Case No: 2000/1952/W2

Neutral Citation Number: [2002] EWCA Crim 85
COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 23rd January 2002

Before :

LORD JUSTICE MAY
THE HON. MR JUSTICE GOLDRING
and
THE HON. MR JUSTICE GROSS

- -

	Regina	
	- v -	
	Davies	

- -

(Transcript of the Handed Down Judgment of
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J.H.B. Saunders QC and M Wall for the Appellant
A W Palmer QC(Mr Barnes 23/01/2002) for the Crown

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Judgment
As Approved by the Court

Lord Justice May:

Introduction

1. On 17th March 2000, the appellant, now aged 40, appeared in the Crown Court at Warwick before Tucker J. and a jury, when he was convicted by a jury majority of 11 to

1 of murder. He was sentenced to life imprisonment. He appeals against his conviction by leave of the Full Court, presided over by Clarke L.J., on 13th February 2001. Henriques J. had previously refused leave on the papers.

2. The appellant's main defence to the charge of murder was diminished responsibility. The first ground of appeal is that the judge wrongly ruled that the opinion of a consultant psychiatrist, Dr Rosemary Cope, who had been instructed by the appellant's solicitors to examine him and report, should be disclosed to the prosecution. Dr Cope was subsequently called to give evidence on behalf of the prosecution and gave the opinion that, although the appellant did suffer from abnormality of mind at the time of the killing, it did not substantially diminish his responsibility for it. The main ground of appeal is that the appellant was entitled to object to her giving evidence because she was instructed in circumstances of litigation privilege and that the judge should have upheld that privilege.

Facts

3. In July 1999, the appellant was 37. His brother, John, was 28. Each of their marriages had broken down and they had no settled home. They were both alcoholics and dependent on drugs. They were sleeping in the one bedroom flat of a self-confessed alcoholic, Michael Middleton, in Leamington Spa. Middleton said that, before the incident which led to these proceedings, they appeared to care for each other.

4. The incident which resulted in John Davies' death was on 3rd July 1999. Middleton, the appellant and his brother were in Middleton's flat, drinking and watching television. Middleton gave evidence of what happened. They had been drinking cider from two litre bottles. The appellant had not drunk as much as the other two. John Davies was lying on a bed facing the wall. Out of the blue, he said to the appellant, "You've lost my missus and my kids and my house." This angered the appellant who told his brother that he had done the same to him 11 years earlier. The appellant then walked into the hall. He picked up a plank of wood and used it to hit his brother on the head and body. The attack was the most vicious that Middleton had ever seen. The appellant hit his brother more than four times. Two of the blows rendered him unconscious. He then managed to get up, but the appellant said to him, "Stay there, I'm going to kill you." The appellant also hit his brother with a steel bar. This was a square tube used for stirring paint which was kept between the bed and the table. John Davies screamed at the appellant for him to stop. Middleton then ran to a flat upstairs and asked the occupant to call the police. When he left to do this, the appellant had his brother pinned in a corner telling him not to try anything.

5. When PC Butler arrived at the flat, he knocked at the door. The appellant eventually

opened it about two minutes later. He was bare chested. He said that his brother had had a fit and had banged his head against the walls during it. There was a length of wood against the sitting room wall. The appellant's brother was sitting in a chair by the bed holding his head in his hands and groaning. The police officer found the metal bar hidden inside the sofa. He arrested the appellant, who appeared calm, although he was sweating. There was scientific evidence of the state of the flat.

6. The appellant's brother was taken to hospital in Coventry. He had a skull fracture and blood clots within the skull and bruising to the brain. He had a long operation to remove the blood clots. He died on 10th July. Post mortem examinations revealed up to 25 injuries, some of which had been delivered with considerable force, but some of which may have pre-dated the incident.

7. The appellant was medically examined within 3 hours of the police arriving. He gave coherent answers to questions and his demeanour appeared to be normal. The police surgeon was not aware that he smelled of alcohol. He appeared to have all his senses and was alert.

