Neutral Citation Number: [2021] EWCA Crim 380

Case No: 201903270 B2 & 202001700 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT OXFORD
MR JUSTICE SWEENEY
T20187145

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2021

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MRS JUSTICE WHIPPLE DBE
and
MR JUSTICE FORDHAM

- -

Between:

Benjamin Luke FIELD	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr David Jeremy QC & Mr Paul Wakerley (instructed by **Reeds Solicitors**) for the **Appellant**
Mr Oliver Saxby QC & Ms Victoria Ailes (instructed by **CPS Criminal Appeals Unit**) for the **Respondent**

Hearing dates: 28th January 2021

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Approved Judgment

Lord Justice Fulford V.P.:

Introduction

1. This is an appeal against conviction by leave of the single judge. On 21 March 2019, in the Crown Court at Oxford (Sweeney J), the appellant, now aged 30, pleaded guilty to four counts of fraud (counts 4, 8, 9, 10 on the original indictment, "OI") and two counts of burglary (counts 11 and 12 on the OI).

2. On 9 August 2019, before the same court, the appellant was convicted by the jury of the murder of Peter Farquhar ("PF") (count 1 on the trial indictment "TI").

3. He was acquitted by the jury of conspiracy to murder (count 3 TI), attempted murder (count 4 TI) and possession of an article for use in fraud (count 8 TI). Counts 3 and 4 related to Anne Moore-Martin and Count 8 to Elizabeth Zettl.

4. On 18 October 2019, before the same court, he was sentenced to imprisonment for life, and the period of 36 years was specified as the minimum term under section 269(2) Criminal Justice Act 2003.

5. He had two co-accused. Tom Field ("TF"), the appellant's brother, was acquitted by the jury of one count of fraud (count 6 TI). Martyn Smith ("MS") was acquitted by the jury of murder (count 1 TI), conspiracy to murder (count 3 TI), three counts of fraud (counts 2, 5 and 6 TI), burglary (count 7 TI) and possession of an article for use in fraud (count 8 TI).

6. The appellant appeals against his conviction on count 1. He also applies for an extension of time in which to seek leave to appeal against sentence, following identification of a potentially unlawful element of the sentence by the Registrar. This latter application has been referred to the full court by the Registrar.

The Facts in Outline

7. The appellant accepted that from late 2012 until mid-2017 he had pretended to be in a genuine and caring relationship first with the deceased, PF and subsequently, with Anne Moore-Martin ("AMM"), when instead he was seeking to manipulate and exploit them for his own gain. He admitted several frauds against PF and AMM, along with burglaries at the homes of other elderly people in the same street.

Peter Farquhar (PF)

8. PF was aged 69 years old when he died in October 2015. He lived at 3 Manor Park, Maids Moreton, Buckinghamshire having shared the house with his mother until her death in 2002. He was a retired English teacher, although he continued to lecture at the University of Buckingham. He was a novelist. He experienced good health, remained mentally sharp and kept detailed journals. He found it difficult to resolve his strong Christian beliefs with his gay sexuality. As a consequence, throughout his adult life he remained celibate and although he

was close to his family and had a wide circle of friends, he was said to have been a lonely man who craved love and affection.

9. The appellant, in his early twenties and studying at the University of Buckingham in 2012, appreciated and ruthlessly exploited PF's vulnerability. He set about seducing PF, claiming to share the same interests and beliefs. He moved in with PF in 2013. The two men commenced what PF thought was a mutually loving and supportive relationship. In 2014, the appellant proposed, and they arranged, a "betrothal ceremony". PF was persuaded to change his will so that the appellant would receive a large inheritance. In 2015, the appellant gave the impression that he was caring for PF, who appeared to be suffering from a mystery illness, potentially some form of dementia. In fact, the appellant was covertly drugging PF but suggesting to others that the latter was drinking too much and was developing a suicidal ideation.

10. PF was found dead in his home by his cleaner on 26 October 2015. He appeared to have drunk himself to death. The appellant inherited substantially from his estate.

11. The issue left for the jury by the judge on count 1 was whether they were sure the appellant, with intent to kill, had given PF alcohol and/or Dalmane (a drug prescribed for insomnia), and/or smothered him causing his death. Whether the judge's directions to the jury in this regard were correct in law is the focus of this appeal.

Anne Moore-Martin (AMM)

12. Shortly before PF was found dead, the appellant also began a relationship with AMM, aged 83, the circumstances of which were relevant to the course of the investigation into the death of PF.

13. AMM lived alone at her home, 6 Manor Park, in the same street as PF, and was also a retired teacher. She was a regular Catholic churchgoer with a strong faith. She suffered from two brain conditions, but her intellectual powers were still good for her age. As with PF, the appellant realised that she was lonely and therefore vulnerable to his seduction and exploitation.

