No: 2006/5380/C4

Neutral Citation Number: [2007] EWCA Crim 2789

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2

Wednesday, 4 July 2007

B E F O R E:

LADY JUSTICE HALLETT

MR JUSTICE SILBER

MR JUSTICE WILKIE

- - - - - - - - - - - - -

R E G I N A

-v-

LISA THERESE GORE (Deceased)

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Computer Aided Transcript of the Stenograph Notes of

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(Official Shorthand Writers to the Court)

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MR A WEBSTER QC AND MR P TURNER appeared on behalf of the APPELLANT

MR P REID QC appeared on behalf of the CROWN

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J U D G M E N T

1. LADY JUSTICE HALLETT: On 8th November 1996 the appellant, Lisa Therese Gore, now deceased, appeared at the Crown Court in Preston charged with two offences, infanticide and endeavouring to conceal the birth of her child. The particulars of the offence of infanticide were:

"Lisa Therese Gore on the 24th day of April 1996 at a time when the balance of her mind was disturbed by reason of her not having recovered from the effects of giving birth to a child or from the effect of lactation consequent upon the birth of a child by a wilful omission namely to attend to the child or seek medical attention at a time of the child's birth caused the death of a child being a child under the age of 12 months."

She was represented by solicitors, leading counsel Mr Richard Henriques QC (as he then was) and junior counsel Miss Heather Lloyd. Miss Gore's parents stood by her and, we are informed, took her to conferences with counsel and solicitors, albeit they may not have been present during the actual conference.

2. Miss Gore was advised that she may have a defence to the charge of infanticide, but she insisted on pleading guilty to that offence. Her parents were informed of the advice and her decision. As is frequently the case, the appellant wanted the proceedings over as quickly as possible. However, nothing was rushed and the necessary expert reports and advice were obtained. Eventually Miss Gore tendered her pleas and her pleas of guilty to count 1 (infanticide) but not guilty to concealing the birth of her child (count 2) were accepted.

3. She appeared on 2nd December 1996 for sentencing before Steel J. The judge had the benefit of a very full psychiatric report and a pre-sentence report from a sympathetic probation officer. In her sentencing remarks, Steel J adopted the suggestion of the probation officer that the appellant was in need of help rather than punishment and sentenced her to a probation order for three years with a condition of psychiatric treatment.

4. The appellant did not attempt to appeal either her conviction or her sentence. Sadly, Miss Gore died of cancer in 2003. However, her case came to light in the course of a review conducted by the Attorney General's

Interdepartmental Group set up following the decision of this court in R v Cannings [2004] EWCA Crim. 01 to consider homicide convictions where the victim was less than two years old. The Criminal Cases Review Commission (CCRC) has referred Miss Gore's case to the Court of Appeal Criminal Division on the basis that the Commission is satisfied that, despite her plea, there are here exceptional circumstances to justify making a reference. The Vice President of the Court of Appeal Criminal Division has granted leave for the appellant's parents, Mr and Mrs Thomas Gore, to bring the appeal on behalf of their daughter.

5. Miss Gore was 25 years of age at the time her baby was born and died. She lived with her boyfriend, Mr Jeremy Dyas, the baby's father, in St. Anne's, Lancashire. Mr Dyas knew nothing of the pregnancy. It seems that Miss Gore, for whatever reason, was not entirely frank with people about her condition. Her last period was in October 1995 and she began to put on weight. In the months prior to the baby's birth, work colleagues, neighbours and family members suspected she might be pregnant. They confronted her but she denied it. She led Mr Dyas to believe that she was taking the oral contraceptive pill and that her weight gain was a side effect of her long term use of the drug. She told Mr Dyas that her doctor would not permit her to receive an injected contraception. This was not true. Miss Gore was later to tell police in interview that she had been taking the pill regularly since before any possible date of conception. She claimed she had such pills at her office, but a search produced none.

6. On the morning of 24th April 1996 the appellant went to work as normal. By 8 o’clock in the morning she was experiencing labour pains. She decided to return home. She left a note for her superior in which she explained she had stomach ache and she had not slept the night before. It is said that at this time she still attributed her pains to food poisoning.

