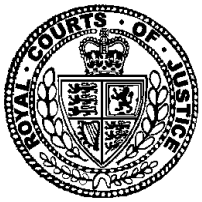

Neutral Citation Number: [2021] EWCA Crim 40

Case No: 201903241 B1, 201903244 B1, 201903349 B1 & 201903351 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT SITTING AT SHEFFIELD
HHJ RICHARDSON QC
T20197091

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE EDIS
and
MR JUSTICE FOXTON

Renewed applications for leave to appeal conviction and sentence

- -

Between:

Regina

-v-

Carol DAWSON **Applicants**
Scott James DAWSON

- -
- -

Mr Alan Kent QC (instructed by **Private Basis**) for the **applicant Carol Dawson**
Mr John Ryder QC (instructed by **Private Basis**) for the **applicant Scott James Dawson**

Hearing date : 17th December 2020

- -

Approved Judgment

Lord Justice Fulford V.P. :

Introduction

1. On the 9 August 2019, in the Crown Court at Sheffield (Judge Richardson Q.C.), Carol Dawson (aged 73) and her son, Scott Dawson (aged 42), were convicted of the murder of Gary Dean by unanimous verdicts. On the 12 March 2019 they were both sentenced to life imprisonment. The minimum period under section 269(2) Criminal Justice Act 2003 was specified for Scott Dawson as 31 years and for Carol Dawson as 26 years. Before this court they each renew their applications for leave to appeal their convictions and sentences, following refusal by the single judge.

The facts

2. In all likelihood Gary Dean, the victim, was on the autistic spectrum. He was a fit man who was obsessional about running and cycling. He lived in Silkstone Common and often utilised a public footpath to cross a field belonging to Scott Dawson, which bordered on House Car Dyke, to access the Trans-Pennine Trail. Scott Dawson was using the land to develop a business farming pigs, which were housed in a barn. Gary Dean had an unusual and persistent habit of behaving in an antisocial manner, thereby causing significant annoyance. By way of example, he evinced an objection to horses being ridden on local woodland paths, and during 2016 and 2017 he erected 'scarecrows' to frighten the horses and he stretched twine across some of the paths at a height designed to unseat the horsemen/women. His behaviour resulted in multiple complaints. The Woodland Trust erected CCTV cameras and the footage revealed Gary Dean, *inter alia*, defecating in the woods. He was asked by the police community support officer to desist.

3. Both applicants made complaints to police about the deceased's behaviour, which included the contention that he had damaged their property over a period of about 5 years, for instance by breaking windows and interfering with machinery. He allegedly approached Carol Dawson with a hammer. He threatened to burn down Scott Dawson's barn containing the pigs. The applicants maintained that as a result of this behaviour it was necessary for someone to keep watch on the premises during the evening and overnight. It was suggested that the deceased's behaviour took a toll on their health. He was prosecuted for harassing Scott Dawson and damaging his property, along with using threatening words and behaviour towards Carol Dawson and assaulting her. He was acquitted on 19 February 2018 on all charges following a trial, albeit the Magistrates' Court imposed a three-year order restraining him from contacting the applicants.

4. Between 3 and 6 September 2018, there was a fire in woods close to a stile leading to Scott Dawson's field. The prosecution conceded that this may well have been lit by the deceased, given the route he regularly took.

5. The prosecution case was that the applicants acted together to assault the deceased. The attack took place sometime between 6.50 and 7.30 a.m. on 6 September 2018. It was alleged that they were motivated by a desire for revenge because they held the deceased responsible for the various problems on Scott Dawson's land set out above which had caused him financial loss. Their campaign against the deceased, culminating in the prosecution in the Magistrates' Court, had failed and it was suggested the applicants considered that the authorities had been unable to deal adequately with their complaints and had decided to take matters into their own hands.

6. There was no direct evidence against the applicants and the case was comprised of strands of circumstantial evidence. The starting point was their suggested hostility towards the deceased. On 18 July 2017 Scott Dawson stated to the police telephone operator, "*now if he's gonna keep getting away with this we all may as well do it to him*". Other extracts from telephone calls they made to the police between June 2017 to January 2018 demonstrated the applicants' frustration and anger about the behaviour of Gary Dean and the failure of the authorities to address it. Carol Dawson, perhaps tellingly, spoke of her "*annoyed son*", she suggested "*somebody's going to be getting killed here*" and she expressed the opinion that the police were not reacting appropriately despite the reports made to them. Scott Dawson, in turn, spoke of taking matters into his own hands and "*they will be out because I'll be ripping him fucking in half*". A written complaint to the police in Carol Dawson's writing, signed by Scott Dawson, stated that the deceased's behaviour was responsible for bringing his business plans to a halt and stated that "*the stress this has caused me is unbelievable, emotinally and finacially*" (sic).

