

# \*1 Regina v Rebelo



No Substantial Judicial Treatment

## Court

Court of Appeal (Criminal Division)

## Judgment Date

8 March 2021

## Report Citation

[2021] EWCA Crim 306

[2021] 4 W.L.R. 52



Court of Appeal

Dame Victoria Sharp P , William Davis , Picken JJ

2020 Nov 17; 2021 Mar 8

*Crime—Homicide—Manslaughter—Gross negligence—Defendant selling unlicensed drug as food supplement to promote weight loss—Victim buying drug, taking overdose and dying as a result—Whether death caused by defendant’s gross negligence in selling unlicensed drug—Whether defendant guilty of gross negligence manslaughter*

The defendant ran a business which sold a chemical, Dinitrophenol (“DNP”), as a food supplement which was claimed to promote weight loss. DNP was not licensed as a medicinal drug. A 21-year-old student, P, a young woman suffering from depression and personality disorders and with a history of self-harming, developed bulimia nervosa, an eating disorder, and purchased a quantity of DNP capsules from the defendant’s business via the internet. Subsequently, after taking eight DNP capsules, she died. The defendant was charged with and convicted of unlawful act manslaughter, gross negligence manslaughter and placing an unsafe food on the market in breach of the food regulations. He appealed against the convictions for the manslaughter offences. The Court of Appeal quashed the conviction of unlawful act manslaughter on the basis that placing DNP on the market was not of itself a dangerous act and could not, therefore, amount to a dangerous act sufficient to amount to an unlawful act for the purposes of unlawful act manslaughter. The conviction of gross negligence manslaughter was quashed on the basis of the court’s conclusion that the direction given by the judge to the jury on the issue of causation was defective and a retrial was ordered on that charge. The defendant was convicted, after the retrial, of gross negligence manslaughter. He appealed against that conviction on the ground, inter alia, that the judge’s direction on causation did not accord with the guidance given by the Court of Appeal in the first appeal and was a misdirection. He contended that the judge had failed to direct the jury that, even if they concluded that P’s decision was not fully free and voluntary, they still had to assess whether the decision to take the amount of DNP which she did was such that it could be said “to eclipse” the defendant’s gross negligence which was the further step required in order to establish the necessary link between the defendant’s supply of DNP and P’s death, and that P’s action, in taking the amount of drugs that she did, did not break the chain of causation.

On the appeal—

*Held*, dismissing the appeal, that it had to be borne in mind that what was said by the Court of Appeal in the first appeal, as the court itself made plain, was suggestive only of the sort of direction that might be given; that it was not intended to be prescriptive; that the passage on which the defendant particularly relied was not authority for the proposition that, before the jury could safely convict, the prosecution were and would be required to surmount the further hurdle or take the further step identified; that that interpretation of the suggested direction ignored its full content; that the first paragraph of the direction dealt with the requirement that the breach of duty had to be a substantial and operative cause of death and the breach of duty would not be a cause of death if P had or might have made a fully free, voluntary and informed decision, and the second paragraph expanded on the term “fully free, voluntary and informed” but the final sentence did not add an extra element to the requirement; that the expression “fully free, voluntary and informed” meant her “ability to assess the risk and understand the consequences relating to the toxicity of the substance and her appreciation of the risk to her health”; that what was required was a balancing exercise in order to decide whether the prosecution had established that a defendant’s breach of duty was a substantial and operative cause of death, even if it was not the sole such cause; that, only if P’s decision to take the DNP was a fully free, voluntary and informed decision, or might have been, would her death, as a matter of law have been caused by her free choice because in those circumstances the defendant had only set the scene for her to make that decision, but he would not have caused her death; that the judge had given a much \*2 fuller direction than the one set out by the Court of Appeal and, accordingly, there was nothing wrong with the content of those directions (post, paras 32,33, 35, 36, 38).

*R v Rebelo [2019] EWCA Crim 633*, CA, explained.

#### APPEAL against conviction

On 27 June 2018 in the Crown Court at Inner London, before Judge Jeremy Donne QC and a jury, the defendant, Bernard Rebelo, was convicted of unlawful act manslaughter, gross negligence manslaughter and placing an unsafe food on the market contrary to [article 14 of Regulation \(EC\) 178/2002](#) and [regulation 19 of the Food Safety and Hygiene \(England\) Regulations 2013 \(SI 2013/2996\)](#). He was sentenced to seven years’ imprisonment for gross negligence manslaughter and to a concurrent term of 18 months’ imprisonment for the offence of breaching the food safety regulations. No separate penalty was imposed for the offence of unlawful act manslaughter. On 11 April 2019 his appeal against his conviction for the manslaughter offences was allowed and a retrial was ordered on the charge of gross negligence manslaughter: *R v Rebelo [2019] EWCA Crim 633*. On 10 March 2020 at the Central Criminal Court, before Whipple J and a jury, the defendant was convicted after a retrial of gross negligence manslaughter. On 11 March 2020, before the same court, he was sentenced to seven years’ imprisonment. He appealed against that conviction with limited leave of the single judge. The single ground (ground 2) upon which leave was given was that the judge’s direction on causation did not accord with the guidance given by the Court of Appeal in the first appeal and was a misdirection.

The facts are stated in the judgment of the court at para 6.

*John Burton QC* (assigned by the Registrar of Criminal Appeals) for the defendant.

*Richard Barraclough QC* and *Gordon Menzies* (instructed by *Crown Prosecution Service, Appeals Unit*) for the Crown.

The court took time for consideration.

8 March 2021. DAME VICTORIA SHARP P

handed down the following judgment of the court.

