

Neutral Citation Number: [2020] EWCA Crim 1351

Case No: 202001618 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SHEFFIELD CROWN COURT
MR JUSTICE MITCHELL
T19990382

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2020

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE PICKEN
and
MR JUSTICE MARTIN SPENCER

Between :

REGINA
- and -
Gary Arthur Allen

Applicant

Respondent
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(Transcript of the Handed Down Judgment.
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Official Shorthand Writers to the Court)

M Hill QC, Mr Greaney QC, Mr de la Poer QC & Mr Gelsthorpe (instructed by the
Crown Prosecution Appeals and Review Unit) for the **Applicant**
Miss K Goddard QC & Mr Andrew Smith (instructed by **Representation Order**) for
the **Respondent**

Hearing date: 7th October 2020

Judgment
As Approved by the Court
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THE RE-TRIAL IN THIS CASE HAS NOW TAKEN PLACE. THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.82 CRIMINAL JUSTICE ACT 2003.

IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.

Lord Justice Fulford:

Introduction

1. On 23 February 2000, in the Crown Court at Sheffield before Mr Justice Mitchell and a jury, Gary Arthur Allen was tried and acquitted of the murder of Samantha Class between 24 and 28 October 1997.
2. The Crown Prosecution Service now applies under section 76 Criminal Justice Act 2003 (“section 76”) to quash the acquittal and for a retrial. Murder is a qualifying offence. The written consent of the Director of Public Prosecutions is required under section 76 (3) which was given on 3 June 2020.
3. Allen, who is the respondent in these proceedings, resists the application.
4. On 3 March 2020, the Full Court made an order imposing reporting restrictions under section 82 Criminal Justice Act 2003.

The Facts

5. At around 10.30 am on Sunday 26 October 1997 the body of a sex worker, Samantha Class, was found washed up on the Hessle foreshore of the River Humber. Her body had been placed in the River Humber at a site accessed via Brickyard Lane, Melton. She was naked from the waist down, save for part of her tights and a boot which were both still in place on one of her feet.

She had been engaged in sex work the previous evening. The evidence indicated that her body had been dragged from a car to the point where it was found in the water. The pathologist, Dr Ruttly, concluded that the cause of death was strangulation by a ligature. 33 injuries or groups of injuries were noted. One injury (to the arm) was consistent with infliction by the tyre of a motorcar. Massive internal injuries were additionally noted. Dr Ruttly's overall conclusion was that Samantha Class had been the victim of a "blunt force" assault, following which she was strangled to death with a ligature, and then run over. Dr Ruttly estimated the time of death was possibly prior to midnight on 26 October 1997, but it may have been later.

6. There was no semen found in her underwear which was recovered from the scene where her body was put into the River Humber but DNA from the semen of two men was found in her vagina. One of these men admitted having had sex with her some days before her death but he was subsequently excluded from police enquiries. The second man remained unidentified until the respondent was arrested for drink driving in July 1998, when his DNA came into the possession of the police and a match with the other semen deposited was established. The forensic scientist's opinion was that her underwear had not been put back on after the most recent intercourse, and as a consequence it had a bearing on the circumstances of her death.
7. Allen was arrested for murder on 17 November 1998. During the first four police interviews, he answered "no comment". In the fifth interview, he accepted that during the night of 25/26 October 1998 he picked up Samantha Class on Porter Street (in Hull city centre) in his Ford Escort and had agreed to pay her £30 for full sexual intercourse. He said he had driven to an area near Walker Street (also in Hull city centre) and had had sex with the victim in his car. He claimed that the condom he had been using split; Samantha Class had become angry and, having put her stockings and underwear back on, left his vehicle and walked off. He suggested that this would have been no later than 1 am.
8. He denied, therefore, killing Samantha Class and said she left his vehicle without injury.
9. As to subsequent events, he stated he had been stopped by the police a couple of days later because his motorcar was un-taxed, uninsured and without a MOT certificate. He decided to get rid of the vehicle, in part because he was frightened that the day after he had had sex with a woman, he saw a news

report that she was dead. He indicated, therefore, that following Samantha Class's picture being shown on the news on Monday 27 October 1997, he took steps to sell the motorcar in which he had had intercourse with her.

