Neutral Citation Number: [2021] EWCA Crim 798

Case No: 2017 00364-B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROYDON CROWN COURT
His Honour Judge Gold QC
Ind. No. T20120236

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2021

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE HOLGATE
and
HIS HONOUR JUDGE DICKINSON QC
RECORDER OF NOTTINGHAM

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Between :

Clarissa Ihenacho	**Appellant**
- and -	
The London Borough of Croydon	**Respondent**

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Ms D Barden (instructed by **the Registrar of Criminal Appeals**) appeared on behalf of the **Appellant**
Ms F Levett (instructed by the **London Borough of Croydon Legal Services)** appeared on behalf of the **Respondent**

Hearing date : 14 May 2021

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Approved Judgment

Lord Justice Dingemans:

Introduction and issues

1. This appeal raises the issues of: whether fresh evidence from forensic consultant psychiatrists should be admitted; and if so, whether the fresh evidence shows that Clarissa Ihenacho, the appellant, was not fit to plead when a confiscation order was made pursuant to the provisions of the Proceeds of Crime Act 2002 ("POCA") in the Crown Court at Croydon on 5 September 2014. The appellant was deemed to have benefitted in the sum of £590,316.08. Her realisable assets were found to be £283,214.90 and a confiscation order was made in that amount of which £108,441.48 was to be paid as compensation.

2. The confiscation order was made in proceedings following the appellant's convictions on 29 September for dishonestly making a false statement in claims for income support, council tax benefit and housing benefit, and for dishonestly furnishing a false document, namely a false tenancy agreement, in support of the claims. On 16 November 2012 the appellant was sentenced on each count to 12 months' imprisonment, concurrent and served her sentence at HMP Bronzefield.

3. The appellant now suffers from a persistent delusional disorder that an impostor has stolen her identity and it was the impostor that committed the criminal acts in her name. A persistent delusional disorder is a mental disorder within the meaning of the Mental Health Act 1983.

4. It is submitted on behalf of the appellant that fresh evidence, in the form of expert psychiatric evidence, should be admitted pursuant to section 23(1) of the Criminal Appeals Act 1968. It is submitted that this shows that the appellant was unfit to plead at the time of the confiscation hearing in September 2014, after her mental state had started to deteriorate following her imprisonment in November 2012. In those circumstances it is submitted that the confiscation order which was made should be set aside on the basis that it was wrong to continue confiscation proceedings in such circumstances and it was also wrong to apply the section 10 POCA 2002 assumptions. It is submitted on behalf of the appellant that in those circumstances, the confiscation proceedings should either be remitted to the Crown Court or this court should exercise its powers on appeal pursuant to section 32 of POCA and undertake the confiscation proceedings for itself without applying the assumptions set out in section 10 of POCA. It was not submitted on behalf of the appellant that if the appellant was fit to plead at the time of the confiscation proceedings, there was any other basis for setting aside the confiscation order.

5. It is submitted on behalf of the London Borough of Croydon, the respondent, who paid over the fraudulently claimed benefits to the appellant and who brought the prosecution against the appellant, that the court should not admit the fresh evidence in the form of the psychiatric reports because there was no miscarriage of justice in this case. It is submitted on behalf of the respondent that, if it is to be admitted, the expert evidence shows that the appellant was fit to plead at the time of the confiscation proceedings, that it is only after those proceedings had concluded that the appellant became unfit to plead, and that the appeal ought to be dismissed. It was further submitted that even if the appellant was not fit to plead, it was appropriate both to continue with the confiscation proceedings because of the numerous previous adjournments to

accommodate the appellant, and to rely on section 10 of POCA. This is because it was common ground that the appellant had been fit to plead at her trial, and that the confiscation proceedings simply followed that conviction.

6. The appellant's interests are represented by Ms Barden, who has been appointed on behalf of the appellant by the Registrar of Criminal Appeals. The respondent is represented by Ms Levett. We are very grateful to Ms Barden and Ms Levett, and their respective legal teams, for their helpful written and oral submissions.

The fresh evidence about the appellant's fitness to plead in September 2014

7. We considered and heard psychiatric evidence while reserving our decision about whether to admit it as fresh evidence on the appeal. The appellant sought permission to adduce: a written expert report from Dr Manhal Zarroug, a clinical psychiatrist, dated 22 April 2016; written reports from Dr Jagmohan Singh, a consultant forensic psychiatrist, dated 1 November 2016 and 25 September 2020; and oral evidence from Dr Singh. The appellant also relied on the joint statements of Dr Singh and Dr Suraj Shenoy, a consultant forensic psychiatrist dated 28 May 2019 and 11 January 2021.