#### Introduction

1. On 27 June 2018, at the Crown Court sitting at Inner London, the defendant was convicted after a trial before Judge Jeremy Donne QC and a jury, of unlawful act manslaughter, gross negligence manslaughter and placing an unsafe food on the market contrary to [article 14 of Regulation \(EC\) 178/2002](#) and [regulation 19 of the Food Safety and Hygiene \(England\) Regulations 2013 \(SI 2013/2996\)](#). He was sentenced to seven years' imprisonment for gross negligence manslaughter and to 18 months' imprisonment (concurrent) for the offence of breaching the food safety regulations. No separate penalty was imposed for the offence of unlawful act manslaughter.

2. On 11 April 2019 his appeal against his conviction for the manslaughter offences was allowed and a retrial was ordered on the charge of gross negligence manslaughter: see *R v Rebelo [2019] EWCA Crim 633* (Sir Brian Leveson P, William Davis and Murray JJ).

3. On 10 March 2020, the defendant was convicted after a retrial at the Central Criminal Court, before Whipple J and a jury, of gross negligence manslaughter. On 11 March 2020, before the same court, he was sentenced to seven years' imprisonment. He now appeals against that conviction with limited leave of the single judge. The single ground (ground 2) upon which leave was given concerns the direction given by the judge on causation. It is said that this direction did not accord with the guidance given by the Court of Appeal in the first appeal and was a misdirection.

4. The defendant also renews his application for leave to appeal on two grounds (grounds 1 and 3) for which leave was refused by the single judge. In short, it is said that, following the decision of the defendant to dispense with his legal team (leading and junior counsel and solicitors) towards the close of the prosecution case the judge should have granted a longer adjournment to the defence than she did, in particular to enable the defence to call a newly instructed expert. As part of that renewed application, the defendant seeks leave pursuant to [section 23 of the Criminal Appeal Act 1968](#), to adduce as fresh evidence, the evidence of a consultant forensic psychiatrist, Professor Jennifer Shaw.

5. We do not consider the renewed grounds to be arguable and would decline to admit the evidence of Professor Shaw. For the reasons that follow, we would refuse leave and dismiss this appeal. \*3

#### The facts

6. The relevant factual background can be taken from part of the judgment of Sir Brian Leveson P, giving the judgment of the Court in the first appeal (we also include as context, some of what was said about unlawful act manslaughter):

“3. The appellant and his two co-accused (both of whom were acquitted) ran a business which sold a chemical, Dinitrophenol ('DNP'), as a food supplement which was claimed to promote weight loss. On the 4 April 2015, a 21-year-old student, Eloise Aimee Parry, purchased a quantity of DNP capsules from the appellant's business via the internet. On 12 April 2015, after taking eight of the capsules, tragically, she died.

“4. We start with a description of DNP which is a chemical that was originally used in the manufacturing of dyes, wood preservatives, explosives, insecticides and other industrial products. It can act as a 'fat burning' and weight reducing drug by blocking the normal processes by which energy is stored in the body, causing energy to be released as heat. As a result, body temperature, metabolic rate, glycolysis and lipolysis (breakdown of glycogen and fat energy stores) all increase.

“5. DNP has not undergone pharmaceutical development and has not been licensed as a medicinal drug. There has been no adequate research into its use as a pharmaceutical product and therefore no reliable evidence on which to base dosing recommendations. Ingestion by a human is to be regarded

as hazardous and its toxic effects various and serious, including, inter alia, kidney failure, liver failure and cardiac arrest. There have been reported deaths in the United Kingdom resulting from the ingestion of DNP. Most of these have been in the context of acute overdose, although there have been cases of death apparently arising from regular use.

“6. Prior to 2012, this type of poisoning was very rare. Thereafter, there has been an increase in the number of reported cases, suggestive of a rise in the use of DNP. Available statistics show, that of the 87 reported cases of DNP poisoning between 2007 and 2017, 12 resulted in death; there were six deaths in 2015 alone. Data collected by the National Poisons Information Service has caused Public Health England (‘PHE’) and the Food Standards Agency (‘FSA’) to publish warnings in respect of the dangers of using DNP as a weight reduction supplement. Efforts have been made by national and local agencies and authorities, including the FSA and police, to disrupt and restrict the sale of DNP. Much of the marketing of DNP is conducted via the internet. As a result, educational work has been carried out targeting places where DNP might be sold or be considered attractive, such as gyms. The appellant was fully aware of the risks and the public concern relating to DNP; his denial that he was selling it for public consumption was rejected by the jury.

“7. Turning to Eloise Parry, she was a young woman with a troubled past. She had been reported as suffering from depression and personality disorders and she had a history of self-harming, including overdosing on paracetamol tablets and taking cocaine. A consultant psychiatrist identified her as being very vulnerable and needing a high level of support. In 2011 she developed the eating disorder bulimia nervosa and received counselling. After completing her A level examinations she was detained in hospital under the [Mental Health Act 1983](#) but subsequently embarked on a university degree. After gaining first class honours at the conclusion of her first year, she was again detained under the [Mental Health Act](#), following another paracetamol overdose.

“8. In February 2015, Ms Parry encountered DNP slimming pills on the appellant’s website. There were number of contemporaneous accounts and records of what Ms Parry was doing and how she felt, both physically and emotionally. In e-mails and messages to university friends she described what she had taken and how she could not control her use of DNP. Despite appreciating that DNP was causing her harm, she continued to order further supplies from the appellant’s business. She was repeatedly warned by her GP, social worker and friends of the danger from taking DNP, including the potentially fatal consequences.

“9. On 10 April 2015 a friend of Ms Parry, Lydia Jane Rogers, warned her that she was going to die if she did not stop taking DNP to which Ms Parry replied: ‘I wish I wouldn’t too but the psychological desperation to take the pills is so hard to fight. They make everything feel okay. They give me control. Which I know is delusional but I feel it so overwhelmingly!’