10. He knew Brickyard Lane having lived there with his aunt when he was 16. He claimed he had visited the foreshore a couple of times during the period following his encounter with Ms Class on a bicycle, but he denied going to Brickyard Lane on the night of 25/26 October 1997.
11. Police investigations revealed that at 4.16 pm on 27 October 1997 he had contacted Willingham's scrap dealers, and on 28 October 1997 he sold the company the motorcar for £25. The vehicle had been registered in his name as recently as 3 October 1997 and he had purchased it for £50. The car had been disposed of by the time the police traced it back to Willingham's.
12. Enquiries with news organisations established that Ms Class's name and photograph had not been released to the media until 9 am on Tuesday, 28 October 1997, therefore over 12 hours after Allen began to take steps to sell his car to Willingham's. The prosecution suggests this clearly undermines his claim that he had disposed of the car at least in part because he became worried having seen the news report that she had been found dead.

The Present Proceedings

The statutory framework

13. By section 77(1) Criminal Justice Act 2003 ("section 77"), this court must order a retrial if satisfied that the requirements of sections 78 and 79 Criminal Justice Act 2003 ("section 78" and "section 79" respectively) are made out; otherwise it must dismiss the application.
14. It is agreed that the requirements of section 78 are met if there is new and compelling evidence against the acquitted person in relation to a qualifying offence (section 78 (1)). The evidence is new if it was not adduced in the proceedings in which the person was acquitted and it is compelling if it is reliable, substantial and, in the context of the outstanding issues, appears highly probative of the case against the acquitted person (section 78 (3) (a), (b) and (c)).

15. The prosecution must also satisfy the requirements of section 79, namely that in all the circumstances it is in the interests of justice for the court to make the order. The interests of justice test is to be determined by having regard to: (a) whether existing circumstances make a fair trial unlikely; (b) for the purpose of the preceding question and otherwise, the length of time since the qualifying offence was committed; (c) whether it is likely that the new evidence would have been adduced in the earlier proceedings but for a failure by an officer or by a prosecutor to act with all due diligence and expedition; and (d) whether, since those proceedings, or, if later, since the commencement of Part 10 of the Criminal Justice Act 2003, any officer or prosecutor has failed to act with due diligence or expedition.

New and compelling evidence

16. Focussing first on the requirement of new and compelling evidence which has come into the possession of the prosecution since the acquittal, there are four relevant areas, as set out below. It is submitted by Mr Hill Q.C., the Director of Public Prosecutions, that the new evidence satisfies the test in sections 78 and 79 for the acquittal to be quashed and a retrial ordered.

i) Evidence of similar attacks ("the Plymouth assaults")

17. Following his acquittal on 23 February 2000, Allen moved from the north of England to the Plymouth area where two relevant attacks occurred shortly thereafter (in March and April 2000), attacks which bore similarities to what happened to Samantha Class in that they were brutal assaults upon female sex workers involving compression of the neck. These were charged as a sexual and a physical assault respectively on US and TC.

18. Turning to the detail of these incidents, therefore, on 29 March 2000 – fewer than 35 days after being acquitted of murdering Samantha Class – Allen approached US who was, at the time, working as a sex worker in Plymouth. He requested oral sex. Once in a secluded area he grabbed US's neck, crushing her throat and pulling her to the ground with his hand. He demanded that he should not be charged for sexual activity. He ripped off US's tights and underwear, punched her in the head, restrained her on the floor and pushed his hand into her mouth. US could see his penis was erect. He described US as "*the scum of the earth.*" The attack only came to an end when Allen was disturbed by a member of the public. US was left terrified with injuries to her mouth, bruising and scratches to her face.