7. In the early afternoon she gave birth, unaided, to a full-term baby boy. Having wrapped the baby in towels and having placed him on the floor the appellant lay on her bed for some two to three hours. She fell asleep for a short period. On waking up she wrapped the baby in paper and then in carrier bags before driving to nearby sand dunes where she left the baby.

However, she was seen and her car number was taken by a concerned bystander. When her boyfriend returned home that evening the appellant told him that her physical pain and the blood on the bathroom floor were due to her experiencing a heavy period. Later that evening the two of them went to a local public house.

8. The baby's body was found that night on the dunes. At 10.50 the next morning the appellant telephoned the police to give herself up. She was arrested. She was taken to a police station and to a hospital. Medical examination confirmed that she had given birth in the previous 24 hours. A search of the dustbin area immediately outside her home revealed bloodstained clothing and pieces of human tissue in a refuse bag.

9. A post-mortem examination was conducted by a pathologist, Dr Tapp. He concluded that the baby's lungs appeared to be expanded and there was a bloodstained frothy fluid in the airways. These facts, coupled with the appearance of the baby's body, indicated that the baby had lived for a period of between five minutes and six hours. A defence pathologist agreed that the baby must have lived for some minutes. He did not agree that the time extended to as much as six hours. He was not prepared to give a maximum time limit. Dr Tapp was of the opinion that the baby died from Neonatal Anoxia. This may arise from a deliberate blockage of the airways but there was nothing found to suggest this had happened. Neonatal Anoxia may also have arisen if the airways had been blocked due to lack of attention following delivery, particularly by soft materials accidentally occluding the nose and the mouth; hence the framing of the particulars of the offence.

10. The prosecution case was that the appellant had been aware of the fact that she was pregnant and, at best, had deliberately closed her mind to this possibility. Following the birth, it was alleged that she had caused the baby's death by wilfully omitting to seek medical attention.

11. The defence case was that she had not realised she was pregnant until she saw the baby's head emerge during delivery. She had assumed that her weight gain was due to her menstrual cycle. As to the delivery itself, she said she had delivered the baby head first whilst seated on the lavatory. Owing to her state of shock, she claimed she left the child upside down in

the lavatory bowl for approximately 15 minutes. This part of her account, which suggested the baby may have drowned in the water, was flatly rejected by the Crown's pathologist.

12. Miss Gore said that she never heard the baby cry or saw him make any movement. She said she sat crying on the lavatory and subsequently went and sat on the floor. After some minutes she found a pair of scissors with which to cut the umbilical cord. She said she then removed the baby from the lavatory, wrapped him in towels and placed him on the floor.

13. The parties sought the assistance of a number of experts. Two psychiatrists were asked to report on behalf of the defence, a Dr Shaw and a Dr O'Halloran. At the time neither doctor suggested the appellant was not fit to plead. Dr O'Halloran suggested the appellant was suffering from hysterical dissociative disorder, a recognised psychiatric disorder. Dr Shaw felt the appellant's condition did not merit such a diagnosis, although she too expressed concern about the level of emotional detachment that she observed in the appellant.

14. When approached by the CCRC, Dr Shaw, in a letter dated 12th October 2005, informed the Commission that she still had no concerns as to the appellant's fitness to plead. In her opinion the appellant would have understood the nature of the charge and been able to instruct her lawyers. Dr O'Halloran, however, in a report dated 22nd September 2005 stated that when first instructed she had not addressed the issue of whether or not the appellant was fit to plead. We confess, given her present position, we find this somewhat surprising.

15. In Dr O'Halloran's new report she remains of the firm opinion that her diagnosis was correct and she added this:

"Miss Gore was not in an optimal state to give full and careful consideration of all the implications of a guilty plea..."