8. Dr Shenoy is instructed by the respondent and he has produced written reports dated 23 October 2018 and 18 September 2020. The respondent sought permission to rely on his written reports and oral evidence if the evidence of Dr Zarroug and Dr Singh was to be admitted.

9. There was much common ground. It is now common ground that the appellant suffers from a persistent delusional disorder that an impostor has stolen her identity and it was the impostor that committed the criminal acts using her name. It is common ground that the appellant was suffering from the persistent delusional disorder by September 2014.

10. It is common ground that the appellant is not now fit to plead, having regard to the test set out in *R v Pritchard* (1836) 7 C&P 303. It is common ground that the persistent delusional disorder is treatable but the appellant, in her deluded state has no insight into her condition and refuses treatment because she considers herself to be well. It is common ground the appellant will not recover and will continue to deteriorate without treatment.

11. The only area of dispute between Dr Singh and Dr Shenoy was whether the appellant was fit to plead in September 2014. Doctors Singh (via CVP) and Shenoy (in person) attended the hearing and gave oral evidence. As both Dr Singh and Dr Shenoy relied on events pre-dating their examination of the appellant, it is necessary to set out some of those events.

The test of fitness to plead

12. The test to be applied to determine whether a defendant is fit to plead was common ground. A defendant must be capable of pleading to and of taking his trial on indictment, see *R v Pritchard,* Archbold 2021 at 4-238, and Blackstone's Criminal Practice 2021 at 12.4. A defendant has to have sufficient intellect to comprehend the course of the proceedings of the trial so as to make a proper defence. This means that

the defendant has to be able to understand the details of the evidence so that he can properly make his defence to the charge against him.

13. As *R v Pritchard* makes clear "it is not enough that he may have a general capacity of communicating on ordinary matters". It is no part of the test to ascertain whether the defence intended to be run by the defendant is well-founded. This is for the obvious reason that defendants may not be willing to admit (either to themselves or to others) what they have done, but be fit and capable of giving instructions. Similarly a defendant who can understand the course of proceedings may be fit to plead even if he is acting against his best interests because of a mental condition, see *R v Robertson* [1968] 1 WLR 1767 where the defendant suffered from a persecution mania.

14. The procedure for determining fitness to plead is now governed by the Criminal Procedure Rules at 25.10. The onus of proof is on a defendant, or in this case appellant, who is contending to be unfit to plead. As the onus is on the defendant the standard of proof is the balance of probabilities. Some of the consequences of a finding of unfitness to plead are set out in the Criminal Procedure (Insanity) Act 1964. So far as confiscation proceedings are concerned it is possible for a defendant to be unfit to plead and, in certain circumstances, for those confiscation hearings to continue and statutory assumptions to apply, see *R v Gavin and Tasie* [2010] EWCA Crim 2727; [2011] 1 Cr App R (S) 126 and *R v Ali (Salah)* [2014] EWCA Crim 1658; [2015] 1 WLR 841 at paragraphs 39 to 41 and 45.

The appellant

15. By way of background the appellant was born in Opobo in the Biafra region of Nigeria but left as a result of the civil war. She moved to France and continued her education, graduating from the Sorbonne. The appellant moved to the UK, attended the University of Manchester and Reading University and obtained post-graduate and teaching qualifications. The appellant married and had five children, and also fostered or adopted other children. She separated from her husband in about 2002. The appellant worked in education until 2005 or 2006. Since that time the appellant obtained a law degree and has pursued work in the charitable field. In her written report Dr Zarroug recorded that the appellant's son had said that his mother experienced significant distress during her imprisonment. In their oral evidence Dr Singh and Dr Shenoy recorded that the appellant had been a high achieving and intelligent individual, which meant that the effect of the criminal trial, her conviction, and the sentence of imprisonment had all been difficult for the appellant to accept.

Relevant events leading up to the confiscation proceedings

16. The appellant had been represented at times during the criminal proceedings but at trial her representatives withdrew and the appellant, who had been a student at an Inn of Court at one time, represented herself. After trial, a section 18 questionnaire was served on the Appellant on 28 September 2012 and a confiscation timetable was set. As noted above, on 16 November 2012 the appellant was sentenced on each count to 12 months' imprisonment, concurrent and served her sentence at HMP Bronzefield. An advocate was instructed to represent the appellant at the sentencing hearing. At the sentencing hearing a new confiscation timetable was set.