19. On 12 April 2000 Allen approached TC who was, at the time, working as a sex worker in Plymouth. When she requested payment up front, he put his arm around TC's neck and squeezed her throat with the "crook" of his elbow. He dragged her backwards, as well as putting his hand over her mouth and fingers down her throat. Allen punched TC in the head repeatedly, before running off following the arrival of the police. As he ran off Allen shouted: "*You whore*".
20. On 21 September 2000 he was convicted of indecent assault on US and assault occasioning actual bodily harm on TC. On 8 December 2000 he was sentenced to five years and six months imprisonment with an extended licence period of four years and six months.
21. Whilst serving his sentence, he admitted to the probation service that he had carried out and planned both attacks. He told probation officers that he had derived pleasure from the planning; that the attacks would have been worse had he not been disturbed; and that he had not inflicted as much injury as he had intended given he had been drunk. He said he felt no remorse.
22. In relation to these offences against US and TC, the prosecution relies upon various features as tending to disprove Allen's defence of innocent association with Samantha Class and as being capable of providing substantial support for the proposition that Allen has a propensity to target, attack and compress the neck of victims similarly placed to Samantha Class. First, the attacks were pre-planned and the victims as a consequence were targeted; second, they took place within weeks of his release from custody and they both involved female sex workers; third, the modus operandi included compressing the neck of the victims; and finally Allen had intended to inflict greater violence, extending over a longer period of time than occurred.
23. The prosecution submits that in consequence the evidence relating to the Plymouth attacks is highly probative as it makes it inherently improbable that someone other than Allen – who it is suggested has been demonstrated to have a tendency to target, attack and compress the necks of sex workers –

happened to murder Samantha Class in the way she was killed within a very short time of his innocent association with her.

24. Ms Goddard Q.C., on behalf of Allen, submits that there are evident weaknesses in the suggested similarities between the Plymouth assaults and the murder of Samantha Class. For instance, there is a lack of evidence of injuries to the necks of US and TC, and both women survived.

ii) Evidence of Allen's mindset

25. Having been sentenced for the Plymouth attacks, as indicated above at [20], Allen was interviewed by probation officers to whom in 2002, 2003 and 2008 he admitted the offences and provided details of his motivation and intentions. He explained that he targeted prostitutes as they were easy targets who would "go with anyone" and they enabled him to re-enact his fantasies; he said that he wanted to hurt people and enjoyed doing so; and he had violent fantasies directed at women which sexually aroused him. He stated that these fantasies were long standing and regular and included inflicting acts of extreme physical and sexual violence on sex workers, viz. beating, strangling, raping and killing them. He described sex workers as the scum of the earth and that they counted for nothing.
26. It is submitted that in order properly to assess Allen's mindset, in addition to these revelations to members of the probation service there is to be added the extreme images found on one of his mobile telephones. These included photographs of the corpses of women who had apparently died violent deaths. In some of the photographs substantial injuries were evident; in others, the women were naked and, in some instances, partially buried. One of the images was labelled as being of a sex worker who had died as a result of asphyxiation. The prosecution contends that this material is relevant to the question of whether he was responsible for the murder of Samantha Class.
27. In relation to this evidence of mindset, therefore, the prosecution relies upon a variety of features of Allen's statements to the probation service as tending to disprove his defence of innocent association with Samantha Class and as being capable of providing substantial support for the proposition that he has

a propensity to target, attack and compress the neck of individuals in Samantha Class's position. First, his admission that he regards sex workers as scum and as easy targets; second, that he derives pleasure from hurting people, his long standing, deep-seated fantasies involving extreme physical violence on sex workers, including strangling and killing them; third, the fact that whenever he meets a sex worker he immediately develops a fantasy about what he wants to do to them; fourth, the fact that his mindset is so entrenched that, even having served a lengthy sentence, his attitude towards sex workers was unchanged; and, finally, his admissions that, if he thought he could get away without being punished, he would act upon his fantasies.

28. The prosecution submits that this mindset evidence is highly probative as it makes it inherently improbable that someone other than Allen – who has a deep-seated hatred of sex workers and longstanding fantasies about strangling sex workers – just happened to murder Samantha Class in the way she was killed within a very short time of him supposedly innocently associating with her.

