Neutral Citation Number: **[2021] EWCA Crim 1776**

Case No: 2020/02655/B1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT ISLEWORTH**
**His Honour Judge Matthews**
**T20177063**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2021

**Before:**

**LADY JUSTICE MACUR**
**MR JUSTICE JAY**
and
**MR JUSTICE MURRAY**

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**Between:**

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| **AWJ** | **Applicant** |
| **- and -** | |
| **REGINA** | **Respondent** |

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**Ms Paramjit Ahluwalia and Ms Emma Torr** (Instructed by **Appeal**) for the **Applicant**
**Mr J Price QC and Ms Chetna Patel** (Instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 28 October 2021

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# Approved Judgment

**Macur LJ:**

The provisions of s.45 /45A Youth Justice and Criminal Evidence Act 1999 are engaged in this case. The publication of any information which may lead to the identification of the victim MT as being involved in these proceedings, including but not restricted to his name, address, or school, is prohibited. This judgment will be anonymised accordingly. In addition, the names of his siblings, who are mentioned in the course of this judgment, should not be reported. All three children are, or have been, subject of public law family proceedings and are therefore accorded anonymity by virtue of section 97 of the Children Act 1989.

1. The applicant seeks permission to appeal against her conviction on 13 October 2017 for "causing or allowing the serious physical harm of a child", contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004, and, necessarily, an extension of time in which to do so. Her applications are dependent upon "fresh" evidence from herself, Dr Clifford, a Specialist Clinical and Research Psychologist, and Dr Jones, a Biomechanical Engineer. The thrust of her application is that her evidence at trial was false and compromised by reason of the control and coercive behaviour exerted by her then partner the co-defendant. The truth, as she now asserts it to be, about the events in question which gave rise to her conviction presents the different scenario upon which Dr Jones' biomechanical professional opinion proceeds and which, she says, supports the possibility that MT's injuries were accidental and not deliberately caused.

2. The respondent resists the applications and makes submissions arising from aspects of the family proceedings which are revealed in the Family Court judgment handed down before trial, having obtained permission to disclose the same into this appeal pursuant to Family Practice Direction 12J. In short, the respondent submits that the expert reports of Dr Clifford and Dr Jones are dependent upon the veracity of the applicant's inconsistent accounts.

3. Ms Ahluwalia and Ms Emma Torr appears on behalf of the applicant. Mr Price QC and Ms Chetna Patel appears on behalf of the respondent.

The Facts

4. In June 2016 the applicant, then aged 29, lived with her partner, the co-defendant, her two older children, M aged seven and T aged eight and their young baby son "MT", who had been born on 8th May 2016. In the early hours of 24th June 2016 their next-door neighbours, heard an argument and shortly thereafter the co-defendant knocked on their door with MT in his arms. He asked them to look after the baby and said that the applicant had thrown the baby on the floor, however when one of the neighbours suggested that they should call the police the co-defendant wished only for an ambulance to be called. However, the neighbours telephoned the police at 01:38. The co-defendant had already made three calls to emergency services between 01:32 and 01:37, the first two of those calls had been abandoned and during the third he could not be understood. At 01:40 the operator phoned the co-defendant's mobile number. He answered the call, during which he said that the applicant had thrown MT onto the floor and asked for the police to attend straightaway.

5. One of the neighbours had been woken by a loud scream. She heard the children next door screaming, "Stop mummy, stop mummy" and heard a male voice saying repeatedly, "Don't drop the baby". The female was screaming very loudly, and it sounded as though she was going up and down the stairs.

6. The neighbours went to the applicant's address. The applicant came to the door and she and her partner, the co-defendant shouted at each other making allegations as to who had caused MT's injuries. At one stage the applicant said that she was feeding the child when the co-defendant hit her causing her to drop the baby.

7. Police and paramedics were soon on the scene. The co-defendant was uncooperative and refused to allow the emergency services to examine MT. The applicant removed MT from his arms, and he was then taken to Kings College Hospital where bilateral skull fractures and a resultant brain haemorrhage were discovered. There was evidence that he may also have sustained four fractures to his ribs.

8. Speaking to one police officer at the scene, the applicant said that she had been feeding MT in the kitchen when her cardigan became caught, pulling her back and causing her to drop him. Speaking to a different police officer she said MT was dropped during an argument between herself and the co-defendant. When speaking to a paramedic she said that she had dropped MT whilst heating milk to feed him. She did not say that she had fallen to the floor herself or suggested that she had become dizzy or light headed. The co-defendant told police officers and paramedics at the scene that the applicant had thrown MT to the floor.