7. Carol Dawson promulgated the suggestion that the deceased had been grooming children for sexual exploitation, was a predator of women, had pushed over an 82-year-old, was kicking newborn lambs, had broken windows and had damaged gates. She communicated allegations to this effect to Mrs Dean, and to the school where she worked.

8. Text messages between Scott Dawson and his partner indicated a willingness to spend time waiting to catch and grab Gary Dean. The latter told the police in interview prior to his prosecution that he had been confronted by Scott Dawson in the woods, and that Scott Dawson had been hooded and wearing some form of mask during the encounter.

9. An air rifle was purchased in May 2018 and pellets lodged in the deceased's spine (there had been a single penetrating gunshot wound to his back) matched pellets found in Carol Dawson's garage. Scott Dawson initially lied when he denied to the police in interview that he had purchased this weapon (which was never recovered). The fire and smoke in the woods near to Scott Dawson's field, as set out above, was posited by the Crown as the final provocation that led to the attack on the deceased. The deceased's daily routine of running in the early morning after his wife left for work was widely known in the local community. There had been internet research by Scott Dawson three days before the murder as to the opening times of the school where the deceased's wife worked and a photograph of Gary Dean was found at Scott Dawson's house. The Crown contended that Carol Dawson waited in a layby to signal to her son when the deceased's wife left home.

10. Analysis of data of contact between the applicants' telephones revealed that in the month prior to the murder they had been in touch once or twice, but in contrast on 6 September 2018 there were contacts or attempted contacts on 12 occasions. Furthermore, Scott Dawson purchased a new mobile phone and SIM card on the 6 September 2018, which then became the contact number used for communications between the applicants. During the police interviews, Scott Dawson initially failed to mention this new telephone but later said he had accidentally damaged his old telephone, which he had burned in order to dispose of it. This was untrue. The old telephone was recovered from Carol Dawson's home address.

11. At 5.30 pm on 6 September 2018, Simon Roberts found the body of Gary Dean in House Carr Dyke at Silkstone Common near Barnsley. He had been brutally killed. The unchallenged evidence was that the deceased had been near the dyke on the edge of a field owned by Scott Dawson when he had been injured and, whilst bleeding, he made his way, scrabbling and not fully upright, down into and along the dyke where he was further injured.

12. He died as a direct consequence of multiple injuries inflicted during a sustained assault. These included multiple severe force blows delivered by way of one or more blunt instruments such as a bar or similar object. He may have been kicked and stamped on. There were severe injuries to his head: his skull was fractured and there was damage and haemorrhaging to his brain. He may have been rendered unconscious during the attack. He had multiple rib fractures, severe bruising to his arms and there was a fracture to his leg, along with other wounds and bruising.

13. A balaclava, on which Carol Dawson's DNA was detected, was discovered in the caravan used by the applicants in a police search on 22 November 2018. It was the prosecution case that after the murder, the applicants took steps to conceal incriminating evidence. By way of example, on 7 September 2018 Carol Dawson was seen at her home address cleaning and hoovering the vehicle she had used on 6 September 2018 wearing pink washing-up gloves, which she later lied in interview about owning. Conversations between the applicants at Carol Dawson's home address, which were covertly recorded, after they had been released from custody on 9 September 2018, along with various handwritten notes which were recovered, tended to be incriminating in nature, although they did not contain any unequivocal indications of involvement in the murder.

14. For both applicants, who did not give evidence, their case was they had not been involved in the killing. It was suggested that the circumstantial evidence failed to prove their guilt and the key assumptions made by the prosecution were unsupported by the evidence.

The renewed applications for leave to appeal against conviction

Scott Dawson: loss of control

15. Scott Dawson does not seek in this application to impugn the jury's decision that he had been concerned in the killing of Gary Dean. His sole ground of appeal against conviction, advanced with skill by Mr Ryder Q.C., is that the judge should have left the partial defence of loss of control, notwithstanding his case to the jury was that he had been uninvolved in the fatal attack.