17. A section 18 response was served on behalf of the appellant on 13 December 2012, by SBG Solicitors, who represented her at that time. It appears that a further confiscation timetable was set at a hearing on 28 February 2013.

18. A section 16 statement was served by the Financial Investigator on 29 April 2013. On 9 April 2013 SPG Solicitors sought an extension of time to serve the section 17 statement due to difficulties obtaining a prison visit and because the appellant was unwell.

19. Applications by the appellant for permission to appeal against conviction and sentence were made and refused by the single judge. On 9 May 2013 the appellant's renewed applications for permission to appeal against conviction and sentence were refused by the full court, see [2013] EWCA Crim 880. It appears that the appellant represented herself at the hearing, see paragraph 7 of the judgment of Wynn Williams J. The proposed ground of appeal against conviction was that her counsel should not have withdrawn on the day of the trial, and that she was finding prison very difficult. The judgment shows that there had been a number of legal representatives who had acted for the appellant and then withdrawn from acting.

20. On 22 July 2013 SPG Solicitors sought the discharge of the representation order for the appellant, at which point the judge requested that they continue to represent the appellant, in case the appellant was unwell. It appears that from September 2013 SPG Solicitors no longer represented the appellant, and that the appellant had made an application in writing to the court to seek the discharge of the representation order.

21. The appellant did not attend the confiscation hearing listed on 22 July 2013, at which point service of a section 17 statement was ordered by 19 August 2013 and a confiscation hearing was listed on 16 September 2013. However, this listing was vacated and the hearing was listed on 20 September 2013. The appellant did not attend the hearing on 20 September 2013, and the hearing was adjourned to 29 September 2013, when the appellant again did not attend and it was adjourned.

22. The case was mentioned on 11 October 2013. It was ordered that the Financial Investigator serve a copy of the section 16 statement and a covering letter informing the appellant that she must attend court on 29 November 2013. The Financial Investigator served statements concerning compliance with these orders on 27 November 2013 and 28 November 2013.

23. On 29 November 2013 new lawyers instructed to act for the appellant, Clinton Davis Pallis Solicitors, attended court. It was ordered that a section 17 statement be served by 10 January 2014. It appears (from page 4 of the transcript of the hearing on 2 July 2014) that Clinton Davis Pallis wished to obtain medical evidence concerning the Appellant's mental health at this point. No medical report was in fact served. This desire to obtain a medical report and the absence of the medical report is relied on by both the appellant and respondent. The appellant relies on this point to show that her mental health had deteriorated by this time and that she could not have been capable of giving instructions. The respondent relies on this point together with the fact that no report was served as showing that either a report was obtained which was unhelpful, or it was not thought necessary to obtain the report.

24. On 31 January 2014 the appellant was referred to local psychiatric services by her GP. Initial attempts to contact her by the Community Mental Health team were unsuccessful. On 6 February 2014 the appellant contacted the Mental Health Team. The appellant was reported to be preoccupied about her identity being stolen. The appellant then missed some appointments and spoke again to the Mental Health Team by phone. The appellant said that Ama Ihenacho was busy, the person that the team member was looking for had been in hospital and that there was a problem with mistaken identity. The appellant said the matter was being handled by doctors and she should not be contacted on the phone again. Subsequent attempts to contact her were unsuccessful. There is a note that by 17 February 2014 there was a plan to offer an urgent outpatient appointment, but nothing appears to have happened until 13 March 2015.

25. No section 17 statement was served and on 18 June 2014 Clinton Davis Pallis Solicitors wrote to the court advising that they wished to withdraw due to non-cooperation. The case was listed for mention on 20 June 2014. The appellant did not attend, but the solicitors did and it was stated that the court would write to her to inform her of a further mention hearing listed on 25 June 2014. The appellant did not attend the further mention hearing and neither did the solicitors.

26. It is apparent (from the transcript of the hearing on 2 July 2014, at pages 4-5) that the prosecution had put the court on notice at the hearing on 25 June 2014 that they were seeking to continue with the case and invite the court to treat the appellant as a deliberate absentee as opposed to an absconder. The prosecution suggested that legal representations could be made to assist the court in relation to the law, even if the appellant's solicitors were without instructions. Clinton Davis Pallis Solicitors wrote to the prosecution on 1 July 2014 indicating that they still wished to withdraw, but had been required to attend in any event by the court.