9. The applicant and co-defendant were arrested. They were interviewed on several occasions and, eventually each gave a prepared statement, indicating that they agreed with the other's account of the applicant falling and leading to accidental injuries to MT.

10. The prosecution case subsequently mounted against the applicant was that she had deliberately assaulted MT during an argument with the co-defendant. The prosecution case against the co-defendant was that he had had an argument with the applicant when she was holding MT and it was, or ought to have been, clear from her behaviour that there was a significant risk of harm to the child and that he had then failed to permit MT to receive prompt medical attention.

11. At trial the applicant said that the injuries to MT were caused when she was preparing his bottle; she was holding MT and her cardigan caught on the cupboard door as she stretched for the kettle. She fell to the floor and dropped MT. She had said to Dr Somers, a Consultant Paediatric Radiologist, called by the defence, that she had flashbacks of MT falling over her left shoulder, that is from a greater height than previously postulated, and she repeated this possibility in cross examination. The medical experts were also cross examined on the basis that MT could have hit his head on a protruding shelf prior to hitting the ground, and that the applicant may have fallen on top of MT.

12. The co-defendant said that he had been in the garden when he heard a loud bang. He went into the house to find the applicant and MT on the floor. He had not seen how it happened. He denied saying "don't drop the baby". There was no argument between

himself and the applicant before MT went to the floor. He did not see the applicant throw MT to the floor.

13. The expert medical evidence agreed that, although they could not rule out accidental injury as a theoretical possibility, the head injuries were more consistent with those seen in non-accidental injury and were inconsistent with any explanation that had been provided at the time by either the applicant or the co-defendant.

14. Dr Jayamohan, a Paediatric Consultant neurosurgeon, said that if a baby was dropped from a height of about 1 metre, which is where the applicant's arms would have been given her height, a single impact following contact with the floor was unlikely to cause the injuries that MT had suffered. The fractures were in two very distinct locations on the baby's skull, and he concluded that there had been two impacts. He did not consider that an impact directly with the floor, nor one in which there was contact with an object first, would be likely to cause either of the fractures but it was not impossible. It was very unusual to see such injuries from day-to-day activities and they normally occurred where extreme force had been used, such as if a baby had been dropped downstairs or involved in a road traffic accident. Most skull fractures, when they did occur as a result from a baby being dropped onto a hard floor, were fine or straight-line fractures unlike the present case. If the mother landed on top of the baby, who had already sustained the fracture, then her weight could worsen an existing fracture. He had, however, never seen, or known fractures such as these to be sustained by a baby in the circumstances as described by the applicant and co-defendant. The explanations did not match either his personal professional experience or that which he had seen in medical literature.

15. Dr Erhardt retired consultant paediatrician, agreed in broad terms. Tests had discounted the possibility of congenital defect leading to an increased risk of bone fractures.

16. Dr Chapman, a recently retired consultant paediatric radiologist, confirmed the presence of a left sided linear skull fracture and a "significant" right sided bifurcated skull fracture which was inconsistent with any of the applicant's explanations. He considered that the chest x rays disclosed rib fractures which would be caused by lateral compressive force. We note that in one of his reports he considered it possible that "being thrown to the floor by the immediate carer as an unintended response of being punched" may account for the injuries, and if "mother gripped MTs chest tightly prior to throwing him" the rib fractures are also explained. (Emphasis added) but he was not questioned on this point by either prosecution or defence counsel.

17. Dr Somers, an expert called on behalf of the defence, disagreed that rib fractures were present, but agreed the mechanism that would be involved in causing them. He did agree, however, that the skull fractures were not typical of domestic accident. He had been provided with two different accounts from the mother, neither of which had involved MT hitting the edge of a worktop or shelf on his descent, which suggestion had been postulated for his consideration by the applicant's solicitor. In any event, none of the scenarios accounted for the head injuries seen nor did they accord with his 26 years' experience of such injuries.

18. The co-defendant was acquitted of causing or allowing the serious physical harm of a child and child cruelty. The applicant was convicted and sentenced to an extended

sentence of 10 years' imprisonment, being a custodial term of six years and the extended licence of four years. In 2018 on appeal, the sentence was reduced to a standard determinate sentence of five years' imprisonment.