8. In interview that evening, he again said that his brother had had a fit. He said that they had been drinking and smoking. His brother had not taken his tablets to control his fits and he kept falling over. He repeatedly banged his head on the walls. He had told Middleton to telephone for an ambulance for his brother. He said that his brother had gone to the lavatory and had banged his head on a piece of wood and on the wall. He was interviewed again on the following day when Middleton's statement was put to him. He denied the incriminating parts of it and continued to maintain his account of how his brother had been injured.

9. There was evidence from doctors who had treated the appellant's brother during the months before the incident for alcohol dependency and fitting. He had been variously prescribed Phenytoin, Herminevrin, Temazepam, Valium, Diazepam and painkillers.

10. Middleton said that, in 1997, the appellant had been attacked and struck on the head a number of times with a pickaxe handle. He had been unconscious and was taken to hospital. After he left hospital, he complained of headaches and resumed his drinking. Dr Rowe saw the appellant in July 1997 at the Radcliffe Hospital in Oxford after he had sustained a head injury. He had a fractured skull and some inter-cranial bleeding. There was no evidence of increasing swelling or bruising. He did not need surgery. A brain scan did not show frontal lobe brain damage, although Dr Rowe agreed that this was not conclusive. The injury was mild.

The defence

11. In a defence case statement in October 1999, the appellant maintained his case that his brother's injuries were caused by fits and convulsions. In a further case statement of January 2000, the appellant accepted that he had inflicted the injuries from which his brother died. His defences to the charge of murder were lack of intent, provocation and diminished responsibility. He did not give evidence at his trial. His defence of diminished responsibility depended on evidence from Dr Kennedy, a consultant psychiatrist, and Dr Haldane, a consultant clinical neuropsychologist.

12. Dr Kennedy examined the appellant on 10th February 2000. He reported that "unless the court is willing to accept physical and psychological dependence on alcohol as an abnormality of mind, there is not, in my opinion, grounds for a defence of diminished responsibility." He recommended that the appellant should be examined by Dr Haldane.

13. Dr Haldane reported that, when the appellant was younger and before he was affected by alcohol or trauma, he had an intellectual level in the low average range. But his intellectual abilities had since declined. Some of his abilities were now in the borderline range. Others were at the upper end of learning disabled range. The appellant could not carry out functions efficiently. His decline was consistent with alcohol abuse. His intellectual and memory function was at a low level and just escaped the diagnostic criteria for dementia. The two specific areas of impairment were consistent with what was known of his head injury in 1997. Dr Haldane considered that the appellant's responsibility for his actions on 3rd July 1999 was diminished by neuro-psychological impairment. He suffered from abnormality of mind (and almost certainly did so in July 1999) due to conspicuous dys-executive syndrome associated with damage to parts of the brain. This resulted in lack of ability to change mental state and "perseveration" – a difficulty in stopping a train of thought or action. This usually produced a disinhibition – an impulsive expression of emotion without being able to stop it. Dr Haldane saw a link between the perseveration and the persistent blows inflicted on his brother. He believed that the appellant in consequence suffered from impaired judgment. Alcohol or drugs would exaggerate the abnormality of mind. Dr Haldane's conclusion was that the appellant suffered from an abnormality of mind in the form of intellectual impairment and behavioural disinhibition due to brain damage, whether caused by alcohol abuse, head injury, or both. This abnormality was exacerbated by consumption of alcohol and drugs immediately before the incident.

14. Dr Kennedy said that the appellant suffered from alcohol dependency syndrome which he described as a mental disorder. He would be able to say "no" to alcohol, but it would be difficult. Having seen Dr Haldane's report, he concluded that at the time of the incident the appellant suffered from alcohol dependency syndrome, brain damage and

damage affecting his ability to make decisions. It was impossible to say what had caused the brain damage – alcohol, or injury, or both. Alcohol diminished intellectual function and caused specific difficulty in executive function. It would have diminished the appellant's ability to control himself. He said that at the time of the killing, the appellant was able to control his physical actions and form the intention of killing or causing really serious injury.