27. A confiscation hearing was listed on 2 July 2014. The Appellant did not attend and neither did a representative of Clinton Davis Pallis Solicitors, who when telephoned by the court said that they were professionally embarrassed. His Honour Judge Gold QC was the judge and decided against requiring the continued involvement of the solicitors, on the basis that it would be unfair to the solicitors to have to continue to act when they felt they were professionally embarrassed and that the prosecution would be able to assist the court from both sides. HHJ Gold QC gave a ruling that the appellant had chosen to absent herself from the court. HHJ Gold QC set out a chronology of proceedings up to that time. HHJ Gold QC noted that there was insufficient court time to hear the matter so he gave one further adjournment. HHJ Gold QC directed that the prosecution write to the appellant to inform her that the confiscation hearing was listed on 4-5 September 2014 and that if she did not attend the case would proceed in her absence.

28. On 3 July 2014 the appellant attended her GP complaining of pain in her neck and painful neck muscles. A dental abscess was diagnosed, and the appellant was prescribed antibiotics. There was no reference to any psychiatric complaint or concerns.

29. On 9 July 2014 the financial Investigator hand delivered letters addressed to the appellant at 105 Links Road, and care of her daughter at 52 Comford Road, SW17. The appellant's daughter said that the documents should be served directly on her mother.

The letter made it clear that the case would proceed, even in the appellant's absence, and that a confiscation order in the sum of £283,214.90 was being sought, and that non-payment could result in the Appellant going to prison for up to 5 years.

30. It is apparent that on 3 September 2014 telephone contact was made with the appellant who pretended that the number telephoned was a children's emergency number, and the appellant refused the delivery of correspondence which was then returned to the Court.

31. On 5 September 2014 the appellant failed to attend court. The court proceeded to hear the prosecution's application for a confiscation order. The Financial Investigator, Zoe Neale, gave evidence. The total criminal benefit was put at £538,846.89 with an additional sum of £51,649, which had been paid into one of the appellant's accounts. The total benefit was deemed to be £590,316.08. The appellant had funds in two properties, 40 Pendevon Road and 105 Links Road. Based on the figures provided by Miss Neale the judge was satisfied that the available assets amounted to £283,214.90 and a confiscation order was made in that amount.

Other relevant events after the confiscation proceedings

32. In November 2014 the appellant attended Merton's Council Tax Office to discuss outstanding council tax for one of her properties. On 27 January 2015 the appellant published a poetry audio book in the name of Ama Bell Gam. The Publishers were 'Bell-Gam Publishers'. In February 2015 the appellant telephoned Merton Council to discuss council tax arrears.

33. On 11 March 2015 the appellant's GP referred the appellant to Springfield for psychiatric input. On 16 March 2015 a note from Mental Health Services recorded a conversation with the appellant's son. The note recorded that "the main risk is that her two homes are going to be repossessed by Croydon Council as repayment of her incurred debt. She is not paying any bills in her name due to her belief that this is not her. She appears to present with persistent delusional disorder, and believes that the person who should have been convicted is not her. She has issues with her identity and believes someone took her identity in the past. The family are very worried that she is going to end up in prison again – served six months in the past. She has received letters stating that if she does not pay, she will incur up to forty two months in prison. This has not prompted any response from her".

34. On 28 April 2015 the appellant rented a flat at 105 Links Road to tenants, obtaining £950 deposit and a monthly rent of £950. The flat was originally advertised through B&K Estates who confirmed the landlord is Mrs Bell-Gam Clarissa Ama Ihenacho. Rent was paid into a Lloyds account that had not been declared on the Section 18 Replies. A B&K credit check revealed a Barclays account that had also not been declared on the section 18 Replies. Both accounts held positive balances.

35. On 26 August 2015 the appellant was assessed by mental health staff outside her house because she refused them access to her house. She was reported to be "slightly dishevelled…she expressed persecutory delusions about stolen identity and in relation to Merton Council. She was unwilling to engage with mental health services".

36. On 11 September 2015 a social worker recorded that the appellant had barricaded her front door with a piano. A warrant which involved the police was required.

