

IN THE SUPREME COURT
OF THE UNITED KINGDOM
UKSC/2026/0062

ON APPEAL FROM THE COURT OF APPEAL
(CRIMINAL DIVISION)
[2026] EWCA Crim 413

The King
v
Benjamin FIELD

THE RESPONDENT’S CASE

Given that each party has been both appellant and respondent at different times they will be referred to as prosecution and defendant in these submissions save where a document is identified by its title.

Introduction

1. Causation in homicide is established by the application of legal principles to facts. *Kennedy (no 2)*¹ identifies the principles and requires no reassessment. CACD Judgement 3 rightly determined that CACD Judgement 1 did not apply *Kennedy (no 2)* correctly. The prosecution’s written case deploys moral disapproval in order to justify the avoidance, evasion or circumnavigation of the legal principles of autonomy determined by *Kennedy (no 2)*.

¹ R v Kennedy (No 2) [2008] 1 AC 269

2. Stripped to its essence, the prosecution's argument is that this court should distinguish the facts of this case from those of *Kennedy (no 2)* on the ground of Ben Field's (BF's) undisclosed intention, and condone a process in which a judge, as a matter of law, rather than a jury, as a matter of fact, decided that BF's act of giving Peter Farquhar (PF) whisky, rather than PF's act of drinking it, caused PF's death.² It follows that all that the jury had to decide was that BF had been present when he gave the drink, and that PF would not have drunk it had he known of BF's intention that he should die – a proposition that could not be, and was not, contested.

3. The prosecution's core argument can be tested by applying it to other factual situations. It must follow that if BF, possessed of a continuous intent to kill over many years, had handed PF his car keys at his request, and PF had driven off and died in a traffic accident, then BF would have caused PF's death and been guilty of murder. PF, while ignorant of BF's intentions, would have been incapable of acting autonomously in relation to BF's acts, but not those of others. So, if a third party had been drinking with BF and PF that night, with all three taking turns to fill the glasses, then the prosecution's analysis would have to be that PF would have been moving in and out of a state of autonomy depending on who filled his glass, acting autonomously when drinking from a glass filled by TP, but not if filled by BF. The act of 'giving' is not limited to pouring a glass. If BF had given the bottle to PF and PF had poured every glass that he drank, something that PF would not have done had he known of BF's intentions, then BF would have caused him to drink and been guilty of murder.

4. The prosecution's argument would have wider application. A wife, uninformed of her husband's intention to leave her for his mistress, and so incapable of exercising her sexual autonomy, would, as a matter of law, have been raped if she had had what would otherwise have been consensual sexual intercourse with him while ignorant of his intention. This, as the authorities on the effect of deceit on sexual autonomy show,

² Although this was the effect of the directions given, the exchanges between prosecution counsel and trial judge at the time of the jury questions (Transcript of Summing Up pages 173C to 173 F) show that while Sweeney J acknowledged that causation was a matter of fact for the jury to decide, both he and prosecution counsel did not believe that there could be a dispute about causation. They were looking at the wrong causal act: causing death by the giving of alcohol rather than causing death by causing the ingestion of alcohol.

is not the law.

5. It is not enough to say that each case depends on its own facts and that first instance judges can be relied upon to evaluate the ‘moral connection’ between the act of the defendant and the outcome, and so determine, on a case by case basis, whether there is a case on causation, and, if so, whether it should be left to the jury. The concept of a ‘moral connection’ is a vague one. It does not provide a legal test.
6. *Kennedy (No 2)* provided welcomed clarity as to what the law is and how it should be applied. The problems that have arisen in this case stem from the failure of the jury directions, and the refusal of CACD 1, to apply the law. Hard cases make for bad law, and the history of this case demonstrates the truth of that aphorism.

The certified questions

7. While this case has an unusual history and comes to this court by an unusual route, the certified questions are not difficult to answer.

8. The answer to the first question as to whether the directions given to the jury were right in law is that they were not right in the principal respects identified by CACD Judgement 3.³ To this list must be added an additional misdirection in relation to minimal cause. This was advanced as Ground of Appeal 4,⁴ but was not specifically considered in CACD Judgement 3. It is repeated at paragraphs 50 to 58 below.