Dr Cope and the judge's ruling

15. Dr Cope examined the appellant on 6th January 2000 on the instructions of his solicitors. She provided them with a written report, which was sent to Dr Haldane and referred to in passing in his report. It was not the defence intention to call her to give evidence and her report was not disclosed. The reports of Dr Kennedy and Dr Haldane were served. The prosecution had no psychiatric evidence to put beside these two opinions. As was the practice at the time, a psychiatric report had been ordered *by the court*, but the appellant had walked out of the consultation and refused to continue the discussion. The prosecution guessed that Dr Cope's opinion did not support the defence of diminished responsibility and applied to the judge for an order that it be disclosed. Mr Palmer QC, for the prosecution, indicated to the judge that, if Dr Cope's opinion was as he anticipated, he would want to call her to give evidence to rebut that called on behalf of the appellant on the issue of diminished responsibility. Mr Saunders QC, for the appellant, objected that the report was the subject of legal professional privilege and referred to section 10(1)(b) of the Police and Criminal Evidence Act 1984. In his ruling, the judge referred to *R. v. R.* (1995) 1 Crim. App. R. 183 and *R. v. King* (1983) 77 Crim. App. R. 1. He concluded that Dr Cope's report was privileged as being a communication made to the appellant's legal advisers for the purpose of conducting his defence: but that the independent opinion reached by Dr Cope was not privileged. This did not result from a lawyer/client relationship but from a doctor/patient relationship. The court could order Dr Cope to divulge her opinion to the prosecution and the judge did so.

16. As a result of this order, Dr Cope provided statements to the prosecution and she was called to give evidence. She had in the meantime heard the evidence of Dr Haldane. Her evidence was that she had visited the appellant in prison at the request of his solicitors in January 2000 and examined him for about one and a half hours. She had then concluded that there was no evidence of psychiatric illness at the time of the alleged offence. She had concluded that he did not suffer from any abnormality of mind to diminish his mental responsibility for the killing. Having heard the evidence of Dr Haldane, which she accepted, it was now her opinion that the appellant did suffer from an abnormality of mind at the time of the offence. This was due to brain damage from either disease or injury. But this was not, in her opinion, of such a degree as substantially to diminish his responsibility. She felt that intoxication with drugs and alcohol had a very significant part to play and outweighed the contribution of abnormality of mind. He was not in her view substantially diminished. The degree of

cognitive impairment was only picked up by sophisticated neuropsychological testing. It was very much a question of degree. She said that the appellant had told her himself that he had been drinking steadily throughout the morning and he had also consumed a variety of drugs. She agreed with Mr Saunders that in reality he would not have been able to help himself drinking unless he was in a clinic. He did not seem to have had an option but to have the first drink of the day and, once he had started drinking, he would carry on.

Grounds of appeal and submissions

17. The main ground of appeal is that the judge's decision about Dr Cope's opinion and his order to disclose it were wrong in law. Dr Cope's opinion was the subject of legal professional privilege and the appellant was entitled to object to her giving evidence to express it. It was based on information provided in privileged circumstances and the opinion could not be separated from the privileged information on which it was based. The judge had no power to order her to disclose her opinion to the prosecution. There are other grounds of appeal which it is not necessary to consider in the light of this court's view on the first main ground.

18. Mr Saunders submits on behalf of the appellant that Dr Cope was instructed only with litigation in mind. The judge was wrong to say that her opinion derived from a doctor/patient relationship, but, even if there was an element of such a relationship, this would not prevent the occasion from being privileged. There was no question of her treating the appellant. Her opinion was based in part on a proof of evidence prepared by his lawyers on his instructions and on what he told her in privileged circumstances. The appellant's interview with Dr Cope was both confidential and privileged. That appears from the terms of section 10(1)(b) of the 1984 Act which restates the common law. It was the subject of legal professional privilege and also of privilege against self-incrimination. Any opinion based on privileged material is itself privileged. It is impossible to separate the opinion and the material on which it is based. The judge had no power to order Dr Cope to disclose her opinion to the prosecution, but, more importantly perhaps, the appellant was entitled to object to her giving evidence which breached his privilege. The verdict of the jury was unsafe. But for the judge's ruling, there would have been no evidence to contradict that of Dr Kennedy and Dr Haldane as to diminished responsibility.