37. On 14 September 2015 the appellant was admitted to Springfield psychiatric hospital, having been detained under section 2 of the Mental Health Act 1983. She unsuccessfully appealed against her admission.

38. The appellant was discharged on 7 October 2015 with a diagnosis of persistent delusional disorder, with the belief that her identity had been stolen. The evidence shows that since then the appellant has refused to comply with any treatment or take medication. This has led to a progressive worsening of her condition.

39. On 25 November 2015 the appellant contacted her mental health nurse saying "I have told you I don't want to see you. I have no obligation to see you as I was discharged from Section and the hospital. I haven't got any mental illness. I'm trying to make your job easy for you, spend your time with other people who need your help, not me, and do not contact my children, they are busy, they are working, this is my human right, do not involve my children, close my file, please".

40. In January 2016 the appellant again attended Merton Council's Tax office to discuss outstanding council tax for one of her properties.

41. On 20 January 2016 the appellant was arrested as a result of enforcement proceedings relating to the unpaid confiscation order. The appellant's daughter liaised with the mental health nurse saying there was a very serious crisis.

42. On 22 January 2016 the psychiatric nurse attended Westminster Magistrates' Court. Mental health notes indicates that "Judge told [the appellant] to get a lawyer, have a mental health assessment, be back in the same court on 2/2/16 at 9.30am. The Judge told [the appellant] that she cannot be bailed as she has exceeded the maximum options available. She owes so much money, about £350,000. She did not appear in court when they wrote to her. She will be imprisoned for a minimum of three and a half years if this is not resolved." The appellant apparently agreed to the judge's requirements.

43. On 27 January 2016 the appellant attended a mental health appointment. It was confirmed that the appellant was not compliant with her oral antipsychotic medication. In April 2016 the Appellant was assessed by Dr Manhal Zarroug, a ST4 psychiatrist, in relation to the enforcement proceedings.

44. Dr Zarroug produced a report dated 22 April 2016 raising issues about the appellant's fitness to plead. In her report, Dr Zarroug recorded that the appellant's son had said that his mother experienced significant distress during her imprisonment. Dr Zarroug concluded that the appellant presented with symptoms suggestive of a mental health disorder since 2014, namely delusional disorder. She stated that: "The nature and degree of her symptoms have been persistently prevalent in her presentation... At the time of the confiscation order, [the Applicant] appears to have been labouring under a defect from disease of the mind. The nature of delusional disorder results in a significantly impaired ability to make judgements/decisions that are related to her delusional beliefs."

45. On 11 August 2016 there was a care plan review. The Appellant was reporting she was mentally stable, her mental health had improved, she wanted to be discharged back to her GP. The appellant's son reported that his mother's mental health had improved greatly, but agreed that his mother needed a few more appointments with a care coordinator to work towards discharge to GP practice. The appellant reported that she was not compliant with any oral medication.

46. On 1 September 2016 the appellant attended an appointment with Mental Health Services and was noted to be relaxed and happy, talking, laughing and communicating and responding to questions being asked about her mental state and support needed. Her son reported she had made wonderful progress, even though she was not taking any medication.

47. On 27 September 2016 the appellant was assessed by Dr Singh, who then produced the report dated 1 November 2016. Dr Singh confirmed that the appellant was not fit to plead and detailed the appellant's difficulties. Dr Singh recorded that he had not had GP or Community Mental Health records. He had therefore taken that information from Dr Zarroug's report. Dr Singh said at paragraph 12.4 of his report that due to her current psychotic state she does not currently have capacity to understand the issues in the case and at 12.7 that: "At the time the Confiscation Order was made on 05/09/2014 she was labouring under a defect from disease of the mind."

48. On 30 September 2016 the appellant was seen at an appointment with Mental Health Services and presented in the same manner as on 1 September 2016, namely being relaxed and happy. A decision was made to discharge her from Mental Health Services.

49. The apparent inconsistency in the appellant's condition at the end of September 2016 was a point which was addressed in oral evidence by Dr Shenoy to show that the appellant's conditions at that stage could be deliberately masked by the appellant. This meant that the condition was not all consuming, as was the position now. Dr Shenoy relied on this to help his assessment of where the appellant was on her journey with a deteriorating mental state. Dr Singh's point was that the appellant had been admitted about a year before this in September 2015, and it was apparent from his interview of the appellant in September 2016 that the appellant was not fit to plead at that time, regardless of the fact that she retained the ability to mask her symptoms.