Tab 6 (p96)

Tab 13 (p215)

9. The answer to the first part of the second question as to whether the first or third Court of Appeal erred in their understanding and application of *Kennedy (no 2)* is that neither constitution erred in their understanding or application of *Kennedy (no 2)*. The explanation for the ‘respectful disagreement’⁵ between CACD Judgement 3 and CACD Judgement 1 is not that the two constitutions disagreed as to what the law is or how it should be applied. CACD 1 understood *Kennedy (no 2)* but, as academic

³ [2026] EWCA Crim 413 handed down on the 16/04/2026.

⁴ Grounds of Appeal dated 01.10.2025 DCS Item 79.

⁵ Paragraph 59 of CACD Judgement 3.

commentators have pointed out,⁶ avoided or evaded or circumnavigated the law as determined by *Kennedy (no 2)* in order to uphold a conviction that could not have been upheld had the law been applied. Whereas CACD 3 both understood and applied *Kennedy (no 2)* and so had to quash the conviction.

10. This case has therefore come to this court on the false premise that there is a disagreement as to the law or its application as between CACD 1 and 3. CACD Judgement 3 did not involve a point of law of general public importance, far less one that ought to be considered by this court. CACD Judgement 3 merely applied the well-established law as determined by *Kennedy (No 2)*, and corrected CACD Judgement 1's failure to do so. The only question raised by the disagreement between CACD Judgements 1 and 3 is whether or not the law should be applied by the CACD. That is a question that the CACD could and, it is respectfully suggested, should have answered for itself without recourse to this court. To borrow from the metaphor used by the President of The Supreme Court when giving evidence to the Constitution Committee of the House of Lords on the 22nd April 2026:⁷ while it is generally desirable that the CACD should not mark its own homework, this is a case in which the CACD ought to have done so, even if that would have required it to award CACD Judgement 1 a rather low mark.

11. The answer to the second part of the second certified question as to whether *Kennedy (no 2)* needs to be reconsidered is, of course, a matter for this court. The principle that *Kennedy (No 2)* reaffirmed was described by Lord Bingham at paragraph 14 of the judgement as '*fundamental and not controversial*'. The defendant's submission is that it is not necessary to reconsider *Kennedy (no 2)* as a result of any deficiency in the law that has been exposed by the facts of *Field*. The errors that occurred in directing the jury in *Field* were not the result of any deficiency in the law. They were the result of the failure of the prosecution to frame its case in accordance with the law

⁶ 'Deadly Whisky' L.Q.R. 2022, 138 (Jan) Simester and Sullivan; Smith, Hogan and Ormerod's Criminal Law 17th Edition, page 86; Involuntary Voluntary Action, J Crim. L. 2023, 87 (5/6) by Amy Elkington, all at The CCRC's statement of reasons DCS Item 52, and 'Free, Deliberate and Informed' by AP Simester at p.3 of his text book Modern Criminal Law.

⁷ House of Lords Constitution Committee: annual evidence session with the President and Deputy President of the Supreme Court.

as determined in *Kennedy (no 2)*.

12. This response will be structured under the following headings:

1. The fundamental error: the proposition that BF's act of giving whisky and/or Dalmane could have been a legally effective cause of PF's death.
2. Errors of fact in the prosecution's written case that are relevant to the issues raised in this appeal.
3. The first certified question: were the jury directions right in law?
4. CACD Judgement 1, what it actually decided and how it has been misinterpreted by both CACD Judgement 3 and the prosecution.
5. The answers to the certified questions.
6. Commentary on the process by which this case has reached the Supreme Court.

1. The fundamental error: that BF's act of giving whisky and/or Dalmane could have been a legally effective cause of PF's death

13. The fundamental error made in this case was the selection of the act of giving whisky and/or Dalmane as the act by which BF was said to have caused PF's death. The act of giving whisky and/or Dalmane was not capable of being a legally effective cause of death. This is so whatever the nature of the act of 'giving'; whether, in the case of whisky, it involved giving a bottle or pouring a glass; and whether, in the case of Dalmane, it involved collecting a subscription or handing over a tablet.
14. As explained in *Kennedy (no 2)* at paragraph 7 of the judgement:

'There is now, as already noted, no doubt that the appellant committed an unlawful (and criminal) act by supplying the heroin to the deceased. But the act of supplying,

without more, could not harm the deceased in any physical way, let alone cause his death. As the Court of Appeal observed in R v Dalby [1982] 1 WLR 425, 429, “the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous.”