19. Mr Palmer submits that there is no property in a witness. A doctor/patient relationship may be confidential but it does not attract privilege. Dr Cope was examining the appellant to determine what mental disorder he might have. That is a doctor/patient relationship. It is not made privileged by section 10(1)(b) of the 1984 Act which is primarily aimed at the particular concerns of that Act. The relevant law is to be found in

Harmony Shipping v. Davies [1979] 1 W.L.R. 1380 and *R. v. King*. Mr Palmer submits that, even if Dr Cope's report and opinion were privileged, the privilege was waived by the disclosure of its existence in the terms of Dr Haldane's report. The judge did not deal with waiver in his ruling and Mr Palmer differs from the suggestion that before the judge the prosecution conceded this point. He agreed that waiver did not feature largely in the submissions made to the judge who did not rule on it.

20. As to the waiver point, Mr Saunders submits that mere references to a document in a expert's report does not result in waiver of privilege. It would have been wrong to edit Dr Haldane's report to remove his references to Dr Cope's report. Dr Cope's opinion did not form any substantial part of Dr Haldane's report or opinion. He was commissioned to carry out psychometric testing and his opinion was based on the results of those tests. His evidence did not refer to or rely on Dr Cope at all.

Discussion and decision

21. First, we agree with Mr Saunders that the judge probably had no power to order the defence to disclose Dr Cope's opinion out of court. It was perhaps a convenient thing to suggest, given the substance of his decision that her opinion was not privileged. But, since in theory the prosecution could have called her blind, the substantial question is whether her evidence in court was privileged, so that the appellant was entitled to object to it being given and the judge obliged to exclude it.

22. Section 10(1) of the 1984 Act provides:

> "… in this Act "items subject to legal privilege" means:
>
> (a) communications between a professional legal adviser and his client to any person representing his client made in connection with the giving of legal advice to the client;
>
> (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purpose of such proceedings; and …"

23. Although Mr Palmer is correct that this is a statutory definition in circumstances concerned with police powers of search and seizure – see for example sections 9 and 19(6) of the Act – this is a statutory enactment of the common law – see *R. v. Central Criminal Court, ex parte Francis* [1989] A.C. 346. Section 10(1)(b) reflects "litigation

privilege" at common law – see *Phipson on Evidence* 15th edition paragraph 20-05 where it is said:

"The second category of legal professional privilege [i.e. litigation privilege] is wider than the first [i.e. legal advice privilege] but arises only when litigation is in prospect or pending. From that moment on, any communications between the client and his solicitor or agent or between one of them and a third party will be privileged if they come into existence for the sole or dominant purpose of either giving or getting advice in regard to the litigation or collecting evidence for use in the litigation. This is the basis for claiming privilege for correspondence with witnesses of fact or experts and proofs, reports or documents generated by them."

24. There is no property in a witness. *Harmony Shipping v. Saudi Europe Line* [1979] 1 W.L.R. 1380 was an appeal which Cumming-Bruce L.J. described as arising out of very peculiar facts. A handwriting expert had inadvertently given an opinion on certain documents to both plaintiffs and defendants. He was embarrassed and the question was whether he was obliged to give evidence under subpoena for the defendants. The Court of Appeal upheld the judge's decision that he was. The essence of the decision was that his opinion as to the documents did not depend on information provided to him in privileged circumstances.

25. Lord Denning M.R. said that, so far as witnesses of fact are concerned, the law is plain that there is no property in a witness. He then said at page 1385C:

"The question in this case is whether or not the principle applies to expert witnesses. They may have been told the substance of a party's case. They may have been given a great deal of confidential information on it. They may have given advice to the party. Does the rule apply to such a case?