19. After trial the applicant said she had immediately sought to appeal against her conviction. She has waived privilege. During the trial, it appears that she had sought to have witnesses called who could speak to the causation and timing of the co-defendant's black eye seen by police officers on the 24th of June 2016. She also wished her mother and T, her eldest child, to be called, albeit that both had retracted their evidence, apparently under her influence, to the effect that she had been subjected to violence by the co-defendant when she was holding MT. She received a negative advice on appeal. Since then, she said she has accessed treatment and support for her Post Traumatic Stress Disorder as diagnosed by Dr Clifford and resulting from the domestic abuse and controlling behaviour she experienced during her relationship with the co-defendant and consequently is only now able to reveal what happened that night.

The application to admit fresh evidence

20. The applicant now says that she was punched to the left side of her forehead between the temple and left ear and felt a blow to her left arm which caused her, she believes, to fall backwards and to drop MT over her left shoulder. Ms Ahluwalia submits that Dr Clifford's unchallenged evidence explains that the applicant would have been unable to make this revelation earlier, that what the applicant says is capable of belief and that the scenario she describes is regarded by Dr Jones to account for accidental causation of MT's head injuries by a fall to the ground and is in accordance with Dr Chapman's concession in his medical report.

21. Mr Price QC submits that the applicant's new case remains one of "accident". That is, the applicant maintains she lost hold of the baby who fell to the ground after being punched in the head but the so called "new" detail provides no more plausible an explanation for the skull fractures than did her previous accounts or the scenarios postulated to the medical experts before the jury. The ultimate issue is not whether the co-defendant assaulted the applicant, it is whether she deliberately threw MT to the floor. The prosecution has always been prepared to accept that she was assaulted as she held MT, not least because she said as much in front of neighbours, to her mother and a police officer, but this goes to mitigation not causation. There was no evidence of the velocity of the blow to her head and arm and Dr Jones's postulated theory of how the injuries could have been caused accidentally was speculative. The new account still provides no alternative plausible explanation to that of non-accidental injury to account for MT's head injuries.

22. Furthermore, the applicant now admits that she gave a false account of events on oath in the criminal trial and in the Family Court. This was the product of a conspiracy between her and the co-defendant for their mutual benefit. They each withdrew the accusations of misconduct against the other which they had made immediately after MT had sustained his injuries. Other evidence contrary to this false narrative was suppressed. This was engineered by the applicant in the autumn of 2016, while the co-defendant was in custody. The applicant prevailed upon her mother and 8-year-old child to change their accounts. In these circumstances the application to adduce fresh

evidence ought to be refused since it is neither "necessary nor expedient, in the interests of justice" to admit it.

23. In any event, the applicant had ample opportunity and the ability to disclose the scenario she now portrays. In the early morning of 24 June 2016, the applicant had the opportunity to explain the situation in the absence of the co-defendant and she did report to others that the co-defendant had assaulted her.

24. The applicant says she made "numerous requests" of her counsel during the trial to call her mother and Tyler to give evidence, which she states were refused by her counsel. If this is true, it undermines the assertion she makes that she was incapable of giving instructions other than in accordance with the co-defendant's interests and subject to his control.

The fresh evidence

25. In a statement dated 21 July 2018 the applicant indicated that she intended to "set the record straight about my relationship history, to tell the truth about what actually occurred on the night of 24 June 2016….and explain that I am innocent of this crime". The statement provides details of her relationship with the co-defendant, and a previous partner, in which she said was the victim of abusive and violent behaviour. She received a caution for assaulting the co-defendant in 2015. In retaliation for a punch in the face a few days preceding the assault, she had thrown a feeding bottle at him causing a black eye. She complained of poor health at the time of the incident, experiencing dizzy spells and poor balance and was "still experiencing memory issues around the time of the incident, and indeed throughout 2017…. due to the head injury sustained during the night in question…evidenced by my post-concussion diagnosis when taken to A&E whilst in police custody [which] was explained to my solicitors on many occasions." However, since being diagnosed with PTSD she had had several flashbacks and there were several details that she had since remembered.