16. By way of introduction to this issue, we note that during the trial evidence was led of Scott Dawson's quick and volatile temper. There was a history of occasions relied on by the Crown when he had become angry with his neighbours, using foul language and threatening violence. Several individuals suggested at trial that they had been, or felt, threatened by him, that he had directed foul language at them, accompanied by threats of violence such as to "*rip*" them to pieces or he offered to fight them "*in the woods*". On one occasion he had pushed a neighbour in the chest. He had shouted and sworn at a woman because of an inappropriately parked car.

17. It is argued by the applicant that Gary Dean had behaved provocatively towards the applicant over a significant period of time and, it is suggested, the fatal attack appears to have been frenzied in nature. The judge is criticized for not carefully analysing the distinct elements of the statutory test for loss of control in his ruling. It is suggested that he failed to consider the particular circumstances of the applicant and that he misapplied what is described as the

objective test. It is suggested that the judge failed to assess the gravity of the overall effect of Gary Dean's behaviour. Although it is accepted that the individual incidents were relatively trivial, they occurred with remorseless regularity over many years and became extremely grave by virtue of their cumulative effect. It is argued that the judge should not have been influenced by the self-control exercised by the other individuals who were affected by Gary Dean's activities. In all the circumstances, it is contended that the jury may reasonably have concluded that Scott Dawson lost control during the course of the encounter.

18. In his ruling, having set out the legislative provisions and an extract from the judgment of this court in *R v Dawes* [2013] EWCA Crim 322, the judge explained his reasons for refusing to leave the defence of loss of control as follows:

> "In the context of this case, there are three elements having regard to the issue of loss of control: first, there has to be evidence of a loss of control. There has to be the qualifying trigger – in other words, things were said or done, perhaps over a period of time, in circumstances of an extremely grave character which gave rise to a justifiable sense of being seriously wronged. In terms of there being a loss of control, it is clear to me that there is evidence that the person who executed the killing of Mr Dean potentially was either out of control or was acting with deliberate and considered violence; it was certainly one or other of the two. So to that extent, that limb of the defence is potentially made out.
>
> That is not the issue in this case. Even viewing matters entirely on the evidence, as I must, and interpreting that evidence as favourably as one reasonably could towards the viewpoint of Scott Dawson, I really question whether this defence has any mileage at all. There is no doubt the evidence establishes that Mr Dean was extremely irritating over a prolonged period of time, certainly that is a conclusion the jury might be entitled to reach. This was all born from his seeming autism which had not been in any way treated by the time with which we are concerned. Even if one accepts his conduct was acutely aggravating – indeed, there is much evidence to reveal that he was acutely aggravating, not only to the Dawsons but to a variety of other people as well, many of whom have given evidence in the case as to his conduct and how they, as ordinary citizens, reacted to him.
>
> Even if one accepts that someone like the Dawsons were entitled to take more than the usual steps that one might take when encountering an aggravating individual, again one questions whether the circumstances were such and so grave a character to give rise to a justifiable sense of being

seriously wronged – for example, calling the police; being involved in the court proceedings and taking all the special measures that are asserted to have been taken by the Dawsons in order to protect their property. And accordingly, I come back to the observations of the Lord Chief Justice at paragraphs 60 and 61 of the judgment in the case of Dawes:

> "For the individual with normal capacity of self-restraint and tolerance, unless the circumstances are extremely grave, normal irritation, and even serious anger do not often cross the threshold into loss of control."

In my judgment, the evidence in this case, viewing it as favourably as one possibly can towards the position of Scott Dawson, he may well have been extremely irritated, but it does not cross, in my judgment, the threshold into the defence of loss of control. The circumstances giving rise to this must be extremely grave. In my judgment, even again looking at the matter as favourably as one can towards Scott Dawson, it does not come into that category at all and the defendant's sense of being seriously wronged must be justifiable. In my judgment, that trigger is not, in any way, activated.

There is, furthermore, evidence in the case that, pursuant to s.54(4), there was potential here for the jury to conclude that this was all being pursued as part of a considered desire for revenge.

In the result, I have come to the conclusion that, applying the law in the way that has been accurately set out in the written submissions of Mr Ryder, this case does not in any way, shape or form come near that which is required in order for this defence to be left to the jury. Accordingly, I have come to the conclusion that the defence of loss of control should not be left to the jury for the reasons which I have briefly, albeit perhaps imperfectly and somewhat infelicitously indicated in the course of this judgment.