Many of the communications between the solicitor and the expert witness will be privileged. They are protected by legal professional privilege. They cannot be communicated to the court except with the consent of the party concerned. That means that a great deal of the communications between the expert witness and the lawyer cannot be given in evidence to the court. If questions are asked about it, then it would be the duty of the judge to protect the witness (and he would) by disallowing any questions which infringed the rule about legal professional privilege or the rule protecting information given in confidence – unless, of course, it was one of those rare cases which come to the courts from time to time where in spite of privilege or confidence the court does order a witness to give further evidence.

Subject to that qualification, it seems to me that an expert witness falls into the same position as a witness of fact. The court is entitled, in order to ascertain the truth, to have the actual facts which he has observed adduced before it and to have his independent opinion on those facts. … In this particular case the court is entitled to have the

independent opinion of the expert witness on those documents and on those facts – excluding, as I have said, any of the other communications which passed when the expert witness was being instructed or employed by the other side. Subject to that exception, it seems to me (and I would agree with the judge upon this) that the expert witness is in the same position when he is speaking as to the facts he has observed and is giving his own independent opinion on them, no matter by which side he is instructed."

26. Waller L.J. agreed with Lord Denning. He said at page 1387A:

"As Lord Denning M.R. had said, the general principle must be that no party has any property in a witness; and the argument before us has partly involved a discussion as to whether there is a difference between a witness of fact and an expert. In my view, there is no difference between those two kinds of witnesses as a matter of general rule. Were it otherwise, as Lord Denning M.R. has indicated, in a sphere of a small number of specialists it might be possible for one party to buy up all the possible experts, and clearly such a situation is not right. …

The safeguard against an expert witness giving evidence on more than one side is the existence of professional privilege, …"

27. *R. v. King* (1983) 77 Crim. App. R. 1 also concerned a handwriting expert to whom documents were sent by the defendant's solicitors. The Crown sought the production of these documents, one of which turned out to be an incriminating forgery. It was conceded that, if the document had been in the possession of the appellant, no privileged would have attached to it. It was held that what was said in *Harmony Shipping* applied in criminal proceedings. The relevant part of this was expressed by Dunn L.J., giving the judgment of the court, at page 3, as follows:

"… the rule is that in the case of expert witnesses legal professional privilege attaches to confidential communications between the solicitor and the expert, but it does not attach to the chattels or documents upon which the expert based his opinion, nor to the independent opinion of the expert himself."

28. Thus, in both *Harmony Shipping* and *King*, the handwriting expert's opinion was expressed by reference to material which was not itself privileged, that is by reference to facts which he himself had observed from documents provided to him by solicitors, for which the solicitor's client could not claim privilege. The court is entitled to have the independent opinion of the expert on such documents and on the actual facts which he has observed in circumstances which were not privileged. But these authorities do not, in our judgment, support the proposition that the court is additionally entitled to have the opinion of an expert which is based on material which is privileged and which is provided to the expert in privileged circumstances. The passage in *King* should not be read as going further than this, since (a) the decision was that *Harmony Shipping* applied in criminal proceedings and (b) *Harmony Shipping* itself plainly does not so extend.

29. The analysis in the previous paragraph accords with that in *R. v. R.* [1995] 1 Crim App. R. 183. A scientist carried out DNA tests on the appellant at the request of his solicitors on a blood sample provided by the appellant for that purpose. The trial judge ruled against a submission that the opinion of the scientist was inadmissible against the appellant on a count of incest as being subject to legal privilege under section 10(1)(c) of the 1984 Act. This court held that a sample of a defendant's blood provided by him to his general practitioner at the request of his solicitors for the purposes of his defence in criminal proceedings was an item "subject to legal privilege" under section 10(1)(c) of the 1984 Act. The appellant was entitled to object to its production or to opinion evidence based on it. It was not a case where the expert witness' opinion was based on examination and testing of a sample obtained in non-privileged circumstances. If the expert had been asked to test a sample lawfully obtained previously by the police when the defendant was in custody, the evidence could have been given with no question of legal privilege arising. But the opinion was based on the sample she had received from the defendant's solicitors. The sample could not have been obtained from the defendant without his consent, and the consent was given for the limited purpose of obtaining her advice in connection with the pending charges against him. The sample was an item within section 10(1)(c) of the 1984 Act and there was no discretion to admit privileged material without the defendant's consent.