“10. The next day she went on an eating binge and, in the early hours of 12 April, took four DNP capsules (each of 250 mgm), followed a few hours later by a further \*4 four similar capsules, thereby exhausting her supply. She made a final purchase of two packets of DNP online. Shortly afterwards she became unwell and arrived at hospital, where her condition deteriorated. She suffered a cardiac arrest and died shortly before 3 pm.

“11. The prosecution case was that the DNP acquired by Ms Parry and, in particular, the eight capsules containing DNP taken by her on the morning of her death had been sold to her by the appellant through his internet site; these were the substantial cause of her death. He had imported industrial 2.4 DNP from China in barrels and he put it into capsules at his home made up of 250 mgm (advertised at some stage as a daily dose for men) and 125 mgm (the dose for women): these dosages were published only after the death of Ms Parry. The income generated was approximately £100,000.

“12. The appellant was fully aware of the dangers associated with DNP and was also aware that the

sale of DNP was of interest to the authorities, who were trying to prevent or disrupt its sale. Active steps were taken by the appellant to disguise his activities, by using various internet identities, disguising the nature of the product in invoices and using arm's-length payment services. There were large profits to be made as the raw 4-DNP, imported from China, was cheap but the capsules produced by the appellant were sold at a considerable mark up.”

“13. In short, the Crown alleged that the supply of these tablets for human consumption constituted an unlawful act which was dangerous and led to death (unlawful act manslaughter); it also constituted a gross breach of the duty of care owed to Ms Parry, crossing the criminal threshold, in circumstances which created an obvious and serious risk of death (gross negligence manslaughter).”

“14. While accepting that the appellant placed DNP on the market, it was denied that he did so with the intent or reasonable expectation alleged by the Crown. The defence contended that Ms Parry was an autonomous woman who decided to make a foolish decision in the exercise of her free will and killed herself, as she was entitled to do. The appellant’s act of placing DNP on the market was too remote. Putting DNP on to the market did not cause her death and he bore no responsibility for Ms Parry ingesting it. It was not possible for him to have foreseen the possibility that she would take a handful of the capsules.”

#### The first appeal

7. The Court of Appeal quashed the defendant’s conviction of unlawful act manslaughter because it concluded, by analogy with the approach taken to the supply of heroin in *R v Kennedy (No 2)* [2007] UKHL 38; [2008] AC 269, that placing unsafe food on the market, of itself, was not a dangerous act; and that to place DNP on the market could not, therefore, amount to a dangerous act sufficient to amount to an unlawful act for the purposes of unlawful act manslaughter.

8. The Court of Appeal rejected the submission that the judge ought to have acceded to a submission of “no case to answer” in respect of gross negligence manslaughter. In that connection, the defendant had argued that there was insufficient evidence that DNP created an obvious and serious risk of death, the only risk being when there was an overdose; alternatively, because there was “a break in the chain of causation as a consequence of the voluntary (that is to say free, informed and deliberate) act of the deceased herself”: see paras 68 and 70. In rejecting that submission, the Court of Appeal said, at para 69, that there was “clearly enough material to justify leaving the issue of serious and obvious risk of death to the jury”.

9. The conviction of gross negligence manslaughter was quashed however because the Court of Appeal concluded that the direction given by the judge to the jury on the issue of causation was defective.

10. At paras 70 and following the Court of Appeal set out the parties’ submissions on this issue:

“70. The alternative ground of appeal advanced by Ms Gerry [counsel then appearing for the appellant] (which was also relevant to unlawful act manslaughter) was based on her submission that there was a break in the chain of causation as a consequence of the voluntary (that is to say free, informed and deliberate) act of the deceased herself; the approach should be no different to the principle which operates to break the chain of causation as a consequence of the act of a third party. She argued that Eloise Parry did not lack autonomy so that her ability to make up her own mind and ingest what, on any showing, were grossly excessive quantities of DNP constituted \*5 a novus actus interveniens which broke the chain of causation between the appellant’s breach of duty and her death.

“71. Ms Gerry argued that an adult woman albeit suffering from an emotionally unstable

personality disorder and an eating disorder still retained autonomy to take risks and make mistakes, or even to commit suicide. She recognised that if unlawful conduct from a defendant has prompted the response of the victim, the defendant may remain liable if the reaction of the victim was within the range of responses which might be expected from a victim in his situation (see *Smith, Hogan & Ormerod's Criminal Law*, 15th ed (2018), p 81 and the cases therein cited) but argued that her reaction was outside that range and not reasonably foreseeable.”

11. The case for prosecution however, as identified at para 72, was that: “Ms Parry’s free will was fettered and that she was coerced by the effect of her condition and the effect of the DNP such that her free will was sapped” and “her ability to exercise free and informed consent was compromised”.

12. In the event, the Court of Appeal’s analysis was this:

“74. In that part of the route to verdict dealing with autonomy the judge asked whether the prosecution had proved that Eloise Parry lacked capacity or was vulnerable and unable to exercise her free will when making the decision to take DNP. The reference to capacity came from the evidence of Dr Rogers applying the criteria set out in [section 3 of the Mental Capacity Act 2005](#) . Thus, the question posed in the route to verdict in relation to gross negligence manslaughter did not reflect sufficiently clearly the issue that arose which was not merely whether it was *not* so unreasonable that it eclipsed the defendant’s acts or omissions but which also depended on whether Eloise Parry’s decision to take DNP may have been free, deliberate and informed decision, as Ms Gerry argued. Her capacity would be relevant to that issue.”