19. Sections 54 and 55 Coroners and Justice Act 2009 provide:

> "**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.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

55 Meaning of *"qualifying trigger"*

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—

(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to *"D"* and *"V"* are to be construed in accordance with section 54."

The first requirement: loss of control (section 54(1) (a))

20. The first of the three requirements is that "*the killing resulted from D's loss of self-control*". There needs to be evidence fit for consideration by the jury – evidence sufficient to raise the issue – that the defendant lost his or her self-control as opposed, for instance, to having acted out of revenge (section 54(4)). Similarly, as Lord Judge C.J. emphasised in *R v Dawes* [2013] EWCA Crim 322; [2013] 2 Cr App R 3 at [60], unless the circumstances are extremely grave, normal irritation, and even serious anger, do not often cross the threshold into loss of control. It is trite law that the defendant does not have to advance the defence for it to arise, so long as there is a sufficient basis founded on the evidence in the case, whether that evidence is agreed or is contentious. Section 54(2) provides that the loss of control does not have to be sudden. Once the judge rules that the issue should be left, it will be for the jury to decide whether or not the prosecution have disproved the defence. Whether or not there is sufficient evidence is a judgment to be made by the judge in the case.

21. It is to be stressed that the duty of the judge is to analyse the evidence as a whole, to "*consider the weight and quality of the evidence in coming to a conclusion*" (see *R v Gurpinar* [2015] EWCA Crim 178; [2015] 1 Cr App R 31 at [12]). This requires a common-sense judgment based on an analysis of all the evidence (*R v Clinton* [2012] EWCA Crim 2; [2012] 1 Cr. App. R. 26 (p.362); [2013] Q.B. 1.) As the Lord Chief Justice emphasised in *Gurpinar*, the trial judge must undertake a much more rigorous evaluation of the evidence before the defence can be left to the jury than was required under the former law of provocation (see [14]).

22. We regret we are unable to accept the judge's decision in his *extempore* ruling that the evidence potentially revealed that Scott or Carol Dawson lost his or her self-control. In our judgment, the evidence was either entirely neutral on this issue or it tended instead to indicate this was a deliberate and calculated assault, motivated by a desire for revenge. As set out above, the applicants' case was not that one or both of them had lost self-control but, instead, that they had

not been involved in the homicide or indeed in any encounter with the deceased on 6 September 2018. Neither applicant gave evidence. The circumstances leading up to the incident, summarised at [8] – [11] above, strongly demonstrated a carefully planned and vengeful attack.

23. The sustained and gratuitously violent nature of the assault did not, standing alone, provide sufficient evidence of loss of control. It is important in this context to emphasise that attacks leading to death can be unnecessarily brutal and prolonged for a wide range of reasons that do not involve loss of control, and a so-called "*frenzied attack*" may be the result, for instance, of anger, a desire for revenge, sadism or a wish to "*send a message*" so as to intimidate or impress others or simply because the attack is continued for as long as it takes to achieve the desired outcome of the victim's death. Whether the extreme nature of an attack of this kind sufficiently indicates the possibility of loss of control will often depend on the other evidence in the trial. In *R v Goodwin (Anthony)* [2018] EWCA Crim 2287; [2019] 1 Cr App R 9, the defendant was charged with murder when a 75-year-old man died from blunt force head injury, after sustaining at least 18 blows to his face, head and neck from a hammer over a period of at least five minutes, when for most, if not all, of that time he was lying on the ground. The appellant's counsel sought to suggest that the defence of loss of control was sufficiently established on the evidence because, *inter alia*, the attack was frenzied. Davis LJ described the use of this word as being counsel's own preferred gloss on what happened and added:

> "46. […] We certainly do not think that the fact that there were at least 18 blows of itself, in the circumstances, gives rise to an inference of loss of control. There is no other evidence identified which might support such a conclusion."

24. In this regard it is important, additionally, to have in mind that evidence may be relevant to more than one of the three requirements (subject to any limitations such as those provided by section 54(1) (c) and (3)). For instance, evidence that potentially establishes a qualifying trigger may also be relevant to whether the accused potentially lost his or her self-control: these two questions may be interrelated, albeit they require separate consideration. In *R v Rejmanski; R v Gassman and another* [2017] EWCA Crim 2061; [2018] 1 Cr App R 18, cases which involved consideration of the appellants' particular mental disorders, the court indicated that evidence on this topic may be relevant to both the loss of control and the gravity of the qualifying trigger (see [27]). But it is equally important to recognise that evidence indicating the existence of a qualifying trigger does not necessarily connote that there will have been a loss of control (see *R v Goodwin (Anthony)* at [33 (6)]) and, we would add, vice versa.