14. The appellant sent AMM cards, gave her gifts and researched sex with the elderly on the internet. Only a month after PF's death (in November 2015), the appellant began a sexual relationship with AMM. He again set about falsely persuading her that he loved her, so that he could exploit her. He wrote messages on mirrors in 6 Manor Park, successfully persuading her that they were messages from God. These were designed by the appellant to persuade her to change her will and to leave her home to him, rather than to her niece.

15. He persuaded AMM to give him money for a car and to fund a dialysis machine for his brother's invented kidney disease. Without her knowledge, he also took pictures of her performing a sex act on him, so that he could use these against her in the future, should the occasion arise.

16. When, in late 2016, AMM attempted to change her will in the appellant's favour, coincidentally she went to the same firm used by PF and the solicitor became suspicious. She

informed AMM that the appellant had inherited from PF's will, causing AMM to change her mind. However, the appellant increased his efforts and eventually in December 2016, she altered her will, despite, as she was to express to police later, feeling uncomfortable about doing so.

17. In November 2017, AMM became ill and went into hospital. While she was there, the appellant removed items from her home that he feared may incriminate him. Her niece, Ann-Marie Blake, who encountered him at the premises, became suspicious of his behaviour and alerted the police. Shortly afterwards, however, AMM passed away from natural causes.

18. The prosecution relied on the hearsay statements of AMM to the police prior to her death, regarding her relationship with the appellant. There was evidence on this issue from Ann-Marie Blake. The Crown introduced medical evidence, regarding AMM's various health conditions and her visits to doctors prior to her death.

19. During the ensuing investigation into AMM's death, the police reconsidered the death of PF. The appellant was initially arrested on the fraud offences but in due course he was charged with the murder of PF and conspiring/attempting to murder AMM. Other than a short, prepared statement, the appellant gave no account when interviewed by the police.

The Prosecution Case in Detail as regards the Murder of Peter Farquhar

20. On count 1 (murder), the Crown alleged, therefore, that the appellant falsely persuaded PF that he loved and cared for him and PF as a consequence fell in love. This was the beginning of a detailed plan, about which the appellant kept a detailed record in journals and notes. He had determined to manipulate PF into changing his will, with the intention thereafter of killing him. He sought to make PF's death appear to have been suicide.

21. Having moved in with PF in November 2013 and following the "*betrothal ceremony*" in 2014, the appellant set about covertly drugging PF. From at least January 2015 to the end of September 2015, the appellant regularly administered prescription and hallucinogenic drugs to PF, often disguised in food or drink. The toxicological analysis of PF's remains demonstrated repeated administrations of sedating drugs in the months preceding his death. These included lorazepam, trazadone, diclazepam, and flubromazolam. The appellant's diary documented these covert administrations, and the amounts and timings broadly correlated with symptoms experienced by PF as detailed in his own journal entries.

22. The appellant "*gaslighted*" PF, that is he persistently manipulated and brainwashed him, thereby instilling self-doubt and a diminished sense of perception, identity, and self-worth. He secretly moved objects around the house and hid things. His purpose was to ensure there was no suspicion that PF had been murdered but instead, whilst ill and when alone, he had drunk himself to death.

23. Once PF had changed his will in the appellant's favour, the latter took the next step in the plan and murdered him on 25 October 2015. The prosecution relied on the simple and self-evident proposition that in order for the fraud relating to the will to succeed the victim had to die. The

prosecution needed to prove that the appellant gave PF the alcohol and/or the Dalmane, and/or smothered him in circumstances that materially contributed to his death.

24. The evidence the Crown relied on came from a variety of sources. The prosecution presented a detailed timeline identifying the key events which they linked to the relevant documentary evidence. The journals kept by PF provided hearsay evidence chronicling his life and thoughts over the period he was being deceived by the appellant. The prosecution relied on evidence from the friends and family of PF, regarding his character, his drinking habits and his relationship with the appellant. There was medical evidence detailing the prescription drugs taken by PF and his various visits to doctors in the months before his death. As to the death of PF, the Crown introduced evidence from PF's cleaner, along with the paramedics and the police, about the finding of PF's body on 26 October 2015. DNA and fingerprint evidence matching that of the appellant was found on the glass and the bottle next to PF when he died.

25. There was pathology evidence as to the cause of death and the presence of alcohol and drugs in PF's system both before and at the time of his death. In this regard we note a number of expert witnesses examined PF's body after he had died. It was suggested that there was no medical evidence to support the suggestion that PF was an alcoholic or had any mental health issues. When this evidence was considered with the other evidence in the case, in particular the notes and journals, it suggested a systematic campaign by the appellant to drug PF and encourage him to drink, in order to make it look like there was something wrong with him, when in fact there was not.

26. The evidence of Dr Bailey, who conducted the first post-mortem, was that PF's body showed a blood alcohol level of approximately three times the legal drink drive limit. At the time, he concluded that the quantity was sufficient to cause acute alcoholic intoxication, coma, and death in a person who was not a persistent heavy drinker, and he recorded the cause of death as "*acute alcohol toxicity*".