30. The prosecution had relied in *R. v. R.* on what Evans L.J., who gave the judgment of the court, referred to as "the passing reference to legal privilege in *W. v. Edgell* [1990] Ch. 359, 416." In *Edgell*, the plaintiff, who suffered from paranoid schizophrenia, pleaded guilty to manslaughter on the ground of diminished responsibility and the court ordered him to be detained without time limit in a secure hospital. He applied to a mental health review tribunal for a transfer to a regional secure unit and sought a report from the defendant as an independent consultant psychiatrist. The psychiatrist's report was not favourable, so he withdrew his application. The psychiatrist however felt obliged to disclose his report to the medical officer and copies were sent to the Secretary of State and the Department of Health and Social Security. The plaintiff claimed injunctions restraining the defendant from communicating the contents of his report and the delivery up of all copies. Scott J., as he then was, dismissed the claim. The Court of Appeal dismissed the plaintiff's appeal. The issue was mainly one of confidence. The essential decision was that in that case the public interest in restricted disclosure outweighed the doctor's duty of confidence. Scott J. at pages 395 to 397 also considered a submission based on legal privilege with reference to *Harmony Shipping* and *R. v. King*. The submission was that information provided to the doctor by the plaintiff was given for the purpose of legal proceedings, that is the tribunal hearing. Scott J. considered that the information so given was part of the facts on which the doctor's opinion was based. Neither the opinion nor the facts on which it was based were, in his judgment, protected by legal professional privilege. In the Court of Appeal, the "passing reference" is at page 416A, where Sir Stephen Brown P refers very briefly to a submission by counsel. At page 416H, he did not consider that this was a case of legal professional privilege, although it was relevant as part of the background which gave rise to the issue of confidentiality. Bingham L.J., who gave the other substantive judgment did not refer to

legal professional privilege at all.

31. The issue in *Edgell* concerned confidence and we do not read the judgments in the Court of Appeal as containing any decision about legal professional privilege. In *R. v. R.*, this court rejected counsel's submission with reference to *Edgell* and reached the decision which we have described. In so far as Mr Palmer in the present case relied on what Scott J. said at first instance in *Edgell*, we are bound by the subsequent decision of this court in *R. v. R.* and respectfully agree with it. In the present criminal context, an expert's opinion obtained at the request of solicitors to a party to litigation in circumstances to which section 10(1) of the 1984 Act applies, and which is based on privileged information such that the opinion cannot be divorced from the privileged information, is itself privileged.

32. The appellant's solicitors' instructions to Dr Cope and what the appellant said to Dr Cope when she visited him in prison on 6th January 2000 were communications within section 10(1)(b), if they were made in connection with or in contemplation of legal proceedings and for the purpose of such proceedings. In our judgment, they plainly were such communications. In our judgment, the judge was wrong to decide that Dr Cope's opinion resulted from a doctor/patient relationship. There was no question of Dr Cope treating the appellant. The purpose – certainly the dominant purpose – of her visit to him in prison was to form an opinion of his mental state and to report to his solicitors, all for the purpose of enabling them to advise him in relation to his defence in the proceedings in which he was charged and to conduct his defence. Her opinion was based, at least to a material extent, on privileged communications. She received documents from the solicitors, some of which were privileged. She may have observed facts about the appellant which did not depend on him consciously communicating with her. But the occasion of her visit was privileged and his communications to her on that occasion were privileged. In her evidence, she was obliged to report things which he had said to her. Thus her opinion then was based on privileged material. In so far as it may also have been in part based on mere observation, the opinion was nevertheless inextricably dependent on privileged material. This did not change because she additionally heard the evidence of Dr Haldane. The critical part of her opinion remained inextricably dependent on privileged material. In our view, this case is in substance indistinguishable from *R. v. R.* This conclusion is also consonant with *Harmony Shipping* and *R. v. King* for the reasons which we have given..

