his further submissions of 28 July 2023. We do not consider that the further submissions added to the substance of his argument. First, it was not disclosed that Dr Ho was instructed directly by the police rather than by the CPS. Second, it was not disclosed that Dr Ho had the police document which set out inter alia the significant parts of the Facebook messaging but also other comments by the investigating officers about the applicant's credibility. Neither of these points is sustainable. Insofar as it mattered from whom Dr Ho took his instructions, it was stated on the face of his report that he had been instructed by the Major Crime Unit of Cambridgeshire Constabulary. The reality is that it did not matter which body formally had instructed him. He was acting on behalf of the prosecution. As to the police document, this was disclosed at the trial. It was used by defence counsel effectively to cross-examine Dr Ho. Defence counsel plainly was aware that Dr Ho had had the document when he prepared his report. There was some deficiency in disclosure in the course of the appeal proceedings, disclosure only being given of an earlier and shorter police document. This was of no relevance to the conduct of the appeal or to the assessment of the evidence of Dr Ho. There is no matter on which Dr Ho relied which was not known at the time of the trial which since has emerged. His evidence had to be judged on its merits.

55. What of the proposition that Dr Ho is now demonstrably a discredited witness? The tentative view expressed by the CPS in its inquiry report does not lead to that conclusion. How Dr Ho's professional competence will be judged by the GMC is speculative. It is not possible to say what the eventual conclusion will be i.e. whether there will be a finding about professional competence and, if so, the extent of the evidence relied on by the GMC. Were the applicant to be tried tomorrow for the offence of murder, the prosecution would not instruct Dr Ho. That does not mean that he is discredited. It simply means that, whilst he is under investigation, the CPS consider it inadvisable to have him as a witness.

56. In our judgment the fresh evidence relating to Dr Ho does not affect the safety of the conviction. Although the psychiatric evidence was a significant feature in the trial, it must be remembered what the evidence as called by the defence was seeking to establish, namely substantial impairment in the applicant's ability to form a rational judgment and to exercise self-control. The evidence of the applicant was the starting point for the jury's consideration of those matters. She explained that she took out the knife in order to deter Jankiewicz from attacking her. Pushing and shoving followed during which she stabbed him when she did not realise that she had the knife in her hand. When considering the psychiatric evidence, the jury had to assess the circumstances of the use of the knife as described by the applicant and, to a lesser extent, Zofie and Peter. Those circumstances did not appear to give rise to the elements required for the partial defence of diminished responsibility.

57. For all of those reasons we do not find that any issue relating to Dr Ho affects the safety of the conviction.

58. The applicant also seeks to rely on fresh evidence from a consultant psychiatrist, Professor Forrester, a clinical psychologist, Dr van Brandt and a new report from Dr Iankov. Professor Forrester's first report is dated June 2020. It is not necessary for us to rehearse the substance of that report. It does no more than mirror the evidence of

Dr Iankov together with some critical commentary on the approach of Dr Ho to the issue of PTSD. This evidence is not fresh evidence. It is merely confirmatory of expert evidence given at the trial. The purpose of section 23 of the 1968 Act is not to permit an applicant to re-run a defence with different expert evidence.

59. Dr van Brandt found that the applicant's intellectual functioning was at a relatively low level. He reached that conclusion in the light of psychological testing. Dr Iankov reached precisely the same conclusion albeit without the benefit of psychological tests. Dr van Brandt's finding on this issue adds nothing to the evidence available at trial. Dr van Brandt also concluded that the applicant was suggestible and compliant. Dr Iankov has provided a further report to explain why this finding would be relevant, namely that it supports the proposition that the applicant would have been susceptible to grooming by the man who raped her in 2015. In our judgment this evidence would have been of marginal significance had it been adduced at trial.

60. Professor Forrester also considered the findings of Dr van Brandt in a report dated February 2021. He said that the findings indicated that the applicant suffers from a mild learning disability. This was of two-fold significance. First, had it been recognised, adjustments could have been made in the course of the trial e.g. the provision of an intermediary. Second, a mild learning disability is a recognised medical condition in respect of which diminished responsibility could have been considered. The issue of adjustments to the trial process is not the subject of any ground of appeal. At no point has it been suggested that the applicant was not able to give a satisfactory account of herself in court or was otherwise unable to participate in the proceedings. Professor Forrester's opinion in relation to any mild learning disability is not developed and not tethered to the evidence in the case. It would not afford any ground for allowing the appeal.

61. Professor Forrester provided a third report dated September 2022. This dealt with the discrete issue of disassociation. In different language he made the same point that had been made at trial by Dr Iankov. The third report is not fresh evidence for the same reasons as apply to his first report.

62. It follows that we do not consider that the evidence from Professor Forrester, Dr van Brandt and Dr Iankov would have affected the outcome of the trial. Thus, it does not afford any ground for allowing the appeal.

63. For all of these reasons we refuse the renewed application for leave to appeal against conviction. The application for leave to appeal against sentence will have to be heard on a future date convenient to the parties. It will not be necessary for the same constitution in its entirety to hear the application in relation to sentence though at least one member of the current constitution should form part of the constitution which considers that application.