And at paragraph 14:

‘Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article “Finis for Novus Actus?” [1989] CLJ 391, 392, Professor Glanville Williams wrote:

“I may suggest reasons to you for doing something; I may urge you to do it, tell you I will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new ‘chain of causation’ going, irrespective of what has happened before.”

15. At paragraph 26 of *Kennedy (no 2)* Lord Bingham identified the cause of the difficulties that arose in that case:

‘Much of the difficulty and doubt which have dogged the present question has flowed from a failure, at the outset, to identify the unlawful act on which the manslaughter count is founded...It would focus attention on the correct question, and promote accurate analysis of the real issues, if those who formulate, defend and rule on serious charges of this kind were obliged to consider how exactly, in law, the accusation is put.’

With the substitution of the words ‘the act causing death on which the murder count is founded’ for ‘the unlawful act on which the manslaughter count is founded’, the same could be said of the case of *Field*.

16. There were two acts leading to PF's fatal ingestion of whisky: the giving of the whisky to him by BF and the ingestion of it by PF. BF could only have been liable for the second act if an act of his caused the second act. The reasons for this are explained in Hart and Honore's *Causation in the Law*⁸ at Chapter XIII which is titled: *Criminal Law: Causing, Inducing, Permitting, Helping Others to Act*. At page 363 – 364 it is said (underlining added):

'But it is also clear that when offences are defined either by simple verbs (like 'killing') or in causal terms ('causing death') the required causal connection exists in certain cases where the harm is brought about by the act of another; viz. where it can be said that the accused caused the second act.

This is the case only when the accused intends the intervening actor to do what he does and the intervening actor's conduct is not wholly voluntary. Hence, a person may be guilty of homicide by inducing another to kill or to do an act dangerous to life which in fact results in death, if the means used amount to coercion, deceit, or the exercise of authority; but not if mere persuasion of an adult responsible person is employed, or if accused's conduct operates, without his intending it, as a reason for the other's act. In a similar way, where suicide is not a crime, a defendant will be liable for homicide by causing a person to commit suicide only when he purposely does so by force, duress or deception.'

17. The act of Kennedy in handing over a syringe of heroin to Bosque was both unlawful and morally objectionable. Yet that did not establish any 'moral connection' between his act and Bosque's death that was sufficient to establish a causal connection. BF's act in giving whisky to BF, was neither unlawful nor morally objectionable. BF did have an undisclosed intention that Kennedy did not. But once it is recognised that the essential enquiry is whether BF caused PF to ingest whisky and/or Dalmane then it can be seen that while PF might not have ingested whisky and/or Dalmane given to him by BF had he known of BF's intention, his ignorance of the intention did not cause him to ingest those substances. A person can be caused to act in a certain way by the intentions of others that he is aware of, but not by the intentions of others that

⁸ Hart and Honore *Causation in the Law* 2nd Edition (1985)

he is unaware of. BF's undisclosed intention has no causal relevance to PF's choice to drink.

18. As to what PF had to be informed about in order to render his decision to drink free, voluntary and informed, he had to be informed as to what he was drinking and so, what he was doing. As was said at paragraph 18 of *Kennedy (no 2)*:

'The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.'

And at paragraph 19:

'In this case the heroin is described as "freely and voluntarily self-administered" by the deceased. This, on the facts, is an inevitable finding. The appellant supplied the heroin and prepared the syringe. But the deceased had a choice whether to inject himself or not. He chose to do so, knowing what he was doing. It was his act.'