25. In the present case, the multiple injuries inflicted on the deceased's body and the analysis of the *locus in quo*, standing alone, did not reveal sufficient evidence that the perpetrator may have lost self-control and otherwise the evidence tended to indicate that this attack was planned and calculated. In the circumstances, we are unpersuaded by the judge's conclusion that this aspect of the defence was potentially made out.

The second requirement: the qualifying trigger (section 54(1) (b))

26. There must be evidence sufficient to be left to the jury that the defendant's loss of self-control was attributable to one or more statements or occurrences that constituted circumstances of an extremely grave character that caused the defendant to have a justifiable sense of being seriously wronged (section 55(4)). On this we agree with the trial judge. The actions of the deceased (see [3] and [4] above) were no doubt, on occasion, highly irritating and, given they sometimes involved low-level criminal offences directed at Scott Dawson's property, may have been a source of anger. But even viewed cumulatively, they do not come close to providing circumstances of an *extremely* grave character that would give rise to a justifiable sense of being seriously wronged. As Lord Judge C.J. observed in *Dawes* as to the impact of section 55(3), (4) and (5)*:*

> "60 […] Their effect is that the circumstances in which the qualifying triggers will arise is much more limited than the equivalent provisions in the former provocation defence. The result is that some of the more absurd trivia which nevertheless required the judge to leave the provocation defence to the jury will no longer fall within the ambit of the qualifying triggers defined in the new defence. This is unsurprising. For the individual with normal capacity of self-restraint and tolerance, unless the circumstances are extremely grave, normal irritation, and even serious anger, do not often cross the threshold into loss of control."

27. This aspect of the partial defence was, therefore, also not made out: there was insufficient evidence for it to be left to the jury.

The third requirement: the subjective and objective question (section 54(1) (c))

28. The third ingredient of the defence is the question of whether a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant – provided those circumstances are not only relevant as bearing on the defendant's general capacity for tolerance or self-restraint – might have reacted or behaved in the same or a similar way. Given our conclusions as to the absence of evidence as regards loss of control and a qualifying trigger, this consideration falls away.

Conclusion

29. We stress the importance of a careful analysis by the judge of each of the three requirements for this partial defence when deciding whether it is to be left to the jury. The application of the provisions of sections 54 and 55 to the circumstances of individual cases is not necessarily a straightforward exercise and the evidence frequently requires detailed consideration. In the present case, we have no hesitation in concluding that there was an insufficient evidential basis for leaving loss of control to the jury. This renewed application by Scott Dawson for leave to appeal is refused.

Carol Dawson: the balaclava

30. In admirably succinct Grounds of Appeal, it is contended by Mr Kent Q.C. on behalf of Carol Dawson that *"(t)he learned judge erred in allowing the jury to hear evidence of the finding of a balaclava in a caravan on 22nd November 2018, almost 3 months after the murder. There was no evidential foundation for the admission of the evidence. It was irrelevant and should have been excluded. Its admission caused Carol Dawson's trial to be unfair and as a result, her conviction is unsafe."* He emphasised in his oral submissions that there was no reason for those involved in this lethal attack to disguise themselves. Furthermore, he emphasises it was not clear whether Carol Dawson was in the immediate vicinity of the assault when it occurred. He suggests this was a markedly sinister object that would have had a significantly prejudicial effect on the jury.

31. The balaclava was found in the living area of the caravan on the farm in which the applicants sometimes stayed, relatively close to the murder scene. DNA that corresponded to Carol Dawson was found inside the balaclava, in the area of the crown.

32. Mr Kent submitted at trial that this piece of evidence should be excluded on the basis that it had no probative value (although it was not submitted that the evidence would have an unduly prejudicial effect).

33. The Crown, in written submissions, contend that this was a relevant piece of evidence. Carol Dawson had worn the balaclava at some stage before it was found on 22 November 2018. It is a garment that by its design is meant to conceal the wearer's identity and would be an unusual choice of normal apparel for a 72-year-old woman. The attack took place during daylight and it was logical to assume that those involved would have wished to conceal their identities.