33. In addition and importantly, the appellant was, in our judgment, entitled to be protected from inadvertent self-incrimination. If a defendant agrees to be interviewed by a doctor instructed by the prosecution, he has the opportunity of being advised and knowing that what he says to the doctor may be used in evidence at his trial. If he is interviewed by a doctor at the instigation of his own lawyers for the purpose of his defence, he is entitled to assume that what he says has the same status as his communications with his own lawyers.

34. For these reasons, in our judgment, the judge's decision about Dr Cope's opinion was wrong. Her evidence ought not to have been admitted. In consequence, we consider that his conviction for murder is unsafe. Without her evidence, there was no evidence to gainsay that of Dr Kennedy and Dr Haldane to the effect that the appellant suffered from abnormality of mind such as substantially to have impaired his mental responsibility for his acts in killing his brother. The jury were not of course bound by this evidence and the decision was theirs. But, absent Dr Cope's evidence, this court cannot regard the conviction for murder as safe where the issue was balanced and the case in support of the defence intrinsically quite strong.

35. Mr Palmer's submissions about waiver do not, in our judgment, in the circumstances of this case convert an unsafe conviction into a safe one. We express it thus, since we consider that it would be wrong to uphold the murder conviction only on a finding that privilege was waived, when the judge did not deal with waiver in his decision and one counsel suggests that the point was conceded. Further, the judge had a discretion to exclude the evidence of Dr Cope which, if waiver was the only issue, he must have exercised in this case. In a criminal case such as this, the safety of a person's conviction of a most serious offence should not turn on nice points of waiver which did not feature in the judge's ruling. We therefore address the submissions briefly.

36. Dr Haldane was sent Dr Cope's report among other documents and he states this fact in his own report. He relied for want of time on these documents for history. There is also a single sentence to the effect that the account of events on 3rd July 1999 given to Dr Haldane was consistent with those given to Dr Kennedy and Dr Cope. He does not refer to or discuss Dr Cope's opinion and his own opinion is based on his own psychometric tests. His report was disclosed to the prosecution, as was necessary if he was to give evidence. We are told that, when he gave his evidence, he did not refer to Dr Cope or her opinion at all.

37. We were referred to *Clough v. Tameside and Glossop Health Authority* [1998] 2 All E.R. 971, a decision of Bracewell J. in a civil medical negligence case. She held that the disclosure of an expert's report which referred in passing to material supplied by the solicitor instructing the expert as part of the background documentation waived privilege attaching to that material on the service of the report. The decision was under Order 24 rules 10(1) and 13 of the former Rules of the Supreme Court. These have now been replaced by the Civil Procedure Rules, whose relevant provisions are materially different – see CPR rule 31.14 and 35.10(4). In *Clough*, there were two questions, that is (a) whether privilege was waived for connected documents when a report is served, or not until it was put in evidence; and (b) what constituted waiver. As to (a), Bracewell J. recognised that there were other first instance authorities against her view that privilege was waived on service. As to (b), she referred to, but did not adopt, a passage in

Phipson on Evidence (14th edition) to the effect that passing reference to another document would not necessarily amount to waiver.

38. Since, as we have said, we do not consider that the safety of the appellant's conviction for murder should in the present case turn on nice points of waiver which did not feature in the judge's ruling, it is not necessary to decide whether, in our view, the decision in *Clough* was correct and, if it was, whether it should apply in a criminal context. It could not, we think, apply absolutely, since the court has a discretion under section 78 of the 1984 Act to exclude evidence which in fairness ought not to be admitted. We would, if necessary, have held, adopting the approach in *Phipson* and applying it to the facts which we have outlined, that there was no waiver in the present case.

39. For these reasons the appeal is allowed and the appellant's conviction for murder set aside. Mr Palmer told us that, in this event, the Crown would not seek a retrial. We accordingly substitute a verdict of manslaughter by reason of diminished responsibility. It will remain to consider the appropriate disposal.