26. On the early morning in question, as she was preparing a feed for MT whilst cradling him in her left arm, the co-defendant appeared to her left. He was menacing. He pretended to strike out at her causing her to cower towards the right. He then hit her on her left forehead between temple and ear and at the same time she felt a hit on her left arm between shoulder and elbow. She believed she fell backwards with MT "going over my left shoulder" and cannot rule out the possibility that she fell on top of him "as we were inches away from each other" and she did not recall a hard landing. She recalled her cardigan being caught. She heard the co-defendant saying something to the emergency operator about her baby being "thrown on the floor"; when he did so he winked at her tauntingly. She was shocked and extremely emotional and concerned for MT. She was "in and out of focus", her comprehension of events "deteriorated". She had been held responsible by the Family Court Judge, but the Judge "remains in thought that this was as a result of [the co-defendant's] actions." The applicant had not felt "comfortable, ready or safe to disclose the abuse" to her previous solicitors for fear of what the co-defendant could and would do. She had hoped that her solicitors or the prosecution would put forward "all the evidence that pointed towards the punch being what happened".

27. In her second statement made on 10 May 2020 the applicant provided further detail of the abusive relationship with the co-defendant. She asserted that she found it

impossible to disclose the abuse to the police in fear of her life and harm befalling her children and family. Even when the co-defendant was on remand (for five months after his arrest) "he was still everywhere" and held sway over her. He had people watching her and continued his control over her. On his release he continued in his physical abuse of her and would "gaslight" her when he knew she was about to see her legal team, saying that she had mental health problems. He was present in court during the time she gave evidence and would drive her to and from court.

28. The respondent did not accept that the applicant's accounts were "capable of belief." Consequently, she gave evidence before us which we received de benne esse restricted to the events on the morning of the 24 June 2016 and the reasons for her non-disclosure of the event as she now describes it.

29. The applicant's evidence in chief closely mirrored her written accounts. In cross examination she said she understood the importance of the paramedics knowing the true circumstances of MT's fall the best to attend to and treat him but did not think that knowing that she had been punched in the head would make a difference. She could not tell the police officers who attended at the scene that she had been punched because "he was there", she did not want to agitate the co-defendant since he was holding MT and she didn't know what would happen. She accepted that at the scene she had said that the co-defendant had hit her, and he was accusing her of throwing MT. Although both she and the co-defendant had stopped making these cross allegations by the time of her second interview in July 2016, it was not because of an agreement made between them. She and the co-defendant had presented their domestic relationship as "normal" and, despite the ill treatment she described as meted out by the co-defendant towards T, she sought the return of her children to their joint care. However, she said it was not her plan to live as a couple with the co-defendant, hoping that she would be able to seek support to leave him. She refuted the suggestion that this would expose the children to further risk. She could not remember asking permission to take the children to visit the co-defendant in prison, nor saying that T had a "weird imagination" to say what he had about the co-defendant hitting her. She accepted that she had spoken to T about his account to the police, before he retracted his evidence and that she had lied to her mother in persuading her she was mistaken about the applicant's complaint of assault prior to MT's fall against the co-defendant. She recalled the blow to her head and to the arm and did not know which impact had caused her to drop MT and how he had fallen beyond seeing him inches away from her on the floor with his back towards her. There were no visible injuries to her head, but it was beneath her hairline, and she physically indicated the area above her ear.

30. Dr Georgina Clifford interviewed the applicant post-conviction and prepared a report for the purpose of the appeal against sentence dated 20 July 2018. Noting that the applicant had been seen by two consultant psychiatrists and consultant psychologist who recorded either no symptoms of PTSD, including flashbacks or nightmares, or that the PTSD they did discern appeared to have been caused by the court cases and the prosecution rather than the events preceding or the trigger offence, she found no reference to any of the experts having conducted a diagnostic screening interview for PTSD. Having done so Dr Clifford formed the view that the applicant was "extremely traumatised and experiencing dissociation at the time of the index event" with delayed onset of PTSD. She considered the applicant's account to describe a history of

dissociation and dissociative amnesia. The delay in disclosing the abuse she had suffered was commonplace in victims of domestic violence. In a subsequent report dated 5 August 2021, Dr Clifford indicated that her conclusions relied upon a "diagnostic screening interview, clinical observations of emotional distress and physiological reactivity, observations of how [the] trauma narrative was presented and the large volume of independent evidence available [regarding incidents of domestic violence]".

31. In his biomechanical report dated 21 October 2019 Dr Jones conducted a document and literature review; he has not interviewed the applicant but had been provided with the bare details of her new case. He regarded the subsequent account as "understandably vague, if one is to accept that she were punched with sufficient force to be adduced to have post-concussion syndrome". The experts had not been asked to address this scenario at trial. He posited four possible scenarios, two of which involving a crush injury from the applicant's body which could account for all the injuries, including rib fractures if present, sustained by MT. Depending on the force of the punch and the applicant's body mechanics then a "higher energy fall scenario could have been produced".