50. On 7 December 2016 the appellant was discharged from mental health services but it was common ground between Dr Singh and Dr Shenoy that at that stage the appellant continued to suffer from persistent delusional disorder. Dr Shenoy said that the appellant would not have changed her deluded belief that another person had stolen her identity, but would have pretended that she did not believe that (so becoming an "accidental true swearer") so that she could be discharged from treatment.

51. On 29 August 2017 there was a telephone call from the appellant's son to the Mental Health Services team attempting to re-refer his mother.

52. On 26 September 2017 the appellant published a book on poetry in the name of Dr Ama C Bell-Gam Ihenacho. The publishers are Bell-Gam Publishers.

53. On 15 January 2018 the appellant was assessed by Dr Shenoy. Dr Shenoy produced a report dated 23 October 2018. Dr Shenoy set out a careful analysis of the GP and

psychiatric records which had been obtained under a court order, because the appellant refused to consent to them being provided. Dr Shenoy recorded that the appellant's medical records showed that her symptoms had fluctuated in the past, for example agreeing to the judge's requirement that she have a mental health assessment when that was incompatible with her deluded belief that she was the wrong person being pursued. Her condition was also reported to have improved, at a time when she was not taking antipsychotic medication.

54. The first joint report was prepared by Dr Singh and Dr Shenoy and was dated 28 May 2019. This recorded:

> "… We both agree that the appellant's history and presentation is consistent with someone suffering from a Persistent Delusional Disorder which is a mental disorder listed in World health Organisation's (WHO) International Classification of Diseases, Tenth Revision (ICD-10), online version 2016 as F 22.0. … The main symptoms in her case are delusions that her identity has been stolen, that she is being persecuted by various agencies and some delusions of grandeur that she has connections with the Royal Family. She lacks complete insight into the nature and degree of her mental disorder due to which she is not accepting any treatment. These symptoms have been fairly constant in her case.
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> …
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> Whether the Appellant was fit to take part in the proceedings at the time the confiscation order was made under the Pritchard criteria and, if not, why not?: Again there are limitations in answering this question as both of us had not seen her around that period. Additionally there is no direct reference to her mental state in her medical record around that period that could have provided some useful information about the severity of her compromised mental state (if any). Notwithstanding these limitations, both Drs Singh and Shenoy provide their opinion to the best of their abilities on the basis of their respective assessments and the review of the available documents. Dr Shenoy is of the view that her mental disorder had onset in January 2014 approximately and got progressively worse over the next few years until she required an admission to hospital in September 2015. However it was not of a degree or severe enough to make her unfit to participate in proceedings under the Pritchard criteria in September 2014 when the confiscation order was made. Dr Singh on the other hand is of the view that the onset of her mental disorder was around the period when the legal proceedings began and it deteriorated further with her incarceration in 2012/2013. Dr Singh believes that by September 2014 her mental disorder was severe enough to impact adversely on her fitness to participate in proceedings under the Pritchard criteria.

> …
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> Notwithstanding the limitations as discussed above, on balance, Dr Shenoy believes that the appellant became unfit sometime between September 2014 and September 2015 as she had a hospital admission in September /October 2015 that would give some indication about the severity of her mental state and this combined with the trajectory of the natural course of her mental disorder (without any treatment). On the other hand Dr Singh believes that she became unfit sometime between January 2014 and September 2014. Dr Singh is of the opinion that her mental disorder became worse in 2012 during incarceration (in prison) and she had her first contact with mental health services in January 2014 following mounting concerns by her family members."

55. Dr Singh produced a further report dated 25 September 2020, following a video call on 2 September 2020. The appellant's family facilitated the call, and Dr Singh was able to hear the appellant talking and communicate with her, but the appellant did not appear on camera.

56. Dr Shenoy attempted to reassess the appellant on 15 September 2020 and he produced a further report dated 18 September 2020. Dr Singh and Dr Shenoy produced a further joint report dated 11 January 2021. So far as is material their conclusions remained the same.

57. Both Dr Singh and Dr Shenoy gave evidence consistent with their written reports and joint statements. Both Dr Singh and Dr Shenoy agreed that it was difficult to attempt to determine whether the appellant was fit to plead in September 2014 when they had only seen the appellant sometime after that. Both Dr Singh and Dr Shenoy agreed that they could not exclude the possibility of error in their assessment.