34. The judge ruled that the balaclava was relevant to an issue in the case. It was, the judge suggested, part of the backdrop and was an important part of the "*amalgam*" of evidence. There had been violent or hostile exchanges between

the deceased and the two applicants closely connected with the farm. At the time of the murder, Carol Dawson was in a nearby lay-by and therefore "*in the thick of it*". However, it was not to be "*over-accentuated*" and appropriate directions would be given that the "*backdrop*" was to be placed in proper context and analysed with care.

35. In the event, the judge reminded the jury where the balaclava had been found and the location of the DNA. Moreover, he summarised the Crown's allegation that Carol Dawson had acted as a lookout and, during these events, had worn the balaclava in order to disguise herself.

36. The balaclava formed only a small part of a very substantial body of evidence that made up an essentially circumstantial case against the applicants. In the context of the other material introduced by the prosecution, the discovery of this particular piece of clothing containing Carol Dawson's DNA had probative value and was admissible. It was for the jury to decide what conclusions, if any, were to be drawn but given the varied and significant elements of planning by the applicants for the attack on Gary Dean, it was open to the jury to infer that it either formed part of the preparations for the attack or it had been worn by Carol Dawson during the events leading to the killing of Gary Dean. It was not a precondition of its admissibility that the applicant had been seen wearing the item. Instead, the overall circumstances rendered its discovery in the caravan admissible and it was for the jury to decide whether it materially contributed to the case against one or both of the applicants.

37. In any event, as just set out, the discovery of the balaclava was only a small part of the overall material introduced during the course of this trial and it was not given any particular prominence, including during the summing up.

38. In all the circumstances, Carol Dawson's conviction is not arguably unsafe as a result of the introduction of this piece of evidence.

The renewed applications for leave to appeal against sentence

39. The applicants received mandatory life sentences. As set out above, in the case of Scott Dawson a minimum term of 31 years was imposed and in the case of Carol Dawson, the minimum term was 26 years. For both applicants there was an order that 179 days spent on remand should count against those terms. Each now renews the application for leave to appeal against sentence following refusal by the single judge.

40. Carol Dawson was born on 30 April 1947 and is now 73 years old. Scott Dawson was born on 24 January 1978 and will soon be 43. In her case an appeal against sentence may not affect her future, even if it succeeds. In his case it may very well do so. It is critical that minimum terms are specified in accordance with proper principles and the terms of what is now Schedule 21 to the Sentencing Act 2020. At the time of sentence, the relevant provisions were Schedule 21 to the Criminal Justice Act 2003, but they are for all present purposes identical except that the paragraph numbering is different. We will use the numbering of the Sentencing Code so that this judgment is more easily intelligible in the future.

41. In sentencing, the judge said that this was a jointly planned attack to kill Gary Dean. A firearm had been acquired and stored at Carol Dawson's home. Scott Dawson had taken the lead and, armed with a powerful air rifle and a pole, had killed with brutal determination. Carol Dawson had fully participated in the killing by encouraging and facilitating the execution of it. The deceased had suffered a prolonged attack in which he was shot with an air rifle and he was beaten with weapons. He had been attacked, chased and attacked again and had endured mental and physical suffering in the last few minutes of his life. The deceased, a much-loved man, was vulnerable due to his autism (which factor, the judge indicated, would not overly aggravate the minimum term) who on occasion had acted in an antisocial manner and irritated some people. However, he was not overly aggressive and would confront only when he knew he could retreat. As set out above, the applicants desire for revenge came from the perceived inaction of the police and having decided that their campaign of intimidation had failed, they decided to rid themselves of the man they believed was thwarting the plans for the farm. After the killing the applicants sought to cover up the crime, cleaned up, destroyed evidence and lied to the police. The judge determined that the starting point for the minimum term, given the particularly high seriousness of each of the applicants' criminality, was 30 years. In mitigation, neither had previous convictions and Carol Dawson relied on her age and the fact that she was not the actual killer but a key participant.