27. However, once the police investigation into the appellant's behaviour towards AMM was underway, a second post-mortem examination was carried out by Dr Lockyer. He found that the cause of death was acute alcohol toxicity and Dalmane use. Alcohol and Dalmane should not be used in combination and Dr Lockyer's evidence was that the combination of the two was likely to have resulted in the potentiation of the sedative effects of both substances, and could have proved fatal by decreasing the level of PF's consciousness, thereby creating a threat to the maintenance of an adequate airway. He could not rule in, nor rule out, the possibility of smothering as it was possible to do this without leaving any evidence. However, there was no pathological evidence that PF had been smothered.

28. In the light of this evidence, the prosecution argued that the appellant had a motive to kill PF (in order to inherit from his will) and his notes as to how he intended to go about the murder accorded with the method he had actually used on the night of 25 October 2015. By way of detail, the jury were provided with extracts from the journals and notes of the appellant, evidencing his thoughts and intentions, detailing his covert drugging and "*gaslighting*" of PF and his research into alcoholism, strong whisky, suicide and the methods by which one might kill another. The appellant had a white notebook which contained extensive notes concerning

PF. A comparison of these notes showed in some detail the drugs and alcohol administered to PF in 2015 and the effects they had upon him. It was suggested by the Crown that this was a plot long in the making: one of the appellant's notes set out *"I moved in [that is, in 2013] so he could die [which took place in October 2015]."* The appellant's notes revealed that he explored the possibility of inducing his victim to commit suicide; but this approach failed, as the notes also recorded (*"It became clear that he suicides not"*). The allegation against the appellant was that he then conceived a plan that PF should appear to have succumbed to an alcoholic's death. To that end, he created a false narrative that the victim was drinking to excess and/or suffering from dementia. He sought to establish that his death was an unsurprising event, and he was assisted in this endeavour by the effects of the drugs he was covertly administering, which appeared to others to indicate that PF was intoxicated.

29. The prosecution suggested that the appellant in one of his notes set out what he had planned, and thereafter put into effect, in order to kill PF on 25 October 2015 – "*High percentage malt £. Suffocation only a mistake if either survival or evidence ensues. Feed Dalmane and alcohol and less air*".

30. Diana Davis, the solicitor, gave evidence concerning the changes to PF's and AMM's wills. The prosecution relied on the appellant's propensity, namely his guilty pleas in relation to various frauds and burglaries, and a video made by the appellant at the care home where he worked which established his exploitation of another elderly person. There were various relevant emails between the appellant and his co-accused. The Crown relied on the appellant's failure to mention multiple facts in interview which he relied on at trial. There was a schedule of Agreed Facts.

The Defence Case

31. The defence case was that, despite the appellant's admitted and repulsive behaviour towards PF, he had not, in fact, intended to kill PF and he had not murdered him. He accepted he had lied to and deceived almost everyone he came into contact with between 2012 and 2017. He admitted he had lied to PF as to his true feelings and that he had intended to inherit from him on his death. He had similarly lied to AMM and had defrauded her of various sums of money. He burgled the properties owned by other elderly people in the street, because, in his words, "*he could*".

32. He acknowledged that he had drugged and gaslighted PF, causing him great suffering. He had manipulated AMM (although he denied having drugged her or encouraged her to commit suicide) and he accepted this had caused her regret and misery when she discovered what he had done, shortly before her death. He accepted that he was a "*snake talker*" and prided himself on his ability to manoeuvre people to achieve his ends without ever actually asking them directly to do what he wanted them to do. However, he denied ever intending to kill PF, he denied having any part in his death and he denied conspiring to or attempting to kill AMM.

33. Between 2012 and 2017, he had also engaged in casual relationships with various women, including particularly Lara Busby and Satara Pracha to whom, he accepted, he had consistently lied. He maintained that he was not homosexual, albeit had had a number of sexual experiences with men, which he suggested he had not enjoyed but had used to test himself. He accepted he had lied about the extent of his sexual experiences with men during examination-in-chief because, as he suggested, he had felt ashamed talking about these experiences in front of his parents. He insisted, however, that he had told the truth in evidence about all other matters.

34. Focussing on the journals and notes, the appellant suggested he had lived an isolated and internalised life since his school days. He had acquired the habit of reading extensively, including dictionaries, and he made copious notes (some of which the police found within computer files). He maintained that in the absence of genuine relationships or communication with others, he used to write as a means of working out his thoughts and as an outlet for frustrations and feelings that he could not otherwise express. While the appellant's notes included numerous references to various ways in which both PF and AMM might die, his writings also included many references to other – what he suggested to be – wholly fantastical ideas.