“75. In that regard, it is important to underline that capacity is not the same as autonomy. To direct the jury that provable lack of capacity as defined in the [2005 Act](#) would be sufficient to demonstrate lack of autonomy was a misdirection particularly given the emphasis thereafter placed on the evidence of Dr Rogers. The second limb of the direction – the reference to Eloise Parry being ‘vulnerable and unable to exercise her free will’ – failed to assist the jury with what was meant in that context by the word vulnerable and how it interacted with any exercise of free will. Admittedly the judge was only using the term adopted in *Kennedy (No 2)* . But in that case the issue of capacity did not arise on the facts and there was no suggestion that the victim was suffering from a mental disorder that might deprive him of capacity. Further, the use of the word vulnerable was not discussed further. The direction should have required the jury to consider only the question of Eloise Parry’s free, deliberate and informed decision.”

“76. Thus, the jury had to be directed, first, that the defendant must owe the victim an existing duty of care which, secondly, has negligently been breached in circumstances, thirdly, that were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction. Fourth, the breach of that duty must be a substantial and operative cause of death, although not necessarily the sole cause of death. This last ingredient required further analysis which, without seeking to provide a definitive definition, could have been put to the jury in this way:

’In relation to the question of causation, the prosecution must make you sure that the victim did not make a fully free, voluntary and informed decision to risk death by taking the quantity of drug that she ingested. If she did make such a decision, or may have done so, her death flows from her decision and defendant only set the scene for her to make that decision. In



those circumstances, he is not guilty of gross negligence manslaughter.’

’What does a fully informed and voluntary decision mean? Whether a decision is informed and voluntary will often be a question of degree. There are a range of factors to be taken into account. The starting point will be the capacity of the victim to assess the risk and understand the consequences. Does he or she suffer from a mental illness such as to affect their capacity? In that regard, you will consider the evidence of Dr Rogers, remembering always that it is for you the jury to attach such weight as you feel appropriate to that \*6 expert evidence. Against the background of what you have concluded about her capacity, you will consider her ability to assess the risk and understand the consequences relating to the toxicity of the substance and her appreciation of the risk to her health or even her life by taking as much as she did and whether it eclipsed the defendant’s grossly negligent breach of the duty of care.’

“77. It is necessary to assess the direction which the judge gave against that suggested template. First, we do not consider that the question of capacity and vulnerability is of potentially less significance than in relation to gross negligence manslaughter as opposed to unlawful act manslaughter. Neither do we consider very helpful, in the context of this case, the formulation that the prosecution must prove that Eloise Parry’s decision to take DNP in the quantity she did was not so unreasonable that it eclipsed the defendant’s grossly negligent breach of the duty of care because the jury were given no assistance as to the way in which they could undertake that balancing exercise.”

#### The retrial

13. The defendant’s retrial commenced on 10 February 2020. The defendant was represented by experienced leading and junior counsel, Mr Lambert QC and Mr Ashley Hendron.

14. The prosecution relied, as it had done at the first trial, on the evidence of Dr Tim Rogers, a consultant psychiatrist with a specialism in eating disorders. His evidence was that Ms Parry lacked capacity when she ingested the tablets; specifically that her ability to understand and weigh information had been impaired by her significant mental health problems. Dr Rogers identified from Ms Parry’s medical notes three separate mental health diagnoses: bulimia nervosa, emotionally unstable personality disorder and depressive episodes. In his expert opinion, the psychiatric conditions from which she suffered meant that she was less able to resist the compulsion to take DNP and that she did not have capacity.

15. The prosecution also relied upon the evidence of Ms Parry’s GP, Dr Ingram. Dr Ingram had had a number of consultations with Ms Parry. Dr Ingram said Ms Parry had mental health difficulties, describing a depressive disorder, depression, paracetamol overdose, eating disorders, bulimia and self-harm. On 25 March 2015, following Ms Parry’s collapse at university and admission to hospital, Dr Ingram and Ms Parry had discussed the dangers of DNP. Ms Parry had said that she felt unable to stop. After she had died, Dr Ingram noted that she felt Ms Parry was very well aware of the potentially life-threatening consequences of taking DNP but that she had such severe body dysmorphia that she was unable to stop herself from taking it.

16. Sally Cowman is a nutritional therapist, who had been treating Ms Parry since October 2014. She gave evidence that Ms Parry had disclosed that she was taking DNP for weight loss, that she knew it could have devastating results but that she had

no control over taking it. Ms Cowman last saw Ms Parry on 9 April 2015 and was concerned for her welfare. Ms Cowman noted that Ms Parry was fragile and despondent; she had lost the capacity to think positively about her future; she knew that DNP could kill her but said that she was reliant on it and could not stop taking it.

17. Ruth Davies was Ms Parry's university tutor. She gave evidence that she had been aware of Ms Parry's past mental health issues and supported her at university. On the day that she died, Ms Parry sent her an e-mail saying: "I've screwed up big time, binge/purged all night long. Took four pills at 4.00, another four when I woke up, started vomiting, now at hospital and I think I'm going to die. I'm so scared. I'm so sorry for being so stupid."

18. Professor Simon Thomas, a clinical toxicologist gave evidence that DNP was highly toxic and not safe for human consumption; and that information on "safe doses" of DNP was misleading as there was no safe dose, or proper information about the therapeutic values of DNP or the risks.

19. The defence case was that Ms Parry was an adult woman suffering from an emotionally unstable personality disorder and an eating disorder who made a fully free, voluntary and informed decision to take the DNP; she was not acting under any compulsion, nor was she vulnerable to feeling compelled. She was someone who wanted to take the DNP and so did. She was a bright and able university student who had conducted internet research and was well informed about the risks of DNP.

20. It was suggested also that DNP was widely used for dieting and bodybuilding, and that, whilst risks may have existed, they were not serious and obvious risks of death. The defendant's sale of the substance was simply meeting customer demand; he may have been negligent but \*7 not grossly so. Those who purchased DNP knew what they were buying; numerous people took DNP without any adverse effect.

21. Further, it was said that the jury could not be sure that the DNP ingested by Ms Parry was in fact supplied by the defendant. It was possible that she obtained the pills through a supplier at her university; she had sent a message indicating the university was investigating a man who was a supplier. There were also plenty of other DNP suppliers in the United Kingdom.