32. In his Addendum Report dated 16th July 2021, responding to written queries arising from, or comments made in relation to, his first report, he confirmed that:

> "19. That a wide number of biomechanical variables are considered in my report is a reflection of the vague description provided by [AWJ,] this is acknowledged at section 105 of the report, 'It is my opinion, from a biomechanical engineering perspective, that the punch scenario introduces a significant number of variables, which are potentially significantly different from those previously considered by the experts, who were asked to provide an opinion based on the original scenario. Perturbations include force magnitude, direction and duration of the perpetrator's punch and body position, reflex, and movement of the victim. Such is the additional complexity in nature, magnitude and interrelationship between these variations (perturbations) the mechanics of the punch scenario cannot be precisely stated'.
>
> 20. It is noteworthy, that should a more detailed account of the assault scenario have been provided, further effort would have been expended in considering other 'minor changes in the mechanics of the event', since it is an imperative, when characterising a complex dynamic event, such as the scenario in this case, that 'minor changes' be considered. Minor changes (minor perturbations, for example, position or velocity of the head or swinging arm) can have very significant effects on the body kinetics and kinematics, the forces that cause motion and the motion, respectively."

Assessment

33. We accept that there is ample independent evidence of domestic violence having occurred within the relationship between the applicant and the co-defendant, and well

understand that a victim of a coercive and controlling relationship may "live in denial". We are also prepared to accept, for the purpose of considering the application to admit fresh evidence pursuant to section 23 of the Criminal Appeal Act 1988, that the applicant was punched by the co-defendant during the early morning of 24 June 2016. However, taken in the context of the other evidence, that is the evidence of the neighbours hearing the co-defendant shouting "don't drop the baby" and his initial accusations of her throwing the baby to the floor to neighbours and emergency operators, and the children shouting at her to "stop", we did not find the applicant to be a convincing witness regarding whether this was the mechanism which led to MT's injuries. Her description of a right-handed punch belies her description of where the co-defendant stood behind her to her left and seems designed to account for the injury to the co-defendant's right hand on arrest. Her reasons for not informing the police officers at the scene are undermined by the fact that she did reveal the assault to her neighbours and did reveal to one of the police officers that the injuries occurred during an argument. The reasons for her dissuading her mother and T from continuing with their initial accounts as being protective of them were, we felt, contrived and self-contradicted by her wish to have them called as witnesses at trial.

34. We note that, in her statement dated 21 July 2018, which she confirmed as true and accurate, despite her new account she challenges the experts who gave evidence at trial for not properly considering MT's prematurity and restricted growth in the womb which may have led to "bones [which] are fragile, and they can fracture more easily". At the same time her assertion in that statement that the "experts involved strongly felt that [MT's] injuries were consistent with [her 8-year-old son's] version of events as quoted by Dr Chapman" is to misrepresent the contents of Dr Chapman's report.

35. We find it surprising that the applicant seeks to rely upon Dr Jones's report as a biomechanical engineer rather than to seek the views of the medical experts who gave evidence at trial. We were unconvinced by Ms Ahluwalia's explanation of why a biomechanical report could not have been commissioned at trial, not least since the Family Court were asked to bear in mind its absence when determining causation. Nor did we accept that Dr Chapman had accepted a similar proposition to that postulated by Dr Jones in his report. As we indicate above, Dr Chapman referred to <u>throwing</u> MT to the floor as an unintended response to being punched not dropping the child. Significantly we find, it appears that Dr Jones "intended to provide a general indication of the complex biomechanical consequences that require consideration <u>if one is to attempt to correlate [MT's] injuries with the account of the assault scenario provided by [AWJ]</u>." (Emphasis provided). Further, both the scenarios which he accepted as providing a potential mechanism of causation, involved a crushing injury which is not made out by the applicant's evidence. His report was entirely speculative.

36. Dr Clifford's report does not provide a ground of appeal but rather an explanation for the applicant's late disclosure of the domestic violence. However, this explanation is dependent upon the applicant's accounts which we found unpersuasive, not least her asserted amnesia about the events of 24 June 2016 and her selective memory recall.

37. In these circumstances we are not satisfied that it is either expedient or necessary in the interests of justice to admit the fresh evidence upon which the applicant purports to rely. Consequently, we refuse permission to appeal against conviction and the necessary extension of time in which to do so.