We received evidence from her de bene esse . Albeit she still accepts that Miss Gore was able to understand the charge, the difference between pleading guilty and not guilty and questions put to her by counsel, the doctor now has her doubts as to whether the appellant's motivation for

pleading guilty may have been distorted by her condition. Dr O'Halloran also questioned whether or not the appellant was capable, given her condition, of wilful action or inaction. The doctor told us that the appellant's dissociative state was variable and partial. It is possible therefore, that she may have gone into "an altered state" after seeing the baby's head. She went further and said:

"Lisa Gore's failure to attend to the child is unlikely, in my opinion, to have been due to a wilful act as defined in R v Sheppard but was likely to have been the consequence of her psychiatric disorder namely the hysterical dissociative disorder."

The reference for R v Sheppard is [1981] AC 395.

16. In her evidence before us, Dr O'Halloran appeared to concede the proposition that it was also possible that the appellant had intentionally or recklessly left her baby to die simply because she did not want him to survive.

17. Despite the fact that Miss Gore is now dead, that she pleaded guilty and did not attempt to appeal her conviction or sentence during her lifetime, the CCRC has referred this case to us because the Commission was satisfied of the following, taking them in our own order:

i. Her defence was prejudiced by the drafting of the indictment which made no reference to any intent to kill or cause grievous bodily harm. This "had a consequential impact upon the advice which Miss Gore received (as seen in the context of the confused state of the law and her psychological state)".

ii.. There is new evidence in the form of Dr O'Halloran's report supporting the contention that Miss Gore's conviction is unsafe because “she did not appreciate the nature of the charge”.

iii. There are “serious doubts” as to whether her omissions caused the death of her baby.

iv. There is “no evidence that Miss Gore intended by her omissions to kill her baby”.

18. At the heart of this reference is the CCRC's submission that a woman can only be convicted of infanticide under section 1(1) of the Infanticide Act 1938 if all the ingredients of murder are proved, in particular if the mens rea for murder is proved, namely an intention to kill or to cause really serious bodily harm. We shall consider first the definition of infanticide. Section 1(1) reads:

"Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder , she shall be guilty of an offence, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of the opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, returned in lieu thereof a verdict of infanticide.

(3) Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of manslaughter, or a verdict of guilty but insane..."

19. The CCRC has helpfully analysed the origins of this legislation. The results of their researches appear at Annex C to the reference. The Bill which became the Infanticide Act 1922 went through several drafts, during the course of which qualifying phrases such as "unlawfully by any direct means intentionally" were removed from the phrase "causes the death of her child". The other interesting fact to emerge from the Commission's analysis

is that at the committee stage of the Infanticide Act 1922 the then Lord Chancellor informed the House that it was not the Bill's intention to place infanticide "in a lower grade of murder", but to treat it as a "lower grade criminal offence". The only significant difference between the offence of infanticide under the 1922 Act and under the 1938 Act, which replaced it, was that in the former Act the offence was confined to a newly born child. It should be remembered that at the time both Infanticide Acts were passed there was no defence of diminished responsibility available to someone charged with murder and the penalty for murder was death.

20. Mr Reid QC for the Crown summarised the similarities and differences between infanticide and the defence of diminished responsibility as later introduced. His analysis follows:

(i) Infanticide requires that the balance of a woman’s mind is disturbed at the time she kills her child, either by failure to make a full recovery from the effects of the birth or as a result of the effects of lactation. Diminished responsibility requires proof of abnormality of mind stemming from one or more of a stipulated list of causes that substantially diminishes the defendant's mental responsibility for the killing.

(ii) Infanticide is both a partial defence to a charge of murder under subsection (2) and an offence in its own right under subsection (1). It can be charged from the outset and can be used to avoid charging a woman with the offence of murdering her own child.

(iii) Whereas the burden of proof is on the defendant on the balance of probabilities to establish the partial defence of diminished responsibility, in infanticide, the prosecution embrace and must prove the disturbance of the defendant’s mind.

(iv) Unlike diminished responsibility, the wording of the Infanticide Act does not explicitly require any causal connection between the killing of the child and the necessary disturbance of the balance of the mind. The infanticidal mother need only produce evidence that at the time of the killing the balance of her mind was disturbed either by birth or by the effects of lactation.

(v) A plea or charge of infanticide is restricted to biological mothers of the deceased and the deceased must have been under 12 months old at the time of death.