35. He used the white notebook to write about PF. He claimed that he was genuinely interested in PF's journals, which he copied out in large part. He also made notes about characters and storylines for PF's last book, on which he claimed they were collaborating. He said that although some of the things he had written represented his thinking and intentions, others did not and were simply for amusement, to blow off steam or to see how they looked on paper. He maintained that he had written many of the notes in the white notebook, including the note "*Feed Dalmane and alcohol and less air*", after PF's death. This otherwise highly incriminating entry therefore did not reflect his future intentions or a settled plan to kill PF.

36. On 25 October 2015, the appellant went away for the weekend and he asked MS (Martyn Smith) to stay with PF on the Saturday night. He had bought a bottle of whisky for MS as a "*thank you*". MS ended up leaving the bottle at the house when he left on the Sunday morning. Having arrived for dinner on the Sunday night, the appellant decided to leave the bottle out as a temptation and a test for PF. The victim had been trying to abstain from drinking on the advice of his doctor after his apparent illness. The appellant's account was that when, as he claimed, he left the house after dinner, neither he nor PF had drunk any whisky. He was not aware that PF had taken any Dalmane that night. He tried unsuccessfully to call PF several times later that evening and during the following morning. He was informed of PF's death by the cleaner.

37. The appellant accepted that whilst the bottle of whisky must have played some part in the fatality, he had not intended to kill PF. He maintained he had played no direct part in PF drinking alcohol that night and he was not present when he died.

38. His case was summarised by the judge as follows:

> "On behalf of Ben Field, it is submitted that the prosecution evidence suggests that, having discovered that Peter Farquhar 'suicides not', Ben Field encouraged him to drink alcohol and to put him at greater risk of dying, rather than murder him. It is argued the evidence does not prove that Ben Field was present at the time of Peter Farquhar's death, or prove that he gave him alcohol or drugs as alleged."

39. The appellant accepts that the jury must have rejected his account that he left the whisky for PF as a temptation and a test that night. They must have concluded that the appellant was present and provided alcohol (and/or Dalmane and/or smothered him).

The Grounds of Appeal

40. Mr Jeremy Q.C., on behalf of the applicant, submits that the grounds of appeal should be viewed in the context of the relevant background evidence. PF was found dead by his cleaner on 26 October 2015 slumped on his sofa. Next to him, on a side table, was a bottle of 60% proof whisky, with a glass on the floor by his feet. As set out above at [26], the initial post-mortem concluded that the cause of death was "*acute alcohol toxicity*" with no signs of trauma or other suspicious circumstances. There was evidence to suggest that PF liked malt whisky and drank it often (indeed, submits Mr Jeremy, by his own estimation he drank it excessively).

41. When PF's body was exhumed in 2017 and the second post-mortem was carried out, only a relatively small amount of Dalmane was found in his body, consistent with a therapeutic dose. No trace of the drug was found in the remaining whisky or in the glass found at his feet. PF had been prescribed Dalmane for insomnia but only took it intermittently. As set out above at [27], Dr Lockyer's evidence was that the combination of alcohol and the Dalmane was likely to have resulted in the potentiation of the sedative effects of both substances. This might have proved fatal through decreasing the level of consciousness and threatened the maintenance of an adequate airway.

42. It is submitted that the prosecution case at trial was conspicuously silent as to how it was alleged the appellant had killed PF. It is argued this was the inevitable result of the lack of evidence as to what happened. The theory that the appellant may have suffocated PF was based, as the appellant contends, on an erroneous interpretation of the evidence, including what is described as a rather obscure note "*Feed Dalmane and alcohol and less air*" (see [35] above). On the appellant's account, it is stressed this was allegedly part of a fictional version of PF's death written after he had died.

43. It is submitted that this case involves consideration of the circumstances in which the voluntary act of the victim displaces the responsibility of the principal or perpetrator, with the result that the victim became the "*doer of the act*" and the "*causer of his death*", particularly as considered by House of Lords in *R v Kennedy (No 2)* [2007] UKHL 38; [2008] 1 AC 269. The act of suicide is suggested to be one example of such a voluntary act.

44. It is highlighted that it was only shortly before the legal directions were given to the jury by the judge that the prosecution indicated that they would argue that PF's drinking of the alcohol

should not be regarded as voluntary because the appellant had deceived him into drinking by not revealing his intention to kill PF. The judge was persuaded to adopt this approach. In the event, his directions prompted a note from the jury on the issue, to which the judge responded, as set out below at [55] and [57], by repeating his original directions (albeit in a slightly different order).

45. Mr Jeremy argues that the crucial question for the jury was causation. They needed to determine whether the appellant had caused PF's death, given, as the appellant suggests, the voluntary consumption by PF of alcohol or drugs would displace the appellant's responsibility as the doer of the act that caused PF's death. Mr Jeremy submits that the judge should have left to the jury the question as to whether PF's consumption of whisky broke the chain of causation. The judge's direction, therefore, needed to be explicit as to, first, the alleged acts by the appellant that were capable of being more than a minimal cause of death, and second, the events that were potentially capable of breaking the chain of causation vis-à-vis the appellant's liability for the death. It is contended that the judge should have directed the jury that in order to convict the appellant they needed to be sure that his deception as to his intention to kill PF was the cause of the latter's decision to consume alcohol and/or drugs and that, but for the deception, PF would not have consumed the alcohol and/or drugs.