22. The defendant did not give evidence. His sole witness was Dr Richard Latham, a consultant psychiatrist. His evidence was given "back to back" with that of the prosecution experts. Dr Latham said that, in his opinion, there was insufficient evidence to displace the presumption under [section 23 of the Mental Health Act 1983](#), that Ms Parry had capacity. In his opinion, Ms Parry's mental health issues influenced the way in which she made decisions, but she retained capacity. He explained that, where capacity is an issue, people can fluctuate from hour to hour. In the present case, Ms Parry was capable of understanding the information on DNP. When she took DNP for the last time, she was repeating something that she had done on previous occasions. However, Dr Latham also said:

"The decision every time she took DNP; that was likely to be because of the cycle of behaviour associated with her mental disorder. She was bingeing, purging and using DNP. These were compensatory behaviours. I don't believe you could ever describe the situation of her taking DNP as fully free because this was part of her disorder and was driven by the symptoms of her disorder. Similarly with voluntariness, I do believe that her mental symptoms meant that her decision was not fully voluntary. The mental symptoms that she had; they do have an impact on her ability to resist the compulsion, so whilst I said before there is still likely to have been some degree of choice ... that choice was very significantly impaired by her mental disorder."

23. This evidence was given on 26 February 2020. After it was given, the defendant apparently lost confidence in his legal team, counsel and solicitors and dispensed with their services. On 27 February 2020 (day 14 of the trial) solicitors newly instructed made an application to the judge on the defendant's behalf, to transfer the legal aid certificate to a new legal team.



24. On 28 February 2020, Mr Burton QC, now also newly instructed, made an application to discharge the jury or to be given at least a week to read into the case. The judge granted the application to transfer, she said as a matter of indulgence to the defendant because she did not wish him to represent himself but only on the basis that she would allow a short period for the new legal team to get up to speed, and that they would need to “soldier on”: see *R v Ulcay* (Practice Note) [2008] EWCA Crim 2379 ; [2008] 1 WLR 1209 . She therefore refused the application to discharge the jury or grant an adjournment of the length that Mr Burton had asked for. In her detailed written ruling dated 28 February 2020, the judge made it clear that she was only prepared to accede to the application to transfer “so long as the transfer can be achieved without derailing this trial”. She added this:

“So far as adjournment is concerned, I have equally made it clear that a change of legal representation at this stage is not a basis for discharging this jury and starting again, nor is it a reason for a long adjournment, which might end up having the same effect, or might serve to lose impetus in this trial. This trial will continue, within the time-frame originally envisaged.”

25. The judge adjourned the case for a short period, until 3 March 2020, and directed the defence to notify her by 2 March if they intended to call further evidence. On 2 March 2020 Mr Burton sent an e-mail to the judge in which he said that the defence now wished to apply either to discharge the jury or to adjourn the trial until 18 March 2020 in order to accommodate the holiday commitments of a newly instructed expert, Professor Jennifer Shaw, a clinical forensic psychiatrist. Professor Shaw had been approached and instructed during the short adjournment which the judge had granted, and had provided a short report dated 1 March 2020. In that report, she stated there was no evidence that Ms Parry lacked capacity and, in an addendum sent by e-mail on 2 March 2020, added that there was nothing about her mental disorder which suggested that her decisions were involuntary. On 3 March 2020, the defence made their application which the judge dismissed for reasons given in writing on 6 March 2020.

26. In short, the judge concluded that it was not in the interests of justice, or practicable, for there to be an adjournment; nor was it appropriate for the jury to be discharged. As to Professor Shaw’s report, the judge said this: \*8

“11. I come then to Prof Shaw’s evidence. Her report is dated 1 March 2020, last Sunday. She plainly had little time to consider the case. She says in terms that she has not reviewed [Ms Parry’s] medical notes (para 4.3). I take it that she has not reviewed [Ms Parry’s] diary or her many social media entries and e-mails either. Nor is she aware of the evidence of witnesses who saw [Ms Parry] in her final days and weeks who describe her state of mental health at that time. In the absence of a detailed analysis of the extensive documentation in this case, I could not accept any opinion offered, even on a preliminary basis, as sound.

“12. Further, Prof Shaw’s ‘report’ in truth simply recites the reports of Drs Rogers and Latham on the issue of capacity. She identifies capacity as the central issue (para 4.5) and comes down in agreement with Dr Latham in concluding that there was no evidence for lack of capacity (para 4.16). There are two points to make in response: (1) Dr Latham has already given evidence about [Ms Parry’s] capacity and there is no need for the defendant to bring another expert to trial to say the same thing. (2) In any event, the issue of capacity has rather fallen by the wayside, given Dr Latham’s concession on the wider issue of whether [Ms Parry’s] decision was fully free, voluntary and informed (he accepted that it was not—which was to agree with the prosecution case—see my earlier ruling). Prof Shaw’s main report does not deal with this wider question at all.”

The judge added, at para 13:

“13. Prof Shaw does provide an addendum. It is nine lines of text. The first three deal (again) with capacity. She then goes on to consider whether [Ms Parry’s] decision to take DNP was ‘fully free and voluntarily informed’. This is not quite the formulation that we have, in this trial, been working to (which is ‘fully free, voluntary and informed’). I cannot therefore be sure that Prof Shaw is addressing the right issue. Then Prof Shaw refers to my summing up, but does not indicate within that reference whether she understands the content of the agreed causation direction, as to what ‘fully free’ and ‘fully voluntary’ and ‘fully informed’ mean; again, I am not sure if she is addressing the right issue. She then returns to the issue of capacity, in the seventh line. Then, there is one last sentence, which really is the focus of Mr Burton’s application, where she says: ‘In terms of whether this was free and voluntary, there is nothing about her mental disorder which suggests that her decisions were involuntary.’ I note that she does not address ‘fully free’ at all, and her views on ‘voluntary’ are not explained, or reasoned, at all. Perhaps it is a smaller point, but nor does she deal with ‘fully informed’.”