19. PF had a choice whether or not to drink whisky given to him by BF. He chose to do so freely and voluntarily, knowing what it was and knowing what he was doing. This ought to have been fatal to the contention that BF caused PF to drink the whisky and thus murdered him.
20. Once the essential question is identified it can be seen that the act of giving was not capable of being a legal cause of PF's ingestion or therefore of setting a legal chain of causation going. The focus of the prosecution's written case on the question of whether the act of PF was capable of breaking a chain of causation is misconceived. The short question raised by this case is whether BF's act of giving could have been the legal cause of PF's act of drinking. And the answer, as given in *Kennedy (no 2)*, is no.
21. So, the prosecution continues to fall into the error made from the outset when it argues, at paragraphs 32 to 43 of its written case, that this case turns on whether PF's act of drinking was capable of 'breaking the chain of causation' and so 'relieving a

prior actor of responsibility for the consequences'. *Kennedy (no 2)* was not concerned with breaks in a chain of causation; it was concerned with whether the act of the defendant was capable in law of causing the act of the victim that caused his death. And so is *Field*.

22. While the prosecution refers extensively, at paragraphs 35 to 43 of its written case to Professor Glanville Williams's '*Finis for Novus Actus*' in support of its argument, it does not refer to the passage in that article that is arguably of most relevance to a correct resolution of the issues in this case. At pages 396 to 397 Professor Glanville Williams said:

Tab A28 (p1956)

'Another possible source of confusion is the double meaning of the word 'cause,' which may refer either to factual ('but-for') causation in general or to imputable (moral) causation in particular....The novus actus doctrine is part of our idea of imputable causation, not factual causation.'

The prosecution argument assumes that BF, by giving whisky to PF, would have made himself legally responsible for PF's choice to drink it so that his act of giving would have become the first link in a chain of legal causation. This is incorrect. The giving of drink to PF could only have been a 'but for' cause. It could not have been the first link in a legal chain of causation.

Tab A18 (p1730)

23. The prosecution refers to *Wallace* [2018] 2 Cr App R 22 at paragraphs 45 to 48 as an example of a case in which the '*moral connection between the act and the result was not severed*' and the defendant was not absolved of causal responsibility even though the victim had an element of choice.
24. Whereas *Kennedy (no 2)* cannot be, and has not been, distinguished from *Field*, the case of *Wallace* can be. In *Wallace* the defendant committed an unlawful act which started a legally relevant chain of causation going. This act was held to be capable of rendering the victim's subsequent decision to end his own life one that was not '*free and unfettered*' and therefore not one that would have been capable of breaking the chain of causation that had started with the defendant's assault. Sharp LJ distinguished that case from *Kennedy (no 2)* when stating at paragraph 76:

‘Kennedy was not concerned...with a response by a victim to (extreme) circumstances created by a defendant’s unlawful act, which were persisting, and which had put the victim into a position where he made a “choice” that he would never otherwise have had to make or would have made (not therefore, as we have already said, the sort of free and unfettered volition presupposed by the novus actus rule).’

Neither *Kennedy (no 2)* nor *Field* were concerned with the extreme conditions that pertained in *Wallace*.

25. In *Kennedy (no 2)* the prosecution conceded that because of the FDI principle it could not hope to show that the defendant had caused the heroin to be taken by Bosque. As CACD Judgement 3 pointed out at paragraphs 39 and 42, BF’s act was not in any legally material way different to Kennedy’s. This is a concession that the prosecution ought to have made in this case.

2. Errors of fact in the prosecution’s written case that are relevant to the issues raised in this appeal.

26. The prosecution’s written case makes various claims that are unjustifiable on any objective assessment of the evidence/case materials:
- i) that BF planned to kill PF over a period of years rather than that he planned to hasten his death by, for example, encouraging him to drink;
 - ii) that there is no more than a ‘relatively implausible residual possibility’ that BF brought about PF’s death without the use of force or deception.
 - iii) that the directions provided for two possible mechanisms of death rather than three.

2.1. The nature of the plan

27. The prosecution claims in the first paragraph of its written case that the defendant planned to kill PF over a period of years and that the events of the 25th October 2016

were no more than his ‘next plan’ to bring about his death. The prosecution relies on this assertion to make the claim, at paragraph 2, that:

‘The jury had no doubt about the intention of the Respondent: their verdict unquestionably established that they were sure that he had carried out an act by which he intended to kill Mr Farquhar.’