46. It is argued that the judge erred in his direction to the jury regarding causation in that he conflated the concept of a "*more than a minimal cause*" with "*deceit*", thereby misleading the jury as to the issue of voluntariness. In this context, it is suggested he failed to explain the critical importance of a voluntary decision by PF to consume alcohol and/or drugs. In a similar vein, it is contended that the judge failed to identify the evidence – if any existed – to the effect that the victim's consumption of alcohol and/or drugs was involuntary. As set out in the preceding paragraph, it is argued the judge should have directed the jury that they needed to resolve "*whether the appellant's failure to reveal his intention that the victim should die, in fact, caused the victim's consumption of alcohol and/or drugs to be involuntary*".

47. Additionally, it is asserted that the judge's directions failed to distinguish between the act of giving any amount of drink and giving a sufficient quantity to equate to more than a minimal cause of death. Mr Jeremy argues that the judge should have directed the jury that they had to be sure that PF's consumption of alcohol or drugs needed to be involuntary in the sense of having been obtained by force, duress or deceit, with the result that the appellant rather than PF did the act which caused the latter's death. In this context, Mr Jeremy accepts that PF's consumption of drink or alcohol would not have been voluntary – it would not have been free, deliberate and informed – if he had been forced to commit the act or had been misled as to the nature of it. By way of example, Mr Jeremy uses the image of the victim who is given a drink that, unknown to him, had been laced with cyanide. It is accepted that this would be capable of rendering his consumption of that drink involuntary because the deceit would have left the victim uninformed as to the true nature of his act.

48. If – says Mr Jeremy – the victim, therefore, is informed (*viz*. knows the facts that are relevant, most particularly as regards the contingent risks of harm) the decision will be voluntary. The fact that he or she is unaware of other facts that were not relevant to the nature of the act, and the risks attaching to it, would not remove the voluntary nature of the act. PF's ignorance of the appellant's secret intention thus did not change the nature of PF's act or his perception of the risk of harm attaching to it. Accordingly, on the appellant's submissions PF's decision to take drink was informed and voluntary.

49. It is accepted by Mr Jeremy that a defendant's **intention** can, in certain circumstances, be relevant to the risk attaching to a course of action. He gave this example. If an accused, for instance, encouraged a weak swimmer to take to the water having promised to provide assistance if the swimmer encountered difficulties, but privately had no intention of doing so and did not do so, the accused could be criminally liable for the victim's death by drowning in these circumstances. The victim had volunteered to swim on the false assurance of rescue if the need arose. The victim's uninformed state as to the defendant's actual intention would have changed the nature of the act embarked upon and rendered it more dangerous.

Discussion

50. Although Mr Jeremy advanced, as a significant part of his submissions, a highly detailed criticism of the prosecution for the way they presented and developed their case, along with an analysis of the genesis of the final arguments of the parties as to the approach to be taken to the charge of murder in the circumstances of this case, this appeal turns on the single question of whether the judge's directions to the jury were legally correct. Although we have considered the detail of Mr Jeremy's criticism and the development of the submissions, they are not in any sense determinative of this appeal. It follows that in this analysis we have, instead, focussed on the judge's directions to the jury.

51. Having reminded the jury to bear in mind all the relevant directions, the written direction provided to the jury on the "*ultimate question*" on count 1 set out the following:

> "i) Have the prosecution made us all sure that Ben Field intended to kill Peter Farquhar?
> If you all answer yes – to go question 2.
> If you all answer no – verdict "Not guilty"
>
> ii) Have the prosecution made us sure that, with intent, Ben Field did one or more of the acts alleged by the prosecution (i.e. in person, giving Peter Farquhar drink, and/or Dalmane, and/or suffocating him) which was/were a more than minimal cause of Peter Farquhar's death?
> If you all answer yes – verdict "Guilty".
> If you all answer no – verdict "Not Guilty" […]"

52. The judge in an earlier written direction in the same document described the prosecution's case on count 1 to the jury in the following way:

> "Ben Field is alleged to have carried out the murder of Peter Farquhar, in accordance with the plan that he should "die an alcoholic's death", by being present in person and physically giving him alcohol and/or Dalmane and/or by smothering him.
>
> It is for the prosecution to prove its case as thus advanced. I emphasise that simply having left the bottle to tempt Peter Farquhar to drink the whisky is not the prosecution case and is not sufficient for proof of guilt on this count.
>
> […]
>
> Murder is committed if, unlawfully and with intent to kill, a person does an act which causes the death of another.
>
> […]
>
> An act causes the death of another if it is more than a minimal cause of it. If it is proved that, with intent to kill, Ben Field, in person, gave Peter Farquhar drink then, even if Peter Farquhar agreed to drink it, it would be open to you to conclude that the giving was a cause of death, unless Peter Farquhar's decision was informed in that he knew that the drink being offered to him was intended to cause his death.
>
> I repeat, simply having left the bottle to tempt Peter Farquhar is not the prosecution's case, and it is not sufficient for proof of guilt on this count. Rather, the prosecution must make you sure of the case that they have advanced.
>
> Ben Field's defence is that, although he had left the whisky bottle for Peter Farquhar to find, he had gone before Peter Farquhar found it and drank from it. It is his case therefore that he was elsewhere (on the way back to Towcester or in Towcester) when the fatal events occurred."

53. As delivered during the summing up, the judge said:

> "Count 1: murder. Ben Field is alleged to have carried out the murder of Peter Farquhar in accordance with the plan that he should die an alcoholic's death, by being present in person and physically giving him alcohol and/or Dalmane, and/or by smothering him. It is for the prosecution to prove its case as thus advanced. I emphasise that simply having left the bottle to tempt Peter Farquhar to drink the whisky is not the prosecution case and is not sufficient for proof of guilt on this count. On behalf of Ben Field, it is submitted that the prosecution evidence suggests that having discovered that Peter Farquhar suicides not, Ben Field encouraged him to drink alcohol to put him at greater risk of dying rather than murder him. It is argued that the evidence does not prove that Ben Field was present at the time of Peter Farquhar's death, or prove that he gave him alcohol or drugs as alleged."

54. Otherwise, the judge's summing up followed the written directions set out above, and he added at the conclusion of this section:

> "That said, you do not all have to be sure which of the alleged methods of killing was used by Ben Field, it is sufficient for a verdict of guilty that between you are all sure that it was one or the other."

55. Having retired during the afternoon of 16 July 2019, during 18 July 2019 the jury sent a note as follows:

> "i) Is Peter Farquhar's DNA on the whisky bottle from the night of 25th October 2015? Was the bottle tested for his DNA?
>
> ii) Could we have clarity on the 4th paragraph on p.22 of your legal directions, especially regarding the implications if Ben and Peter were drinking together on 25th October 2015?"

56. As set out above at [52], the "4th paragraph", to which the jury note referred, contained the following:

> "An act causes the death of another if it is more than a minimal cause of it. If it is proved that, with intent to kill, Ben Field, in person, gave Peter Farquhar drink then, even if Peter Farquhar agreed to drink it, it would be open to you to conclude that the giving was a cause of death, unless Peter Farquhar's decision was informed in that he knew that the drink being offered to him was intended to cause his death."

57. The judge responded as follows:

> "Right, thank you. In order to answer your question, I am firstly going to remind you what the definition of murder is, because that is going to underlie my answer. And it begins at the bottom of page 21. "Murder is committed if, unlawfully and with intent to kill, a person does an act which causes the death of another. It is only lawful to kill someone if the person who kills is acting in necessary and reasonable self-defence, whether of himself or another," which obviously, does not arise in this case. You are entitled to infer what a person's intention was, from all the relevant circumstances including what they did or did not do and did or did not say, whether before, during or after the incident, something juries do all the time.
>
> The prosecution do not have to prove motive. However, in this case it is alleged that there is one, as I have set out. And "an act causes the death of another, if it is more than a

minimal cause of it." I am going to stop there insofar as that paragraph is concerned. It is then, important to remember what the cases on either side are insofar as the actual murder itself is concerned. In which event, we need to go back to page 20, at the bottom. The prosecution case, Ben field is alleged to have carried out the murder of Peter Farquhar in accordance with the plan that he should die an alcoholic's death by being present in person and physically giving him alcohol and/or Dalmane and/or by smothering him. It is for the prosecution to prove its case as thus advanced. I emphasise that simply having left the bottle to tempt Peter Farquhar to drink the whisky is not the prosecution case and is not sufficient for proof of guilt on this count.

On behalf of Ben Field, it is submitted that the prosecution evidence suggests that having discovered that Peter Farquhar's suicide is not, Ben Field encouraged him to drink alcohol and to put him at greater risk of dying rather than murder him. It is argued that the evidence does not prove that Ben Field was present at the time of Peter Farquhar's death, or prove that he gave him alcohol or drugs as alleged. If we then go on to the ultimate questions that I have posed for your consideration in Ben Field's case on murder. Against the background that he denies an intention to kill, the first question addresses that issue.