21. Both the Commission in its reference and Mr Webster QC, who appeared on behalf of the appellant, referred the court to the need for reform of the law of infanticide as expressed by this court in R v Kai-Whitewind [2005] Cr.App.R 31, [2005] EWCA Crim. 1092. At paragraph 140, Judge LJ giving the judgment of the court said this:

"The law relating to infanticide is unsatisfactory and outdated. The appeal in this sad case demonstrates the need for a thorough re-examination."

However, it should be noted that the court's concern in Kai-Whitewind was that the requirements in subsections (1) and (2) of the Infanticide Act were outdated and unduly narrow. The court was of the opinion that consideration should be given to extending the definition of infanticide not restricting it.

22. The only decision relevant to the mens rea required for infanticide put before us by counsel was R v K.A. Smith [1983] Crim.L.R 739. This was a first instance decision and the decision focused on the issue of whether the offence of attempted infanticide was an offence known to law. All concerned appear to have proceeded on the basis that infanticide is an offence for which the necessary ingredients include the intention for murder, but this seems never to have been argued.

23. We have also been informed of anecdotal material that a number of women charged with manslaughter (where the prosecution has not alleged an intention to kill or cause really serious bodily harm) have subsequently pleaded guilty to infanticide. This appears in an article in the Criminal Law Review 1993 at pages 23 to 25. The article is entitled "The consequences of killing very young children.” and its author: RD Mackay.

24. Whatever the practice of prosecutors and the courts, Mr Webster has valiantly tried to support the CCRC's interpretation of section 1. He argues that section 1 created a new offence for which the Crown must prove a wilful, (as in malicious) act or omission causing the death of a child, the requisite disturbance of the mind, and, most importantly, the Crown must

prove that but for the disturbance of the mind the circumstances were such that the killing would have amounted to murder. In other words, Mr Webster pinned his colours firmly to the mast of the Crown must allege and prove [or the appellant accept] an intention to kill or cause grievous bodily harm".

25. Mr Webster suggested it could not have been the intention of Parliament to create an offence which has the necessary ingredients of manslaughter plus the added element of a disturbance of mind and then to provide that it may be punishable as manslaughter. He invited us to conclude that it is clear from the wording of section 1 as a whole that Parliament chose not simply to reduce the offence to manslaughter but wished to create a quite separate offence. In this regard he invited us not to overlook that section 1(2) provides infanticide as a partial defence to what might otherwise be murder, and subsection (3) expressly preserves the power of a jury to return a verdict of manslaughter. Mr Webster argued that these provisions were inconsistent with the interpretation put on the section by Mr Reid.

26. Mr Webster insisted that the court should focus on the significant phrase " notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder ". He argued that the inclusion of those words must have some meaning and purpose. He suggested it would be helpful to remove the sub-clause dealing with the disturbance of the mind in which case the section so far as is relevant would then read "Where a woman by any wilful act or omission causes the death of her child ... notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder..." Mr Webster accepted that for this argument to run "notwithstanding", used as a preposition in this context, must mean "provided that". He invited us to note that the section does not provide "the offence may have amounted to murder" but provides "the offence would have amounted to murder." On this analysis he argued the subsection defines the offence by reference to a specific set of circumstances.

27. If Mr Webster was forced back to examine the legislative history, which he was happy to do, he argued that the original Bill was aimed at providing alternatives to murder (for which we repeat capital punishment was the only

penalty). He took us through the CCRC's analysis of the history and pointed out that a number of amendments to the Bill had been proposed by the Lord Chancellor but there had been no detailed debate in the Commons upon the final form of words used. Indeed, there was very little debate. He also pointed out that the gentleman promoting amendments to the Bill, did not seem to consider that the change of wording from "unlawfully by any direct means intentionally causes the death of her newly-born child" to "by any wilful act or omission causes the death of her new born child" to be of any significance. On that basis, Mr Webster argued if it was not significant to the government of the day it should not be significant to this court. He suggested that in any event the change of words was intended to ensure that the section covered omissions, as well as acts, which might otherwise have been excluded from the definition.