28. The jury’s verdict was based on a misdirection. Given how easy the directions made it for the jury to conclude that BF had intentionally done an act – given him drink - that caused PF’s death, it is unsurprising that it reached the verdict that they did.
29. The evidence, when looked at objectively, was not consistent with a continuing intention to kill over many years. The evidence was consistent with the way in which the judge summed up the issues to the jury, with the approval of the prosecution and defence, at page 20 and 21/34 of the legal directions:⁹

‘Ben Field is alleged to have carried out the murder of Peter Farquhar, in accordance with the plan that he should ‘die an alcoholic’s death’ by being present in person and physically giving him alcohol and/or Dalmane by smothering him.

....

On behalf of Ben Field, it is submitted that the Prosecution evidence suggests that, having discovered that Peter Farquharson ‘suicides not’ Ben Field encouraged him to drink alcohol and to put him at greater risk of dying, rather than to murder him.’

30. While a plan that PF should die an alcoholic’s death by which PF was encouraged to drink and made to appear as though he was an alcoholic is morally abhorrent, it is not a plan to kill. As stated by CACD Judgement 3 at paragraph 46, an intention that PF should bring about his own death by drinking too much only becomes an intention to kill when it is accompanied by an act intended to cause death.

⁹ Draft directions v3 DCS item 9.

2.2 The claim that there is no more than a ‘relatively implausible residual possibility’ that BF brought about PF’s death without the use of force or deception

31. The prosecution invites the court, at paragraph 19 of its written case, to bear in mind when considering the safety of the conviction, what it describes as the ‘relative implausibility’ of the ‘residual possibility’ that BF brought about PF’s death without the use of force or deception.
32. A fact is either proved to the criminal standard or it is not. And if it is not then a defendant is entitled to the benefit of the doubt. So, if, as the prosecution appears to concede, the evidence does not prove that BF used force or deception, then this appeal must proceed on the basis that he did not, and an exploration of the likelihood of events that cannot be proved is purposeless, other than to reinforce the moral condemnation.
33. But in addition, this claim is positively contrary to the evidence if that evidence is looked objectively. The prosecution at trial made no such claim. It said, at paragraph 10.75 of the Opening Note:¹⁰

Tab 40 (p818)

‘In other words, PF had taken – or being given – more sedatives that evening. He had drunk – or been encouraged to drink – a quantity of alcohol.’

Tab 41 (p942)

34. What the prosecution actually said in opening, as shown by the transcript obtained by the CCRC,¹¹ was:

‘In other words, Peter Farquhar has taken himself voluntarily, or been given more sedatives that evening. The sedative in his system was the sedative he was prescribed, although the experts say he had only had occasional exposure to that over the last few months before he died. Had taken or been given more sedatives that evening, and he had drunk or been encouraged to drink a quantity of alcohol - 277 millilitres and either this mixture had killed him, as if defendants one and two had done the giving

¹⁰ Opening Note internal page 50 DCS item 15.

¹¹ Transcript of prosecution opening included in CCRC’s statement of reasons DCS item 52.

and encouraging will have been, must have been we say their intention.'

35. So, the prosecution brought this case on the basis that PF might have ingested both Dalmane and whisky voluntarily. There was no mention of PF's ingestion being other than voluntary as a result of BF's undisclosed intention until, at the time the jury directions were being discussed, the defendant served its suggested route to verdict which left the question of voluntariness to the jury. As shown in the chronology of events leading to the giving of legal directions,¹² this caused the prosecution to amend its Note on Directions of Law and to serve, on the working day before the jury directions were given, its Note on Directions of Law (2).¹³ It was at paragraph 6 of this document, under the heading 'Issue of Law/2,' that the prosecution made for the first time the argument that PF could not have been acting voluntarily when he drank alcohol given to him by BF because he was not informed of BF's intention. This argument was a response to the belated realisation that if PF's acts of ingestion of whisky and/or Dalmane had been voluntary, a possibility that had been conceded in the case as opened, then BF would not have caused PF's death and the prosecution would not have had a case on murder.

Tab 24 (p365)

Tab 26 (p434)

36. The reason why the prosecution at trial conceded, without trying to disparage, the possibility of voluntary ingestion by PF, was that the evidence compelled it to. The following references to the evidence are all taken from the Judge's summing up.¹⁴

i) The records kept by both BF and PF, and both were assiduous note makers, suggested that BF's covert drugging of PF commenced on the 26.01.2015 and ended on the 30.09.2015 which was over three weeks before PF's death on the 24th/25th October 2015 [102G – 103C].

ii) The fact that the covert drugging had stopped at the end of September was corroborated by the numerous witnesses who reported PF being back to his old self by the time of his death [111C – 112H].

iii) It was further corroborated by results of the examination of chemical traces in PF's hair [121D – G].