Have the prosecution made us all sure that Ben Field intended to kill Peter Farquhar? If you all answer yes, go to question 2. If you all answer no, the verdict is not guilty and Martyn Smith is also not guilty. If, however, you have all answered yes, i.e. you are sure that he did intend to kill Peter Farquhar, it is then and only then, that you go on to question 2, which is have the prosecution made us sure that with that intent, Ben Field did one or more of the acts alleged by the prosecution, i.e. in person, gave Peter Farquhar drink and/or Dalmane and/or suffocating him. In other words, he has to have had the intention to kill when doing one or more of those alleged acts. And then the critical words, "which was or were a more than minimal cause of Peter Farquhar's death."

So if we then go back to the paragraph about which, your question has been asked. If it is proved that with intent to kill, Ben Field in person, gave Peter Farquhar drink then, even if Peter Farquhar agreed to drink it, it would be open to you to conclude that the giving was a cause of death, unless Peter Farquhar's decision, that is the decision to drink, was informed in that he knew that the drink being offered to him was intended, by Ben Field, to cause his death. Why the difference between the two? In the first part of the sentence, if it is proved that with intent to kill, Ben Field in person, gave Peter Farquhar drink, then even if Peter Farquhar agreed to drink it, it would be open to you to conclude that the giving was a cause of death unless Peter Farquhar's decision to drink was informed, in that he knew that the drink being offered to him was intended to cause his death.

The difference is because it is not the prosecution – the prosecution do not put its case in that way and they must prove their case. And the reason why they do not put their case in that way is that if Peter Farquhar's decision to drink was in the knowledge that the drink was being offered to him with the intention of causing his death, then his decision in that knowledge, to drink, would in law, be the only cause of his death. It would not be the responsibility of Ben Field.

> On the other hand – and here, we have the prosecution case, that they were together and that Peter Farquhar most certainly did not know that he was being offered drink with the intention of killing him by his consumption of it, that in those circumstances, even if he agreed to drink - not knowing that it was intended by Ben Field that it was to kill him - it would be open to you to conclude that the giving was a cause of death. And it is open to you so to conclude because then, it is a matter of fact. And you and you alone are the judges of fact and therefore, it would be open to you to conclude, if you thought it right, that in those circumstances, that the – notwithstanding the agreement to drink, that the giving of the drink or the drug was more than a minimal cause of death.
>
> Can I try and put it also in another way, to make it even simpler? If, at the end of the day, it was or might have been that even though they were together and even though Ben Field was intending to kill Peter Farquhar, that Peter Farquhar drank in the knowledge that Ben Field was giving him the drink. He, Ben Field intending to kill Peter Farquhar, then it would not be right to convict Ben Field. If it was or might have been that, then the prosecution would have failed to prove their case, which was that he was given alcohol with that intention and most certainly, without the knowledge that Ben Field was intending to kill him thereby. Now, is that clear? I see nods. Thank you.
>
> If, in some way, I haven't addressed the kernel of what you were asking me, then do please put into writing, exactly what you would like me to explain. But I hope that essentially by repeating what you've already got, that we're just a few words of extra explanation that I have made the point even clearer than I hoped it was before. All right? Now, can I just check with the bar that nobody's got any concerns that I need to correct that in any way?"

58. The critical authority for the resolution of the issues raised on this appeal is the decision of the House of Lords in *Kennedy.* In that case the appellant prepared a syringe of heroin and handed it to the victim, who immediately injected himself and returned the syringe to the appellant. The victim died as a result. The issue on the appeal against Kennedy's manslaughter conviction was whether he could be said to be jointly responsible for carrying out the act that was causative of the death. The House of Lords held that informed adults of sound mind are to be treated by the law as autonomous beings able to make their own decisions about how they would act, and in *Kennedy* the deceased had chosen to inject himself knowing what he was doing. In those circumstances, the appellant had not caused the drug to be administered to the victim and his actions were not a significant cause of the deceased's death. The House of Lords stressed that the act of supplying heroin cannot found a charge of homicide (see [7]), if it is freely and voluntarily self-administered by the victim (see [19]) who is able to make an informed decision (see [20]). Lord Bingham put the matter thus:

> "14. The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and

informed decision to act in that way rather than another. There are many classic statements to this effect. In his article "Finis for Novus Actus?" [1989] CLJ 391, 392, Professor Glanville Williams wrote:

> 'I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before.'

In chapter XII of *Causation in the Law*, 2nd ed (1985), p 326, Hart & Honoré wrote:

> 'The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.'

This statement was cited by the House with approval in *R v Latif [1996] 1 WLR 104*, 115. The principle is fundamental and not controversial."

59. The concession made by Mr Jeremy in relation to the weak swimmer is both correct in our view and important. As he accepts, the victim's uninformed state of mind in this example as to the accused's real intention would have changed the nature of the undertaking on which the victim embarked, by rendering it more dangerous. The false friend was potentially liable to a conviction for homicide on account of his or her undisclosed intention that the victim should die by not providing assistance in the event of difficulty. This is highly pertinent in the present case. Mr Jeremy's concession also recognises that whether the victim's ignorance of the accused's real intention does relevantly change the nature of the undertaking on which the victim embarks, as in his example, will depend on the specific nature of the individual case. The concession acknowledges, moreover, the appropriateness of the trial judge addressing the nature of the individual case in deciding how to direct the jury. It follows that in situations exemplified by the weak swimmer example, it would be appropriate for the judge to give the jury a direction on causation referable to the victim's knowledge or ignorance of the accused's intentions.