28. Albeit Mr Webster accepted that the word "wilful" appears in another Act of the same decade, namely the Children and Young Persons Act of 1933, and that “wilful” in this context has been interpreted in the case of R v Shepherd (to which we have already referred) as covering both intent and recklessness, Mr Webster rightly reminded us that when it comes to statutory construction context is all. Words do not necessarily bear the same meaning in every Act of Parliament. He submitted that the word "wilful" cannot, given the clause beginning "notwithstanding", have the same meaning in the Infanticide Act as it has in the Children and Young Persons Act.

29. Given the terms of the referral to this court by the CCRC, Mr Webster was then, as it seems to us, forced to argue that, if the mens rea for murder is a necessary ingredient for infanticide, then it must be specifically averred. He reminded the court of the terms of rule 6 (b) of the Indictment Rules which dictates that the particulars of offence shall disclose “the essential elements of the offence”. He suggested that where there is a failure to aver an ingredient as vital as the necessary intent, this court should not dismiss such a failure as insignificant. He accepted that there are circumstances in which even if the particulars of offence do not cite all the necessary ingredients of the offence, provided the defendant is not prejudiced thereby, the court is not obliged to quash the conviction. However, he argues that

where you have someone in a very fragile and emotional psychological state as Miss Gore was, the court must tread very carefully. It is said she might well have pleaded guilty to an offence wrongly particularized. Had her attention been focused on the issue of an intention to kill her child she might have taken a different course. He invited us, therefore, to bear very much in mind the circumstances of this appellant when considering whether or not the requirements of the Indictment Rules have been breached and whether or not the appellant was thereby prejudiced or embarrassed in her defence.

30. On the subject of what happened at the time Miss Gore was advised as to her plea and when she made her decision to plead guilty, we have the benefit of the recollections of her solicitor and her junior counsel, Miss Lloyd, who has spoken to former leading counsel. We know that her solicitor, Mr Dolphin, was alive to a possible defence based on mens rea . He instructed counsel to advise and consider the question of wilfulness. Similarly, Miss Lloyd and Mr Henriques were alive to the same issue. Miss Lloyd was asked by the Commission to comment on the question of wilfulness and how it was addressed by counsel. She informed the CCRC that the appellant was advised that there was a potential defence available to her based on her mental state, but "Miss Gore wished to plead guilty and was fully aware of the implications of her ultimate and informed decision to plead guilty." Miss Lloyd was never pressed by the CCRC on what she meant when she said "Miss Gore was advised that there was a potential defence based on her mental state". We have nothing from her parents who seem to have been close by when the advice was given and the decision taken. Thus, for all this court knows Miss Gore was advised in the way that Mr Webster would have wished. Miss Gore may have accepted all the ingredients of the offence as he claims they should be. Miss Gore cannot help us on what advice she was given, what prompted her plea or, most importantly, what she accepted by her plea. This is one of the more obvious difficulties that arise when cases are brought to this court years after the event and when a defendant has sadly died in the meantime.

31. As to what prompted Miss Gore to plead guilty, we accept that one factor playing on her mind might well have been the desire to get the matter over with. It was plainly in her emotional and psychological best interests to do

so. There may have been other factors in play here too. Miss Gore may have been influenced by the fact that the offence of infanticide carries with it less moral opprobrium than an offence of homicide. She may have been influenced by the fact that she was told that almost invariably offences of infanticide are met these days with a community penalty. But, if she was properly advised, the fact that these factors may have played their part in her final decision does not, in our judgment, mean that she was in any way deprived of her free choice; nor does it mean this court should proceed on the basis that she entered her plea for the wrong reasons. Thus, there is nothing before us, as we see it, to suggest that the appellant's attention was not focused on the ingredients of the offence of infanticide when she made her informed decision to plead guilty.