27. The judge went on, at para 15:

“15. But in any event, I am not persuaded that Prof Shaw really would be able to offer assistance to this Court, even if I were to do what the defendant asks. I have already heard two expert psychiatrists of considerable standing in their respective fields give clear evidence that [Ms Parry’s] substantial mental health problems interfered with her ability to make decisions; thus, that her decision to take DNP could not be described as ‘fully free, voluntary and informed’. I do not find that view at all surprising. Indeed, to my lay ear, it sounds intuitively right. That means that the contrary view, which Mr Burton suggests Prof Shaw espouses, is the surprising one. I do consider it surprising to suggest that someone with such extensive mental health problems as [Ms Parry] had could still be acting in a way which was fully free, voluntary and informed. If my intuition is right, it means that there is a likelihood that once Prof Shaw was correctly directed on the law, had full sight of the documents including medical notes and witness evidence in this case, and had sufficient time to reflect on all this material, she would anyway align herself with the agreed view of Drs Rogers and Latham. That would mean that all this time and money had been wasted, and it would also mean that the defendant had been granted a new trial or a lengthy adjournment for no good reason.”

28. The content of the written legal directions and route to verdict had been discussed (and agreed) between counsel for the prosecution and the defendant’s then leading counsel, Mr Lambert, and the judge, on 21 February 2020. Following the judge’s refusal to discharge the \*9 jury or adjourn the trial, the prosecution closed their case. There was then a further discussion about the legal directions before the judge. Mr Burton submitted that the previously agreed draft did not adequately reflect what Sir Brian Leveson P had to say in the Court of Appeal judgment at paras 75 and 76. He highlighted how the proposed directions made no mention of “the eclipsing point”, and that “to take 16 times what is the recommended dose” brought “the eclipsing point into play”. In the course of exchanges with Mr Burton, the judge said that she did not consider the use of the word “eclipsing” to be “very helpful” for the jury. The trial then proceeded. The judge commenced her summing up on 4 March 2020 and the jury were sent out on the morning of 6 March 2020.

29. The judge’s written legal directions to the jury under the sub-heading “Fully free, voluntary and informed” contained in

a section entitled “Causation of Death” said as follows:

“21. In relation to the question of causation, the prosecution must make you sure that Eloise Parry did not make a fully free, voluntary and informed decision to risk death by taking the eight tablets of DNP on the morning of 12 April 2015: this is the ‘decision’ you must think about. If this was a fully free, voluntary and informed decision, or may have been, that means that as a matter of law, her death was caused by her free choice, because in those circumstances, the defendant only set the scene for her to make that decision, but he did not cause her death.

“22. What does a fully free, voluntary and informed decision mean? Lawyers sometimes refer to a person’s ability to make a fully free, voluntary and informed decision as ‘autonomy’. Whether a decision is fully free, voluntary and informed will be a matter of degree. It will be for you to judge whether all the relevant factors in this case, including her eating disorder and her mental health generally, were such that you can be sure that her decision to take the DNP was not fully free, voluntary and informed, as the prosecution alleges.

“23. It is important that you look at each element separately although there is likely to be some overlap between ‘fully free’ and ‘voluntary’.

“24. You will appreciate that a state of mind may fluctuate and just because some decisions Eloise Parry made at some times in her life may not seem to be fully free, voluntary and informed, it could still be the case that when she made the decision to take DNP on 12 April 2015, that decision was fully free, voluntary and informed. It is that decision you must think about.

“25. When considering whether it was ‘fully free’ you will want to consider in particular the effect of any mental health condition. In ordinary language, you might talk about someone being vulnerable because of their mental health issues. This might include, as the Prosecution say, that the person’s ability to protect themselves from significant harm was impaired. The prosecution say that Eloise Parry was vulnerable because of her mental health problems and her psychological addiction to DNP, because those problems stifled her ability to make a fully free decision. The defence say that she was able to protect herself; they say that an adult woman suffering from an emotionally unstable personality disorder and an eating disorder can, and in this case did, make a fully free, voluntary and informed decision to take the DNP.

“26. When considering whether the decision was ‘fully voluntary’ you will want to consider whether she was acting under any compulsion, whether caused by her mental health problems or any psychological addiction she may have had to DNP. Here too, you will consider whether she was vulnerable, which in this context would mean that her ability to resist feeling compelled to take the DNP was impaired. The prosecution say that there is clear evidence that she was acting under an element of compulsion because of her psychological dependence on DNP combined with her mental health problems. The defence say she was not acting under compulsion, nor was she vulnerable to feeling compelled; she wanted to take the DNP and so she did.

“27. When considering whether she was “fully informed” you will want to consider whether she knew the risks that she was taking. The prosecution say that she was not fully informed as the references she makes to ‘safe’ doses are nonsense and not supported by science. The defence say that she had conducted substantial research so knew full well what risks she was taking.”

30. Having referred to the expert evidence on the capacity issue, under the heading “Summary” the directions continued:

\*10

“33. You should ask yourselves whether taking account of all the evidence in the case, Eloise Parry made a fully free, voluntary and informed decision to take the DNP? If you conclude that her decision was, or may have been, fully free, voluntary and informed, then that decision was the cause of her death, because as a matter of law, that decision supersedes or overtakes any grossly negligent act by the defendant in supplying the DNP in the first place. The defendant is not guilty of manslaughter.

“34. If, on the other hand, you are sure that Eloise Parry did not make a fully free or fully voluntary or fully informed decision to take the DNP, then, if the defendant was in gross breach of his duty of care owed to her, his negligence remains a substantial and operative cause of her death, even if it was not the sole cause of her death. He is guilty of manslaughter.”