60. The undisclosed murderous intention of the appellant, in our judgment, substantively changed the nature of the undertaking upon which PF embarked, in this particular case. The jury must have rejected the appellant's account that he was not present when the victim drank this large quantity of whisky which he had supplied. PF, therefore, would have believed that he was drinking 60% proof whisky in the company of someone who loved and would care for him, not someone who wished for his death. As a consequence, PF would not have had an informed appreciation of the truly perilous nature of what was occurring. Being provided with the whisky, he was being encouraged by the appellant to consume a significant quantity of a powerful alcoholic drink, which inevitably would have started to impair his judgment, most particularly as it interacted with the Dalmane. Engaging in this activity was not, as a consequence, the result of a free, voluntary and informed decision by PF. To the contrary, he

was being deliberately led into a dangerous situation, as with the weak swimmer, by someone who pretended to be concerned about his safety: as was undisputed on the evidence in the case, the appellant posed as his lover and partner – someone who PF would undoubtedly have assumed would be solicitous of his wellbeing – whereas, in reality, the appellant simply desired PF's demise. The appellant, therefore, manipulated and encouraged PF into a position of grave danger, given the combination of the sedative effects of the substances risked decreasing the levels of the victim's consciousness, thereby fatally impairing his airway. The appellant's undisclosed homicidal purpose, in these circumstances, changed the nature of the act: PF was to a material extent unwittingly lured into a perilous drunken and drugged position by someone who feigned to be his loving partner. Once the effects of the substances started to affect PF's judgment and as he succumbed, the appellant would have been a mere bystander, or worse. He certainly would not have sought medical assistance, given he admitted he wanted to increase the risk of PF dying.

61. It follows we are of the view that the position of the appellant is to be likened to that of the deceived swimmer. It would be open to a jury in either case to conclude that the victims (real and fictional) had been lured into a false sense of security by the accused's undisclosed murderous purpose, embarking as a consequence on a fatal course of action uninformed as to or unaware of the true dangers of the undertaking, so that the deceit was a cause of death.

62. Whether or not the deceased acted freely and voluntarily, when in a position to make an informed decision, will always depend on a close analysis of the facts of the case. If, in the context of a decision by the deceased, there is a significant deception by the accused that changes the truth or the reality of what is happening, such as materially to increase the dangerous nature of the act, then he or she may be criminally liable for what occurred. That 'deception' as to the 'nature of the act' may – as in the weak swimmer example – be directly linked to the undisclosed intentions of the accused. The judge incorporated the idea of 'deception' as to 'the nature of the act' thus in a ruling given on 4 July 2019 in relation to the charge of conspiracy to murder AMM by encouraging suicide (count 3 TI):

> "[…] a Defendant's conduct may amount to murder if he drives the victim to suicide by force, duress or deception (with the deception being as to the nature of the act encouraged) such that the suicide was not the voluntary act of the victim. […]"

63. For these reasons we consider that the approach of the judge was correct. He left it to the jury to determine whether the appellant's actions were a more than minimal cause of PF's death. He told the jury if they were sure that, with intent to kill, the appellant in person gave PF drink, and PF drank it, it was open to them to conclude that the giving of drink was a cause of the death; but he told them that conclusion would not be open to them if PF knew the drink being offered was intended to cause his death. He also told them that if PF agreed to drink – not knowing that it was intended by the appellant that it was to kill him – it would be open to them to conclude that the appellant's giving of drink was a cause of death. These directions rightly recognised that in this particular case the jury had to be sure that the drink was given to the deceased with intent to kill, that the drink was a (more than minimal) cause of death and that PF's act of drinking was not a free, voluntary and informed decision such as to break the chain of causation. The judge's directions captured the essence of the issue in a clear and admirably

succinct manner. Those directions were, moreover, given in the broader context of the supposedly caring and protective nature of the relationship, whose falsehood lay at the centre of the undisputed evidence in the case, as the jury undoubtedly understood.

64. We dismiss the appeal against conviction.

Sentence

65. The appellant received a mandatory sentence of life imprisonment. When determining the appropriate minimum term, the court should take into account the effect of section 240ZA Criminal Justice Act (crediting periods of remand in custody) (section 269(3)(b) Criminal Justice Act 2003). The judge omitted to address the 346 days the appellant had spent on remand prior to sentence.

66. We grant the extension of time and leave to appeal against sentence. The sentence will remain that of imprisonment for life, with a minimum term of 36 years. From that minimum term there will be deducted 346 days.