58. Dr Singh emphasised the florid nature of the appellant's symptoms when he saw her in September 2016, and Dr Shenoy pointed to the apparent variation of symptoms when the appellant was discharged a few days later that month.

59. Dr Singh explained that the appellant would be able to function in other areas of life, such as writing or renting properties, because they did not engage the delusional disorder. Dr Singh therefore did not consider that the appellant was deliberately picking and choosing when to engage.

60. Dr Shenoy emphasised the absence of any contact with psychiatric services from February 2014 to March 2015. He considered this to be significant given the fact that the appellant visited the GP in July 2014 and was seen by solicitors in this period.

61. Dr Singh considered that the appellant's delusional disorder would have been so established by September 2014 that the appellant would not be able to give instructions on the case. Dr Shenoy considered that the appellant would have been capable of giving instructions.

Admission of the fresh evidence

62. It was submitted on behalf of the appellant that the fresh evidence should be admitted. It was submitted that particular regard should be had to the credible contents of the psychiatric reports, the support they lend to the appellant's grounds of appeal and that this evidence would have been admissible before the Crown Court.

63. The respondent submitted that the fresh evidence should not be admitted and relied in particular on the judgment of the Privy Council in *Taitt v State of Trinidad and Tobago* [2012] UKPC 38; [2012] 1 WLR 3730 to support its contentions. The respondent submitted that the effect of that decision was that psychiatric evidence about fitness to plead should not be admitted unless it pointed very clearly to the fact that there had been a miscarriage of justice. However the decision in *Taitt* was a decision of the Privy Council sitting on appeal from the Court of Appeal of Trinidad and Tobago dated 11 December 2009, following a trial at which the appellant had been convicted on 16 May 2006. At neither the trial nor on appeal to the Court of Appeal of Trinidad and Tobago had an issue about the appellant's fitness to plead been raised. The approach of the Privy Council in that case was in relation to the admission of evidence in second appeals heard in the Privy Council. *Taitt* was not about the approach to the admission of evidence in section 23 of the Criminal Appeal Act 1968. That said it is obviously important for issues of fitness to plead to be raised at first instance so that they can be fairly determined when they are raised, rather than, as here, over six years after the event.

64. We have decided to admit the psychiatric evidence pursuant to section 23(1) of the Criminal Appeal Act 1968. We have had regard to the matters set out in section 23(2) of the Act. So far as is relevant it was common ground that the evidence was capable of belief, see section 23(2)(a). The evidence might afford a ground for allowing the appeal, see section 23(2)(b). This was because if the appellant was not fit to plead at the time of the confiscation hearing this is relevant to the fairness of the proceedings, even though it is possible in certain circumstances for a defendant to be unfit to plead during confiscation hearings and for the confiscation hearings to continue and statutory assumptions to apply. The psychiatric evidence would have been admissible in the confiscation proceedings to show that the appellant was not fit to plead, see section 23(2)(c). This was because it was relevant to show whether the appellant was fit to plead. There was a reasonable explanation for the failure to adduce the evidence in those proceedings, see section 23(2)(d). This was that the reports were not then available.

The appellant was fit to plead on 5 September 2014

65. We therefore turn to deal with the remaining area of dispute between Dr Singh, supported by the written report from Dr Zarroug, on the one hand, and Dr Shenoy on the other hand, namely whether the appellant was fit to plead in September 2014. This was at a time when the appellant was suffering from a persistent delusional disorder, and when Dr Singh considered her to be unfit to plead, but Dr Shenoy considered her to be fit to plead.

66. Before doing so we should record that we did not hear any oral evidence from the appellant's family, even though it is apparent from the medical records that members of the family have been responsible for some of the contact between the GP and

community psychiatric services on the one hand and the appellant on the other hand. It is apparent from some of the reports that the appellant has not wanted her family involved in the proceedings, and it is apparent from the same materials that attempting to assist the appellant, notwithstanding her persistent delusional disorder, has been very difficult for the family. On the other hand it has restricted the evidence about matters contemporaneous to 2014 available to us.

67. We also record that we do not have any evidence from the lawyers who were instructed, at various times, on behalf of the appellant. This may be for understandable reasons, namely that it is the appellant's legal privilege and it is now common ground that the appellant lacks capacity to waive that privilege. Again this has restricted the evidence available to us to make a full assessment of the appellant's fitness to plead in September 2014.