#### The ground of appeal

31. Mr Burton submits that the judge misdirected the jury on the issue of causation. Specifically, he submits that the judge failed to follow the guidance given in the first appeal judgment at para 76 because she failed to direct the jury that even if they concluded Ms Parry’s decision was not fully free and voluntary, they still had to assess whether the decision to take the amount of DNP that she did was such that it could be said “to eclipse” the defendant’s gross negligence. He submits that, on a proper analysis of the guidance given by Court of Appeal, this further step was required in order to establish the necessary link between the defendant’s supply of DNP and Ms Parry’s death, and that Ms Parry’s action, in taking the amount of drugs that she did, did not break the chain of causation,

32. In our judgment, this submission is misconceived. First, it must be borne in mind that what was said by the Court of Appeal, as the court itself made plain, was suggestive only of the sort of direction that might be given; it was not intended to be prescriptive. Secondly, we do not think that the passage on which Mr Burton particularly relies is authority for the proposition that before the jury could safely convict, the prosecution were and would be required to surmount the further hurdle or take the further step which he identifies.

33. The submission now made relies on an interpretation of the suggested direction which ignores its full content. The direction consisted of two paragraphs. Mr Burton cites only the second paragraph. That paragraph’s purpose is to explain the first paragraph which dealt with the requirement that the breach of duty had to be a substantial and operative cause of death. The breach of duty would not be a cause of death if Ms Parry had or might have made a fully free, voluntary and informed decision. That is what is set out in the first paragraph of the direction. The second paragraph expands on the term “fully free, voluntary and informed”. The final sentence does not add an extra element to the requirement.

34. Thus, as is clear from what the Court of Appeal did say, the key issue was whether Ms Parry had or might have made a fully free voluntary and informed decision to take DNP; if that was the case, the jury could not be sure that the defendant’s breach of duty was a cause of her death. We repeat the following passage from the Court of Appeal’s judgment:

“In relation to the question of causation, the prosecution must make you sure that the victim did not make a fully free, voluntary and informed decision to risk death by taking the quantity of drug that she ingested. If she did make such a decision, or may have done so, her death flows from her decision and defendant only set the scene for her to make that decision. In those circumstances, he is not guilty of gross negligence manslaughter.”

35. What followed was an explanation of what is meant by “fully free, voluntary and informed” (“What does a fully informed and voluntary decision mean?”). It is in that context, that the “starting point” taken is “the capacity of the victim to assess the risk and understand the consequences”; and then of her “ability to assess the risk and understand the consequences relating to the toxicity of the substance and her appreciation of the risk to her health or even grossly negligent breach of the duty of care”. As Sir Brian Leveson P said at para 77, what is required is a “balancing exercise” in order to decide whether the prosecution has established that a defendant’s breach of duty is a substantial and operative cause of death, even if it is not the sole such cause, bearing in mind, of course, that the jury would only be considering the causation issue at all if they have already concluded that the defendant’s conduct amounted to gross negligence and required criminal sanction. \*11

36. The judge gave a much fuller direction than the one set out by Sir Brian Leveson P. That is not surprising because she had to relate the legal direction to the evidence called in the trial. As can be seen she explained that it was for the prosecution to make the jury sure that Ms Parry “did not make a fully free, voluntary and informed decision to risk death” by taking the DNP which she did, spelling out to the jury that if her decision “was a fully free, voluntary and informed decision, or may have been, that means that as a matter of law, her death was caused by her free choice, because in those circumstances, the defendant only set the scene for her to make that decision, but he did not cause her death”. The judge went on to address the matters raised in the second part of the suggested direction with commendable clarity. Capacity was, of course, addressed in some depth. So too was the amount of DNP which Ms Parry took. The judge pointed out that whilst the prosecution’s case was that there is no such thing as a safe dose, it was the defence case that Ms Parry “had conducted substantial research so knew full well what risks she was taking”.

37. We note that before she came on to deal with the evidence concerning the causation issue, the judge reminded the jury that it was the defence case not only that the defendant’s breach of duty was not truly exceptionally bad, but also that:

“What is said is that there are lots of people who want this product, DNP, for whatever reason; lots of people who take it and who have no adverse effect. And in this case what happened was Eloise Parry took a massive overdose, but that was her decision and we will come on to that, but that is why she died.”

There can be no doubt, in these circumstances, that the jury would have had in mind that it was for them to consider the significance of the fact that Ms Parry took as much DNP as she did, as part of the balancing exercise which their assessment of the issue of causation required.

38. Finally, insofar as the complaint centres on the absence of the word “eclipsed” from the judge’s written directions, it is to be noted that, no doubt out of an abundance of caution, the transcript shows that the judge did add the words: “or eclipses” after “supersedes or overtakes” when taking the jury through her written directions in the course of her summing up. What matters, however, is the substance and correctness of the legal directions, rather than the use of this particular verb. The content of those directions had been agreed as we have said with the defendant’s previous counsel; and in our view, there was nothing wrong with them. Specifically, the jury were accurately directed on the issue of causation and their approach to the core issue of “free, voluntary and informed consent”. It follows that the appeal against conviction must be dismissed.

The renewed applications for leave to appeal

39. We turn next to the grounds for which leave was refused.

40. The first of these grounds is that the judge’s refusal on 28 February 2020 (a Friday) to discharge the jury or to adjourn the trial for at least a week (rather than until the following Tuesday, 3 March 2020) gave the defendant’s newly instructed legal team too little time in which to read into the case.

41. Like the single judge, we see no merit in this proposed ground. The only reason a new legal team became involved was

because the defendant chose to sack his solicitors and counsel. As already indicated, this was because he had apparently lost confidence in them when Dr Latham gave evidence that was damaging to his case. This was not a legitimate basis for a loss of confidence, even assuming for this purpose that this is ever a proper ground for a change of representation.