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LORD JUSTICE MAY: The written judgment has been prepared, distributed to the parties and is available. For the reasons given in that judgment, this appeal is allowed. The appellant's conviction for murder is set aside and the Court substitutes for that verdict a verdict of manslaughter by reason of diminished responsibility.

What consequences of that can you deal with today?

MR WALL: My Lord, I would ask that before anything further is done by way of sentence a medical report is prepared on the appellant in this case.

LORD JUSTICE MAY: Yes. That is a medical report.

MR WALL: A psychiatric report.

LORD JUSTICE MAY: Not, however, with view to the possible making of a Hospital Order.

MR WALL: My Lord, at the moment I do not know what the position is. He has spent a lot of time in Ashworth special hospital since he has been remanded into custody. I have been told that he was returned to prison, I think last week or the week before, but is back on the hospital

wing again in the last couple of days. So it is a possibility that I would urge the court to keep open at the present stage that the appropriate sentence might well be a Hospital Order, possibly with a Restriction Order. In order to do that I am going to need obviously a psychiatric report, and potentially if the psychiatrist who reports finds favour with the idea that it ought to be a Hospital Order a second report and some investigation into the available of a bed.

LORD JUSTICE MAY: Quite.

MR WALL: In order to achieve all that I would ask the court to consider granting legal aid for my solicitor to help organise the obtaining of reports and the necessary liaison.

LORD JUSTICE MAY: We will consider that in a moment. What is a matter for concern is the time that this may take and any help the court can give to have it done within a reasonable time.

MR WALL: I hope it will not take as long as it would normally take to obtain these reports because he would have been seen by a number of psychiatrists during his period at the special hospital.

LORD JUSTICE MAY: Yes.

MR WALL: In order to get the initial report, I would be surprised if it took longer than four weeks or so.

LORD JUSTICE MAY: Yes.

MR WALL: Then, of course, it will depend whether we need to get second report. But, if we do, again I do not imagine it will take too long. What may take time is the possibility of finding a bed. But until we know what the position is and what sort of care he requires if he requires care in a hospital, I am afraid I cannot help as to that.

LORD JUSTICE MAY: Do you want to say any more for the moment?

MR WALL: No, I do not, thank you.

LORD JUSTICE MAY: There is nothing the Crown say. Thank you.

(The Bench conferred).

LORD JUSTICE MAY: Mr Wall, Mr Barnes, I do not know whether between you can help us. It is obviously a question that the court has to sort out for itself and we ought to know the answer. One logistical problem is getting the three judges all together at the same time at some future date. Do you happen to know whether it is necessary for all of us to be here?

MR WALL: Off the top of my head I would said not because the conviction appeal has now been dealt and the sentence appeal can be treated as a separate entity.

LORD JUSTICE MAY: We will sort that out. It may be that when the time comes there will only be two of us. That is one point. Thank you very much. You have not anything to say about that.

MR BARNES: No, I agree with Mr Wall.

LORD JUSTICE MAY: Mr Wall, we will adjourn the question of sentence. The appellant will be remanded in custody meanwhile. We will order a psychiatric report, and, if it becomes necessary, a second one.

MR WALL: Thank you.

LORD JUSTICE MAY: We do grant legal aid for your solicitor in this matter.

MR WALL: Thank you.

LORD JUSTICE MAY: In addition, please, will your solicitor, or if it is appropriate you - will one of the appellant's lawyers inform the Criminal Appeal Office in writing what progress is made on this matter at the end of four weeks from today.

MR WALL: Certainly.

LORD JUSTICE MAY: And thereafter, if the matter has not been finalised by then, four weeks after that.

MR WALL: Monthly reports.

LORD JUSTICE MAY: Monthly reports. Obviously, it is desirable that this should be brought to a conclusion as soon as may be.

MR WALL: Yes, I will urge that those who now instruct me act with all due diligence.

LORD JUSTICE MAY: Is there any other matter the court should be dealing with?

MR WALL: No, not at the moment.