32. As far as the alleged inadequacy of the particulars of offence is concerned, therefore, given the appellant's repeated expressed desire and intention to plead guilty to the offence, whatever advice she received, we fail to see what difference the inclusion of the words "with the intention of killing or causing grievous bodily harm to the child", if required in law, would have made to this accused. However narrowly or broadly defined the mens rea for the offence of infanticide should be, Miss Gore rejected the possibility of a defence on the grounds of her mental state. There is no reason on the material put before us to suppose that had the particulars been drafted differently she would have taken any different course and has been prejudiced by the alleged defect. In any event, we do not accept that the particulars were defective. The Act makes no mention of an intention to kill and the particulars followed the words of the offence-creating section. The rules, in our judgment, were sufficiently complied with. Had there been any defect in the indictment of the kind complained of by Mr Webster, we have no doubt that an application to amend could have been made and, there being no prejudice to Miss Gore, the application would undoubtedly have succeeded. Thus, we would dismiss this limb of the appeal.

33. However, it may be helpful to the parties to add that in any event we prefer the interpretation put on section 1 by Mr Reid for the Crown. In our view, there is no requirement that all the ingredients of murder be proved before a defendant can be convicted under section 1(1) of the Infanticide

Act. We are satisfied that Parliament intended to create a new offence of infanticide which covered situations much wider than offences that would otherwise be murder. If the criteria in subsection (1) are fulfilled, the mother who kills her child does not have to face an indictment for murder. She faces a lower grade criminal charge, namely infanticide.

34. The mens rea for the offence of infanticide is contained, as we see it, explicitly in the first few words of section 1(1), namely the prosecution must prove that the defendant acted or omitted to act wilfully. There is no reference to any intention to kill or cause serious bodily harm. Mr Webster acknowledges that on his version of the section the word "wilful" would be superfluous. The word "wilful" was not superfluous in the Children and Young Persons Act 1933 and to our mind, it was not superfluous here. It is from the word "wilful" that one derives the necessary mens rea for the offence of infanticide. As to the meaning of the phrase " notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder ", to suggest as the CCRC and Mr Webster suggested that this means "notwithstanding and provided that" is to strain the English language. We take the word “notwithstanding” to mean what the Oxford English dictionary says that it means when used as a preposition. It means "despite the fact" or "even if". It does not mean "provided that". In an era when a mother who killed her child with the intention of doing so would have faced the death penalty, we take the view this phrase was added for the avoidance of doubt. Further, we note that in subsection (1) Parliament has used the word "would", it has not used the word "must". "Would" does not mean "must" and there is no reason to give the word "would" an extended and unnatural meaning. Had the draughtsman intended to provide that a woman could only be guilty of infanticide if she intended to kill or seriously harm her child, he would no doubt have said so and Parliament would not have agreed the deletion of the word "intentionally". Finally, as Mr Reid pointed out, the section creates an offence in subsection (1) and it provides a partial defence to murder and a possible alternative verdict to murder in subsection (2). If section 1(1) were intended only to be used where the mental element for murder was proved then section 1(2) would be redundant. The offence created by section 1(1) could always have been left open to the jury as an alternative charge to murder.

35. Although humanity may not be an acknowledged cannon of statutory construction, the fortunate consequence of our interpretation is that the offence of infanticide covers a wider range of cases than those covered by the interpretation put forward by Mr Webster. A distressed young mother in a similar position to this appellant is not forced to confront what may be the stark truth that, for whatever reason, however disturbed she may have been at the time, she killed her child intending to kill or cause really serious bodily harm. Nor will such a young woman, if she does not accept that she had such an intention, have to face a murder trial. To our mind no useful purpose would be served by restricting the offence of infanticide in such a way. As Mr Reid put it, the present state of the law is that a mother in this position, often a woman in severe distress, is not required to acknowledge that she has murdered her child before she can benefit from a charge of infanticide.

36. We turn finally to consider the question of whether or not this conviction is unsafe because, it is said, the court cannot be sure how the baby died and whether the death was caused by the appellant's wilful neglect. We do not wish to cause Miss Gore's parents or any members of her family unnecessary distress. We would have preferred to limit our remarks to supporting counsels' assessment of the strength of the case against the appellant, given all the material before them. However, we feel we have no alternative but to go into a little detail, given the way the matter has been put before us with great care and skill by Mr Webster. In summary, we disagree fundamentally with the CCRC's assessment of the strength of the case against Miss Gore. In our judgment, some may legitimately take the view that the Commission (and indeed the CPS lawyer who reviewed this case on behalf of the Attorney General) have been overly generous to Miss Gore.