42. No significance can be attached to the fact, as it is said to be, that the case raised a number of complex issues or to the number of exhibits, amounting to some 11,500 pages, or to the fact that the jury bundle consisted of almost 1,600 pages. First, as Mr Barraclough QC for the respondent points out, the evidence in the jury bundle had been reduced to schedules and the points for the jury to consider fell within a relatively narrow compass. Secondly, Mr Burton was unable to demonstrate, even arguably, that the limited time available to the new legal team materially affected the presentation of the defendant's case.

43. The only example given was that, due to lack of time, counsel failed to notice the significance of evidence concerning the way in which the defendant supplied DNP in 2014. This, however, amounts to nothing. The evidence was in the jury bundle. If it was of real significance, it was there for the jury to take into account. In fact, it was not of any significance. In 2014 the defendant referred on social media to his DNP being supplied in red and white capsules. There was evidence that the DNP capsules in Ms Parry's possession in 2015 were yellow. The fact that *\*12* the defendant used red and white capsules in 2014 was of marginal value in determining the colour of DNP capsules which he supplied in 2015.

44. We would add two points. First, the associated complaint that the judge declined to refer to this aspect of the case is unsustainable. As the judge noted in some of the exchanges with Mr Burton during breaks in her summing-up, the defendant had chosen not to say whether the DNP capsules which Ms Parry had in 2015 were supplied by him; and in our view, she was entitled to decline to mention the evidence of what the appellant had said on social media given that he had chosen not to give evidence before the jury. Secondly, the evidence before the jury (including from Ms Parry's electronic devices and bank statements and the like) that it was DNP admittedly supplied by the defendant to Ms Parry that caused her death, was compelling.

45. The second ground now advanced (the ground described as ground 3(a)) is that the judge ought to have discharged the jury or adjourned the trial on 3 March 2020 to enable Professor Shaw's report "to be finalised" and to permit her to give evidence on the defendant's behalf.

46. We see no merit in this ground either.

47. The starting point is that the evidence it was proposed that Professor Shaw should give covered the same ground as that of the expert witnesses who had already given evidence at the trial. In those circumstances, what was said in *R v Kai-Whitewind* [2005] EWCA Crim 1092; [2005] 2 Cr App R 31, para 97 is apposite:

"The fact that the expert chosen to give evidence by the defence did not give his evidence as well as it was hoped that he would, or that parts of his evidence were exposed as untenable (as, certainly on one view, occurred with Dr Rushton) thereby undermining confidence in his evidence as a whole, does not begin to justify the calling of further evidence, whether to provide 'substantial enhancement' of the unsatisfactory earlier evidence, or otherwise. Where expert evidence has been given and apparently rejected by the jury, it could only be in the rarest of circumstances that the court would permit a repetition, or near repetition of evidence of the same effect by some other expert to provide the basis for a successful appeal. If it were otherwise the trial process would represent no more, or not very much more than what we shall colloquially describe as a 'dry run' for one or more of the experts on the basis that, if the evidence failed to attract the jury at trial, an application could be made for the issue to be revisited in this court. That is not the purpose of the court's jurisdiction to receive evidence on appeal."



48. The judge was not merely entitled to refuse the application, in our view, she was right to do so for the reasons she gave. It is to be observed that Professor Shaw's short report did not address the question whether Ms Parry's decision to take DNP was fully free, voluntary and informed; and Professor Shaw's subsequent attempt to fill this gap in an addendum e-mail (after prompting from the defendant's solicitors) did not, as the judge identified, address the correct test that the jury had to apply.

49. What little evidence there was from Professor Shaw related primarily to the question of capacity. Nothing she had to say added materially to the evidence given. The fact that Dr Latham may have given evidence contrary to the defendant's case was neither here nor there. This could provide no justification for permitting the course proposed on the defendant's half, namely, to permit a second lately instructed expert to give evidence covering the same ground as Dr Latham and/or to contradict what he had said, and to delay or derail the trial in consequence.

50. Nor do we see any merit in the third ground, namely that described as ground 3(b). This is that the evidence which Professor Shaw put in a report dated 14 April 2020, prepared after the trial, would have been admissible, and renders the jury's verdict unsafe.

51. The grounds of appeal do no more than cite the overall conclusion of Professor Shaw and argue that the jury were deprived of knowing that there was expert disagreement in relation to the findings of Dr Rogers. For us to receive the evidence of Professor Shaw, we would have to conclude that it may afford a ground for allowing the appeal. The mere fact of expert disagreement cannot lead to that conclusion. It is necessary to demonstrate that the substance of that disagreement, had it been before the jury, might have affected the verdict. Nothing in Professor Shaw's report supports such a conclusion.

52. We would add in this respect that paras 6.18 to 6.20 of the 14 April 2020 report deal with the question of whether Ms Parry's decision was fully free, voluntary and informed. In relation to "fully free", Professor Shaw sets out all of the features indicating that the decision was not fully free. Her conclusion that the decision, in fact, was fully free depended on an assertion of fact which it was for the jury to determine. In respect of "fully voluntary", Professor Shaw's *\*13* conclusion was as follows: "whilst [Ms Parry's] urge to take the drug at times overcame her decision not to take the drug, this decision was in my view still under her control." On the face of it, that conclusion was internally contradictory.

#### Conclusion

53. It follows that we refuse the renewed applications for leave to appeal, together with the associated application to adduce fresh evidence under [section 23\(2\) of the Criminal Appeals Act 1968](#) ; and that this appeal must be dismissed.

Clare Barsby, Barrister *\*14*

*Appeal against conviction dismissed.*

(c) Incorporated Council of Law Reporting for England & Wales