42. As appears above, the defence of loss of control was the subject of extensive argument at trial. It was clearly important in this sentencing exercise to make a determination as to the extent to which either or both defendants may have been provoked (for example by prolonged stress). Paragraph 10(d) Schedule 21 identifies that as a mitigating factor which may be relevant to the offence of murder. The terms of the paragraph make it clear that in cases of murder before 4 October 2010 this factor arises where there is provocative conduct which did not amount to a defence of provocation under the old law. *A fortiori* the kind of conduct which is relevant for this purpose will not amount to the defence of

loss of control. "Provocation" in this context is an ordinary English word, not hedged about with the considerations which defined it for the purposes of the old partial defence to murder (and we note that provocation is identified as a factor indicating lower culpability in Sentencing Council Guidelines for offences to which the partial defence of provocation has never applied: for example the Guidelines applicable to sections 18 and 20 OAPA 1861). The only statutory assistance in defining it is the example given of conduct causing "prolonged stress". This no doubt appears for historical reasons and is designed to make it clear that the mitigating factor is not removed where the motivation is a reaction to conduct over a prolonged period of time and is not confined to immediate reactions to conduct by the deceased.

43. In the sentencing remarks, which were prepared with care and were made available by the judge in written form immediately after sentencing, the judge did not refer to this mitigating factor. He did make findings about the conduct of the deceased which he described as involving an "*abnormal and anti-social manner when he did not appreciate the insensitivity and annoyance he caused to some people*." He recorded the fact that the defendants had complained to the police about the deceased and that there had been an unsuccessful prosecution of him, after which a restraining order had been made against the deceased. The main bone of contention appears to have been the behaviour of the deceased on some forested land which adjoined the defendants' land, including by starting "*small fires adjacent to*" the defendants' land. The judge found that the trigger for the murder was the deceased's behaviour in starting another fire there on 5 September 2018. In summing up the issues for the jury, the judge had given more detail of the habitual behaviour of the deceased which he described as "*aggressive and unpleasant*". It does not appear from the sentencing remarks that he rejected the evidence he was there summarising.

44. The judge found that the correct starting point in the Schedule 21 range was the 30-year starting point provided by paragraph 3 for offences the seriousness of which is "*particularly high*". 9 examples are given of cases which would normally fall within this category in paragraph 3(2) Schedule 21. The only one which is engaged here is "*murder involving the use of a firearm*". This murder involved the use of a .22 air rifle to wound the victim before he was killed with another weapon. It was a powerful air rifle, capable of using heavy pellets for pest control. It was, however, legally held without any licence. It is not, perhaps, the kind of weapon Parliament had at the forefront of its mind when enacting paragraph 3 of Schedule 21. The use of a firearm is often a seriously aggravating feature of murder cases because the murderer has been able to acquire a deadly weapon and ammunition, possession of which is itself a serious offence, and which is a marker for involvement in serious criminal behaviour beyond the murder in question. Those features are absent here. This

is not to say that the use of the weapon was irrelevant, but only to question whether the case truly attracted a starting point of 30 years. The weapon was certainly taken to the scene and used, for the purposes of paragraph 4 Schedule 21, and the issue is whether an increase above an already enhanced starting point of 25 years was required because the weapon was a non-lethal air rifle as opposed to a lethal knife. That, of course, affects only the starting point and not the ultimate sentence, but the selection of the starting point is a significant part of the process of determining the minimum term.

45. The judge also treated the deceased as being particularly vulnerable by reason of his autism. Undoubtedly this was a relevant feature because it explained the anti-social behaviour to which the applicants reacted in such a calculated and wicked way. The evidence was that most people, once they knew why the deceased behaved as he did, found his conduct easier to tolerate. These applicants wholly failed to react with that degree of humanity, and this aggravates their conduct.

46. It appears to us that it is reasonably arguable that:

    i) The selection of the 30-year starting point in this case gave undue prominence to the fact that an air rifle was used to inflict non-lethal force.

    ii) The judge did not give any weight at all to the conduct of the deceased which might, arguably, amount to provocation within paragraph 10(d) of Schedule 21.

    iii) The vulnerability of the deceased may have been given too much weight; and

    iv) That minimum terms of 31 and 26 years were therefore manifestly excessive.

47. We therefore give leave to both applicants to appeal against sentence. We note that the applicants have been represented by counsel on a private basis hitherto on these renewed applications. Scott Dawson does not apply for a representation order, whereas Carol Dawson does. We grant her application for a Representation Order, limited to leading counsel acting alone, given the potential importance of the issue relating to the use of the non-lethal firearm. Any further applications in relation to representation will be considered by the Registrar.

48. The prosecution should attend the hearing of the appeal to provide the court with assistance as to the facts of the case and the issues of principle identified above.