37. Miss Lloyd has pointed out a number of difficulties in the appellant's path had she decided to plead not guilty. Miss Lloyd felt the case against Miss Gore was a strong one. Mr Henriques QC must have felt the case was a strong one or he would not have advised a plea of guilty. Miss Lloyd also pointed out that the account that Miss Gore gave initially, and as now relied on by Mr Webster, was contradicted on a number of significant issues by

pathological and other forensic evidence. In particular, Miss Lloyd referred to the evidence from both the prosecution and the defence pathologist that the baby lived for some minutes, or hours, after birth. The pathological evidence also suggested that the baby could not have been born into the lavatory bowl. This contradicted two crucial aspects of the appellant's account. There were further doubts about the reliability of the appellant’s account about the room where she said the baby was born and the way in which she claimed to have cut the umbilical cord. Further, the Crown could rely upon the fact that the appellant on one view had lied, or had certainly failed to tell the truth, about her pregnancy and being on the contraceptive pill. Nevertheless, the Commission challenged trial counsels’ assessment of the strength of the case at the time they advised, for example the CCRC suggested that no significance could be attached to Miss Gore's clear statement to an arresting officer that she had not killed the baby because the baby was "born dead". With great respect to the Commission, they may not attach any significance to that remark but that does not mean trial counsel could ignore it. A jury may well have attached considerable significance to it. Their assessment of what the appellant said may have been influenced by the psychiatric evidence put before them about the appellant’s mental state, but it should be remembered that the psychiatric evidence did not necessarily point all one way. Given the clear evidence of the pathologist that the baby had lived for some time, the jury might have felt that the appellant’s lies, if that is what they found them to be, in particular her assertion that the baby was already dead when she left it alone, were attempts by her to distance herself from an unpalatable truth, namely she had deliberately left the baby to die.

38. An unsympathetic person, an unsympathetic jury, might have wondered why she tried to keep her pregnancy and the birth from those around her. She was not a young child indulging in illicit sexual activity. She was an adult in a loving and supportive relationship who also had the benefit of a very close and loving family unit. She gave birth to a living child and she did nothing to ensure he lived; far from it. She waited for hours until he was dead and then dumped his body unceremoniously in the dunes. She then told her boyfriend more lies before going out for a drink with him. On that evidence, a jury would have been entitled to infer she intended that the baby

die. That was the case as it presented to counsel at the time of trial and they had to advise accordingly.

39. We have no doubt any experienced trial counsel, in the position of Mr Henriques and Miss Lloyd would have taken exactly the same view as they did. Mr Webster QC is an experienced trial counsel. He has done his best to adopt and advance appeal on this ground, but we suspect with little enthusiasm. He was forced to concede that it was not his strongest ground. In truth his only argument was based on an assertion that there was no reliable independent evidence as to how the baby died. There was no evidence of trauma or smothering. He argued it was not possible to conclude with certainty whether medical assistance and a reasonable timescale would have saved the baby. In our view, that argument is wholly without merit. On the doctors' evidence the baby was born alive. He breathed for several minutes; on Dr Tapp's version of events, possibly for several hours. There is every reason to suppose that had he received some attention, any attention, he would not have died. Nor should it be forgotten that the defence pathologist Dr Lawler at page 4 of his report said as follows:

" ... I would have to concede that given the lack of injuries, the lack of congenital abnormalities and the lack of an acceptable cause of death, it is more (than) likely than not that had medical attention been sought immediately after the birth, the infant would have survived. Although I am, of course, unable to speak for Dr Tapp, I strongly suspect that his comments would be very similar; ……however, I rather think that, in his own mind, he is satisfied, and perhaps beyond reasonable doubt, that prompt medical attention would have resulted in this infant's survival." It must be, therefore, a safe and proper inference that the baby died because Miss Gore wilfully left him to die.