29. Ms Goddard highlights that this evidence relates to things said by Allen some considerable time after the murder of Samantha Class. It is suggested this is weak evidence of his mindset in 1997. The violent images found on his telephone in 2019 do not reveal any connection with water, as was the position in the Class case. In these circumstances, the supposedly compelling nature of this evidence is questioned. Ms Goddard additionally submits that the conversations occurred in circumstances of confidentiality and for public policy reasons should be deemed inadmissible. Furthermore, it is suggested that Allen ought to have been afforded a contemporaneous opportunity to check any record compiled by the relevant officials and he was not cautioned, and the consequential unfairness renders the alleged statements liable to be excluded under section 78 Police and Criminal Evidence Act 1984. Accordingly, it is submitted that this evidence should be treated as having no, or little, probative value on this application, and it fails to meet the test in sections 78 and 79 Criminal Justice Act 2003.

iii) Evidence of confession

30. Following his release from prison on licence in 2010 from his sentence of imprisonment for the Plymouth attacks, Allen returned to Humberside, prompting an undercover police operation (Operation Misty), which was

tasked “(t)o prove or disprove whether Allen (despite being acquitted at court) was responsible for the murder of Samantha Class in 1997 and to assess and manage the risk Allen poses to sex workers and the general public and thereby prevent if possible any further person being subjected to violent attacks by Allen”. In the course of this investigation, the respondent admitted to an undercover officer on two occasions that he had murdered Samantha Class. The admissions were covertly recorded.

31. Allen first met “Ian” on 19 October 2010, approximately 6 months after he was released. Ian’s cover identity was that of an experienced criminal who was on the run from other criminals having seriously wounded a rival. On 6 December 2010 Allen confessed to the murder of Samantha Class. There were covert recordings made of their conversations. In the midst of a seemingly rambling and inconsequential conversation whilst travelling in a motorcar, Allen said “Well I’ll tell you the truth. But you’re probably not gonna want to know me afterwards, but if you wanna know I’ll tell you. The truth of the matter is, is that you know years ago when I was depressed [...]” and he proceeded to set out that he had had sex with Samantha Class, he had ejaculated inside her and the condom had split. She had demanded his name and money and threatened to tell the police that he had raped her. He had lost his temper and strangled her, thereafter dumping her body in the Humber. He described saying to his victim “hang on, I’ll get me wallet” and reaching into the back where he had some string which he used to strangle her. Later he discovered that if he had disposed of the body an hour later, in all probability it would not have been found. He said, “I went fucking mad and I did her.” He described how the police obtained his DNA as a result of his arrest for issues relating to driving, and he summarised his defence at trial. He said as regards the account he had given to the police as to what had occurred “Course I aren’t going to tell them the fucking truth”.

32. On 16 February 2011 Allen again confessed to the murder of Samantha Class to Ian. On this occasion it appears to have been prompted by the publication of information about him in the press that day. The article concerned, *inter alia*, Allen’s criminal record and the suggestion that he presented a risk to women. Again, the conversation was covertly recorded. Allen said:

“Yeah, well no ‘cos I mean, that thing with that Samantha Class, as I say, I told you about that what happened there; the condom split and she said; ‘well if you don’t give me your fucking’ this, that and the other and ‘if you don’t start giving me money’ and that ‘I’m gonna tell the police you

raped me'. And I just fucking flipped and I killed her and dumped her. But that's just the way I was then, you know what I mean? I thought, fuck it, you know what I mean?"