Tab 33 (p634)

Tab 33 (p643)

Tab 33 (p653)

¹² Chronology of events leading to the giving of legal directions DCS item 80.

¹³ The rty proposed on behalf of the defendant and the first and second prosecution notes on directions of law are all at DCS item 29.

¹⁴ Transcript of the summing up DCS item 5.

Tab 33 (p617)

iv) PF was a long term intermittent user of Dalmane [84H – 85A].

Tab 33 (p651)

v) The amount of Dalmane found in PF's system at PM was consistent with his prescribed dose [119G – H]. There was no reason why, if BF had smuggled Dalmane into PF's food or drink that night, he would have restricted himself to a therapeutic dose.

Tab 33 (p615)

vi) PF was partial to malt whisky, and by his own estimation drank a little too much of it; his diaries recorded his resolution to moderate his drinking [83C – F].

vii) There was no evidence that PF was forced or deceived into consuming either whisky or Dalmane [119G - H] and no other marks of injury or assault were found at the post-mortems [118G].

Tab A33 (p650)

37. The claim made at paragraph 19 of the prosecution written case that *'there was no particular reason for him to take it (Dalmane) that evening'* is another assertion that is based on speculation rather than evidence.

2.3 The three mechanisms of causing death

38. The fact that, as CACD Judgement 3 found, the directions left three rather than two mechanisms of death is evident from any objective reading of them.

39. The prosecution, at paragraph 14 of its written case, seeks to amalgamate the mechanisms of alcohol and Dalmane in order to mitigate the problem caused by the omission of Dalmane from the direction on causation. It relies on the passage at the top of internal page 24 of the directions where the phrase *'one or the other'* is used to argue that there were but two. Its argument does not consider the references to *'giving alcohol and/or Dalmane and/or by smothering him'* that are referred to at page 20 and in the ultimate questions at page 24. Nor to the fact that this later reference is prefaced by the *'one or more of the acts alleged by the prosecution'* which suggests more than two acts.

3. The first certified question: were the jury directions right in law?

40. The key sections of the written directions¹⁵ are, at page 22/34 where this is said:

‘An act causes the death of another if it is more than a minimal cause of it. If it is proved that, with intent to kill, Ben Field, in person, gave Peter Farquhar drink then, even if Peter Farquhar agreed to drink it, it would be open to you to conclude that the giving was a cause of death, unless Peter Farquhar’s decision was informed in that he knew that the drink being offered to him was intended to cause his death.’

And, at page 24/34:

‘Count 1 – the ultimate questions (bearing in mind all my relevant directions)
Ben Field

1. *Have the Prosecution made us all sure that Ben Field intended to kill Peter Farquhar?*

If you all answer yes – go to question 2.

If you all answer no – verdict ‘Not Guilty’ (Martyn Smith also ‘Not Guilty’)

2. *Have the Prosecution made us sure that, with that intent, Ben Field did one or more of the acts alleged by the Prosecution (i.e. in person, giving Peter Farquhar drink, and/or Dalmane, and/or suffocating him) which was/were a more than minimal cause of Peter Farquhar’s death?*

If you all answer yes – verdict “Guilty”

If you all answer no – verdict “Not guilty” (Martyn Smith also “Not Guilty”).

41. These directions were defective in four particular respects, each of which, of itself, rendered the conviction unsafe:

i) BF could not have caused PF’s death by giving him whisky or Dalmane and murder by these routes should not have been left to the jury.

ii) Having wrongly left murder by giving whisky or Dalmane to the jury it should have been for the jury to decide whether PF’s ingestion of those substances had been

¹⁵ Draft directions v3 DCS item 9.

voluntary and whether BF had caused his death.

iii) The qualification that BF would only have caused PF's death if PF had been ignorant of his intentions was given in respect of whisky but not Dalmane.

iv) There was neither evidence that the whisky and/or Dalmane given to PF by BF had been more than a minimal cause of death, nor a sufficient direction that it had to be.