40. In any event, there is one final and significant feature of this case which we cannot ignore: namely the fact that this appellant pleaded guilty and never in her lifetime attempted to appeal. Our powers of interference in those circumstances are very limited. Mr Webster put before us very helpfully, as indeed has the Commission, a decision of this court in Kelly and

Connolly [2003] EWCA Crim. 2957. In Kelly , Rix LJ giving the judgment of the court quoted from a previous decision of this court in Bhatti , CACD, 19th December 2000 (unreported). He quoted paragraph 33 in which . Potter LJ observed:

"Thus once the defendant has pleaded guilty and been sentenced on the basis of his plea, it will only be in the rarest of cases that circumstances should be regarded as vitiating or undermining the voluntary nature of the plea to such an extent that the conviction should be regarded as unsafe."

Potter LJ also said at paragraph 31 of Bhatti that in cases where the defendant who has pleaded guilty seeks to appeal against conviction it is highly relevant to the issue of whether the conviction is unsafe that (a) the defendant knew what he was doing, (b) intended to plead guilty, and (c) did so without equivocation and after receipt of expert advice. It is common ground that Miss Gore was fit to plead. Her plea was not equivocal. She was fully and properly advised and for good reason she was advised to plead guilty and decided to do so. In so doing she accepted she had wilfully caused the death of her baby. She accepted the baby had been born alive and that she caused its death. As was held in Saik [2004] EWCA Crim. 2936, her plea of guilty was an acknowledgment of each ingredient of the offence (in this case infanticide). There is nothing in the report or evidence of Dr O'Halloran put before us to cause us to doubt Mr Dolphin's statement and Miss Lloyd's assessment that Miss Gore was fully aware of the implications of her guilty plea and her mind went with the making of that plea.

41. The evidence given by Dr O'Halloran which we received de bene esse in our view takes this appeal no further. Accordingly, we reject, without reservation, any criticisms of counsel or the process leading up to and including the appellant's entering her plea of guilty, if any were implicit in the Commission's reference. In our view, and it seems this was accepted by Miss Gore's parents, her legal advisers served her very well. They did everything possible to limit the distress the proceedings were bound to cause.

42. We conclude with these observations. We are surprised that the Commission should have seen fit to refer this case to us. This was not a case

where the system failed a distressed defendant. On the contrary, it was a case where a young woman was treated with considerable compassion and sensitivity. She never wanted to resurrect this matter and it is unfortunate that, given there can be no benefit whatsoever to her, her parents' expectations have been raised only to be dashed. They should have been left to grieve for their daughter, not forced to relive the tragic circumstances of the death of their grandchild. The Commission might have been well advised to heed the wise words of Kay LJ when he said in the appeal of Ruth Ellis [2003] EWCA Crim 3556:

"We have to question whether this exercise of considering an appeal so long after the event when Mrs Ellis herself had consciously and deliberately chosen not to appeal at the time is a sensible use of the limited resources of the Court of Appeal. On any view, Mrs Ellis had committed a serious criminal offence. This case is, therefore, quite different from a case like Hanratty [2002] 2 Cr. App. R. 30 where the issue was whether a wholly innocent person had been convicted of murder. A wrong on that scale, if it had occurred, might even today be a matter for general public concern, but in this case there was no question that Mrs Ellis was other than the killer and the only issue was the precise crime of which she was guilty. If we had not been obliged to consider her case we would perhaps in the time available have dealt with 8 to 12 other cases, the majority of which would have involved people who were said to be wrongly in custody. The Court of Appeal's workload is an ever-increasing one and recent legislation will add substantially to that load. Parliament may wish to consider whether going back many years into history to re-examine a case of this kind is a use that ought to be made of the limited resources that are available. The exercise of the CCRC's discretion in deciding whether to refer cases is one that is a frequent source of challenge by way of Judicial Review and it may be that an express power to consider factors of this kind would enable the CCRC to take into account more readily the public interest in making its decision."

43. Finally, we wonder whether anybody has explained properly to Mr and Mrs Gore that, had we accepted the interpretation of the law put forward on Miss Gore's behalf, the result could have been disastrous for other distressed young women in the position of their daughter.

44. For all those reasons we do not doubt the safety of this conviction and the appeal must be dismissed.