68. We find that both Dr Singh and Dr Shenoy were doing their honest best to assist us, and both Dr Singh and Dr Shenoy fairly acknowledged the difficulties in deciding this particular issue because they did not see the appellant at the time. We were grateful to them for the assistance that they provided to the court.

69. We can confirm that we did not derive much assistance from the admitted facts that the appellant was able to carry out other tasks relating to her properties and council tax bills both before and after the relevant period. This was because those actions, as both Dr Singh and Dr Shenoy pointed out, did not involve challenging the delusional belief and therefore would not be affected by it (at least before the symptoms became all pervasive). As stated in *R v Pritchard* it is not enough to have a general capacity to communicate on ordinary matters.

70. It seemed to us that the important points in favour of the appellant being unfit to plead in September 2014 were the facts that: it was common ground that the appellant did have a persistent delusional disorder in September 2014; there was contact with the Mental Health Services team in February 2014; and the appellant's solicitors raised the issue of obtaining medical evidence about the appellant towards the end of 2013.

71. On the other hand we consider that these points are outweighed by the matters pointing towards the fact that the appellant was fit to plead in September 2014. First there was a period from February 2014 to March 2015 when there was no contact with the Mental Health Services. We accept, as Ms Barden fairly pointed out, that the appellant might have "fallen between the gaps" of the provision of psychiatric services, but we do take account of the fact that the appellant was seen, albeit for an unrelated matter, by a GP in July 2014 and no issues about mental health were raised. We also take account of the fact that members of the appellant's family did press for intervention when the appellant was in need of help, as is apparent from the medical records. That suggests that after February 2014 there was a period when the appellant did not need assistance.

72. Secondly we take account of the fact that the appellant was represented by solicitors who in July 2014 did not suggest that the appellant was not fit to plead, even though they had earlier raised the issue of obtaining medical evidence about the appellant.

73. Thirdly we note that the appellant had, albeit earlier in the chronology, been able to complete a statement for the confiscation proceedings and had been able to appear in the Court of Appeal to make submissions in support of her appeal in May 2013. This

suggests that the appellant was able to deal with matters which related to her delusional belief in a way which suggested that she could give instructions for a period of time.

74. Fourthly we note that these were confiscation proceedings and there was nothing to suggest that as of 5 September 2014 that the appellant would not have been able to identify what assets she had, where she had obtained them from, and what were her sources of income. It is clear that the confiscation proceedings would have taken place against the background of convictions which the appellant contended were a miscarriage of justice (originally on the basis of a false defence, which had by this time manifested to become a persistent delusional disorder, namely that someone else had carried out the relevant acts) but it is not apparent why that contention and delusion would prevent the appellant giving instructions about, and making a proper defence to, the confiscation proceedings.

75. For all of these reasons we find that it has not been shown on behalf of the appellant, on the balance of probabilities, that the appellant was not fit to plead in September 2014 at the time of her confiscation hearing.

Other matters

76. This conclusion means that the appeal will be dismissed. This means that it is not necessary to determine issues relating to the application of assumptions under section 10 of POCA or the points about the appellant's alleged criminality in relation to obtaining mortgages by false representations that the appellant had an income when the appellant's tax returns and statement in this case was that she had no income.

77. We were told by Ms Levett that, given the time that had expired since the order was made, it would be open to the respondent to make an application for an uplift in the calculation of the available amount under section 22 of POCA. We do not express any view on that save to say that it is apparent that any new application will raise issues about the fair representation of the appellant given her unfitness to plead, which is likely to lead to further delay and expense.

78. Finally it is apparent that as part of the confiscation order both the benefits paid out by the respondent and the costs incurred by the respondent in prosecuting the appellant were ordered to be paid as compensation pursuant to section 130 of the Powers of Criminal Courts (Sentencing) Act 2020, now section 133 of the Sentencing Act 2020. Ms Barden did not take any point on this and Ms Levett put in a note supporting the approach which was taken by the judge.

79. We understand why the benefits paid to the appellant were ordered to be paid as compensation to the respondent, but it is not apparent to us why costs incurred in bringing a prosecution are "loss and damage resulting from that offence" and should be ordered to be paid as compensation. As the point has not arisen for decision we say no more about it, and we leave the point to be decided in a case where it arises.

Conclusion

80. For the detailed reasons set out above we admit the fresh evidence on appeal but dismiss the appeal against the confiscation order.