33. He said he disposed of the car 4 days later because he was short of money and it had failed its MOT. He had contemplated telling the police the truth but concluded that he would be charged with murder. He repeated on a number of occasions that he went "*fucking mad*" and in due course Allen told Ian he had been drinking and that he "*fucking went mad... Kicked fuck out of her and strangled her and dumped her in the river.*" He described himself at the time as being "*depressed*" and "*pissed*".
34. In relation to the confessions to the undercover police officers, the prosecution submits these are highly probative as they are unequivocal admissions of the offence itself.
35. Ms Goddard queries the assertion that Operation Misty was, in part, designed to assess and manage the risk which Allen posed to sex workers and the general public, and to prevent a repetition of attacks of this kind. She argues that the Sexual Offences Prevention Order that was in force was sufficient for these purposes and that the deployment of undercover police officers was unnecessary. Furthermore, the conversations between Allen and the officers did not reveal any interest on their part in his future intentions in this context. By providing Allen with a "platform that enabled him to talk" the officers strayed into "questioning" him, thereby rendering the exercise unlawful because of the lack of authorisation by the Director of Public Prosecutions under section 85 (3) Criminal Justice Act 2003. Furthermore, it is contended the evidence falls to be excluded under section 76 Police and Criminal Evidence Act 1984 ("section 76"). It is argued that in any event the reliability of the admissions is a matter that is in doubt, given that Allen did not disclose any information that would be known only to the killer, for instance the location of Samantha Class's handbag. It is submitted that the only information he disclosed was information already in the public domain and known to him from the original trial. It is submitted, therefore, that the evidence is not compelling.

iv) Evidence of another murder

36. In April 2019 the body of a sex worker, Alena Grlakova, was discovered in a water course in the Rotherham area known as the Old Slaugh. She was partially naked and had been dead for some time. She had apparently died following compression of the neck. The police investigation established, through electronic voice-recordings made by Allen, that he had threatened serious violence towards Ms Grlakova on the evening of her last confirmed sighting, namely 26 December 2018, when she visited his home. It is the prosecution's case that she left at 6.20 pm and probably returned at some stage thereafter, when she was killed by Allen. The investigation also established that he twice visited the area where her body was later deposited. It is notable that, having conducted searches for digging tools on the internet, he then visited a hardware store in between his reconnaissance visits to the Old Slaugh, when he purchased two trowels and some gloves. He also purchased cleaning materials in the days following the argument.

37. Allen visited a number of local news sites in the days after Ms Grlakova's disappearance more frequently than had been his pattern hitherto. His searches included looking at an article about a missing Slovakian female on 31 December 2018. The prosecution contends that, during the days after he had buried Ms Grlakova's body in the Old Slaugh water course, he was anxiously trying to find out whether her body had been discovered.

38. He is due to stand trial for her murder in April 2021 and we note that the prosecution will seek to have both murders tried together if the present application succeeds.

39. For the evidence relating to the murder of Alena Grlakova, the prosecution relies upon a number of features as tending to disprove Allen's defence of innocent association with Samantha Class and as being capable of providing substantial support for the proposition that he has a propensity to target, attack and fatally compress the neck of someone in Samantha Class's position. First, both victims were adult female sex workers of a similar age; second, Allen saw both victims at a time highly proximate to their deaths; third, they died through the compression of their necks; fourth, Allen had had sexual intercourse with both victims; fifth, their bodies were disposed of by their killer in water; and, finally, they had no clothing below the waist (the

differences being that Ms Grlakova was completely naked, whereas Ms Class was naked only from the waist- down save for one boot and the foot of a pair of tights).

40. The prosecution submits that the material relating to the murder of Alena Grlakova is highly probative of the contention that Allen murdered Samantha Class given he had dealings with the two victims of these murders at a time highly proximate to their deaths, in circumstances where the killings have highly distinct features in common.

41. Ms Goddard contends that there is a lack of evidence that Allen knew Alena Grlakova was a sex worker. There is, it is suggested, a similar absence of evidence that she returned to his flat after 6.20 pm, which would have been necessary in order for Allen to have committed this offence. It is averred that there are difficulties in any event with the evidence concerning the date and time of her death, partly based on potential sightings of the victim after 26 December 2018 and partly as a result of expert evidence concerning the level and movement of water at the relevant site which would have had an impact on whether or not the body would have remained under water, and for how long, and the rate of decomposition. It is argued, furthermore, that there is no evidence of the kind of sustained violence having been directed at Alena Grlakova which preceded the murder of Samantha Class. Finally, there are undoubted differences in the prosecution's case as to the circumstances of the two murders, for instance where they occurred, namely in his motorcar and at his home.

42. In all the circumstances, it is submitted that the similarities between the two murders are not strong and that there is a significant unresolved issue as to the strength of the case against Allen on the Alena Grlakova murder charge given the questions over her return to his flat after 6.20 pm and the date and time of her death. It is suggested that these factors are relevant to the reliability and the substance of this evidence and whether it is highly probative.

Discussion

43. It has been only necessary to consider one of the areas of new evidence relied on by the prosecution, namely the confessions to undercover officer Ian. In this regard, it is to be observed that *R v Dunlop* [2006] EWCA Crim 1354;

[2007] 1 Cr App R 8 provides clear authority for the proposition that confession evidence following the original trial, standing alone and depending on the circumstances, can provide compelling evidence – in that case, overwhelming evidence – such that it is in the interests of justice for the individual to be retried. The present application is to be distinguished from *R v Whittle* [2010] EWCA Crim 2934, given in that case the confession represented the outpourings of a drunken, agitated man such that his confession was treated by this court with “hesitant circumspection” (see [24]). Similarly, this case is readily distinguishable from *R v Miell* [2007] EWCA Crim 3130; [2008] 1 Cr App R 23 in which case the post-trial confession to murder was, in a number of significant respects, manifestly untruthful and Miell must have been aware when he made it that details in it were incompatible with the forensic evidence. This court concluded that it was likely, on a retrial, that the jury would be left in doubt as to whether Miell was telling the truth when he said that he had committed the murder. The confessions in the present case do not contain those or similar difficulties.

44. Turning to Ms Goddard’s submissions, we are unpersuaded the undercover operation amounted to a breach of section 85 (3). Section 85 provides:

“Authorisation of investigations

“(1) This section applies to the investigation of the commission of a qualifying offence by a person—

- (a) acquitted in proceedings within section 75(1) of the qualifying offence, or
- (b) acquitted elsewhere than in the United Kingdom of an offence the commission of which as alleged would have amounted to or included the commission (in the United Kingdom or elsewhere) of the qualifying offence.

(2) Subject to section 86, an officer may not do anything within subsection (3) for the purposes of such an investigation unless the Director of Public Prosecutions—

- (a) has certified that in his opinion the acquittal would not be a bar to the trial of the acquitted person in England and Wales for the qualifying offence, or
- (b) has given his written consent to the investigation (whether before or after the start of the investigation).

(3) The officer may not, either with or without the consent of the acquitted person—

- (a) arrest or question him,
- (b) search him or premises owned or occupied by him,
- (c) search a vehicle owned by him or anything in or on such a vehicle,
- (d) seize anything in his possession, or
- (e) take his fingerprints or take a sample from him.

(4) The Director of Public Prosecutions may only give his consent on a written application, and such an application may be made only by an officer who—

- (a) if he is an officer of the metropolitan police force or the City of London police force, is of the rank of commander or above, or
- (b) in any other case, is of the rank of assistant chief constable or above.

(5) An officer may make an application under subsection (4) only if—

- (a) he is satisfied that new evidence has been obtained which would be relevant to an application under section 76(1) or (2) in respect of the qualifying offence to which the investigation relates, or
- (b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.

(6) The Director of Public Prosecutions may not give his consent unless satisfied that—

- (a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and
- (b) it is in the public interest for the investigation to proceed.

(7) In giving his consent, the Director of Public Prosecutions may recommend that the investigation be conducted otherwise than by officers of a specified police force or specified team of customs and excise officers.

45. As submitted by Mr Hill, section 85 is simply not engaged by the exchanges between Allen and Ian in the course of this undercover operation. Focussing on the relevant part of the provision, section 85 (3) (a), Ian was not questioning Allen in the sense contemplated by this part of the subsection. This provision is to be read in conjunction with the remainder of section 85 (3), which demonstrates that the activities in contemplation (*viz.* arrest, questioning, search, seizure and taking fingerprints) are all formal aspects of the investigation into offences which are governed by the Codes of Practice under the Police and Criminal Evidence Act 1984. As submitted by Mr Hill, the proper construction of the prohibitions in section 85 is that they are designed to prevent the kind of unfair or oppressive behaviour which the safeguards of the Police and Criminal Evidence Act Codes of Practice address. This court has held that Code C does not apply to conversations between

suspects and undercover investigators unless the undercover role is deliberately misused in order to avoid the requirements of the Code (see *Christou* [1992] QB 979; *Bryce* [1992] 4 All ER 569; *Edwards* [1997] Crim LR 348; *Rajkuma* [2003] EWCA Crim 1955). In our judgment, given the self-evident similarities, the conversations between suspects and undercover investigators are to be treated in the same way, in this context, for the purposes of section 85 and Code C of the Codes of Practice, and therefore they do not come within the ambit of section 85 (3) unless there is a deliberate attempt to circumvent the protections that section 85 would otherwise provide (namely the authorisation of the Director of Public Prosecutions).

46. This new confession evidence is undoubtedly relevant as it reveals the identity of the person directly responsible for the death of Samantha Class. It is substantial evidence which is highly probative of the case against Allen given these were apparently voluntary confessions to the murder. It is reliable, in that it is based on an audio recording made by a police officer and it has not been suggested that there is any reason to doubt the integrity of the digital record. Although Ms Goddard has raised the suggestion that the evidence may fall to be excluded under section 76, no evidence has been brought to our attention that demonstrates the confessions were the result of oppression of Allen or that they were made in consequence of something said or done which was likely to render the confessions unreliable.

47. There are other issues in relation to this evidence which may be raised by Allen at trial as Ms Goddard foreshadowed, such as whether the prosecution's contention that Operation Misty was launched in part to assess and manage the risk which Allen posed to sex workers and the general public and to prevent a repetition of attacks of this kind is supportable; whether the Operation was unnecessary because of protection provided by the Sexual Offences Prevention Order; whether the officers strayed into questioning Allen; and whether the probative value of this evidence is substantially undermined because Allen did not disclose anything that was not already in the public domain. We do not express a view on the sustainability of any of those, or other, contentions but instead adopt the reasoning of Lord Judge CJ in *R v Dobson* [2011] EWCA Crim 1255 at [21], namely "[...] *the legislative structure does not suggest that availability of a realistic defence argument which may serve to undermine the reliability or probative value of the new evidence must, of itself, preclude an order quashing the acquittal. It must, of course, be carefully analysed, and given its proper weight. If the argument, or indeed any defence evidence, leads the court to conclude that the new evidence is not, after all, as reliable or substantial as it was thought to be, or that it no longer appears to be highly probative of guilt, then the court cannot be satisfied that the statutory test has been met. That is a fact-specific decision.*" Put otherwise, the new evidence does not

have to be overwhelming (see Sir Brian Leveson *P R v HM* [2015] EWC CRIM 585 at [46]).

48. None of the points identified by Ms Goddard leads this court to conclude that the confessions are evidently unreliable, lacking in substance, unfairly obtained or that they are not, *prima facie*, highly probative of guilt. We have carefully analysed these contentions, according them proper weight, and we are satisfied that this new evidence is compelling, in the sense that it is reliable, substantial and highly probative.

49. It is in the interests of justice for a retrial to take place in the circumstances of this case, based on this confession evidence, in order to preserve the integrity of the criminal justice system, given the seemingly unequivocal admission of guilt by the acquitted defendant. A retrial, as a consequence, is necessary to establish whether there has been a profound injustice to the deceased.

50. We add that we have been taken in detail by Mr Hill through the reasons for the delay in bringing this application before the court (particularly the period between 2012 and 2018) but Ms Goddard expressly did not suggest that a fair trial was unlikely because of the time that has elapsed since the qualifying offence was committed and it has not been suggested that a police officer, or the prosecution more generally, have failed to act with due diligence or expedition. We consider that this was a sensible – indeed inevitable – concession, given the compelling explanation for the gap between the date when the confessions were made and this application, which in light of the concession it is unnecessary to rehearse.

51. Given these conclusions, it is unnecessary to consider the other three areas of new evidence about which we make no comment, either way.

Conclusion

52. For the reasons set out above, we are satisfied that the requirements of sections 78 and 79 are made out. We grant the application to quash the acquittal and we order a retrial.