3.1. Murder by giving drink or drugs to PF should not have been left to the jury

42. Murder by the giving of drink or drugs to PF should not have been left to the jury. In accordance with the principle of autonomy considered in *Kennedy (no 2)*, the legally effective cause of PF's death was his ingestion of these substances and not BF's act of giving those substances to him. BF could only have caused PF's death if there had been evidence that he had caused PF's ingestion and that PF's ingestion had not been free voluntary and informed – in the sense of informed as to what he was ingesting and so, what he was doing. There was no such evidence.

3.2 Having wrongly left murder by giving whisky or Dalmane to the jury it should have been for the jury to decide whether PF's ingestion of those substances had been voluntary and whether BF had caused his death.

43. Having wrongly left murder by giving drink or drugs to the jury, the directions did not leave the question of causation to the jury to decide. They invited the jury to convict so long as PF had agreed to take drink from BF while ignorant of the fact that it was intended to cause his death. It could not be, and it was not, argued before the jury that PF might have agreed to drink whisky given to him by BF had he known of BF's intention. The consequence of this was that causation – the element of the offence that the prosecution could not prove – was determined by the trial judge and not by the jury.

44. As referred to at paragraph 35 above, in advance of the judge's first draft of the directions being supplied to counsel, the defendant provided a draft route to verdict that would have left the question of the voluntariness of PF's consumption of drink, and its impact on causation, to the jury to decide. A slightly improved version was attached at appendix 1 to the appellant's skeleton argument supplied to CACD 1.¹⁶

Tab 19 (p307)

While neither of these drafts is intended to be definitive, they suggest a way in which causation could have been left to the jury on the facts of this case and are not wholly dissimilar to the directions that were actually given to the jury in the later case of *R v Rebelo*.¹⁷

Tab A20 (p1778)

3.3 The qualification that BF would only have caused PF's death if PF had been ignorant of his intentions was given in respect of whisky but not Dalmane.

45. While the directions left open to the jury three possible mechanisms of causing death: '*physically giving alcohol and/or Dalmane and/or by smothering*', the qualification to the direction on causation – that PF drank in ignorance of BF's intentions – was given in relation to alcohol but not in relation to Dalmane.

46. It follows that the directions permitted the jury to convict of murder by the giving of Dalmane irrespective of whether PF had been informed as to BF's intentions, and so, on the prosecution's own analysis, when PF's decision to accept Dalmane would have been free, voluntary and informed and would have broken the chain of causation.

47. The prosecution's response to this defect, at paragraph 91 of its written case assumes too much of a jury. It claims that no 'ordinary juror' having heard the direction that drink could not be a cause of death if PF had known of BF's intentions, would understand that 'different principles,' would apply to Dalmane. He would, the prosecution therefore argues, have incorporated that qualification into his consideration of Dalmane as a mechanism of causing death, even though he had not been directed to do so.

¹⁶ Argument on behalf of the appellant of the 14.10.2020 DCS item 45.

¹⁷ *R v Rebelo* [2021] 4 WLR 52.

48. The defendant suggests that the conventional assumption is that jurors apply the directions that they are given and that they are not expected to supplement them with directions that they ought to have been given. And even if the prosecution's assessment of what the ordinary juror could be expected to assume were correct, the random nature of the jury ballot tends to include jurors who may be out of the ordinary as well as those that are ordinary.

49. These first three submissions were the first three grounds of appeal before CACD 3 and were all adopted by that court. But the fourth ground of appeal was, not specifically considered in CACD Judgement 3. It is repeated below.

3.4 There was neither evidence that the whisky and/or Dalmane given to PF by BF had been more than a minimal cause of death, nor a sufficient direction that it had to be.

50. The leaving of three alternative mechanisms of causing death to the jury: whisky, Dalmane and smothering, required that there should be evidence that each of whisky and Dalmane was capable of being a more than minimal cause of death and an appropriate direction to the jury in relation to each of them. The only references to minimal cause were at pages 22 and 24 of the directions.

51. As to the evidence in relation to the amount of drink given, it was the prosecution case, and the jury must have found, that PF and Field had been drinking together that night. As the judge reminded the jury in summing up at p.119 B - E, the quantity of alcohol found in PF at PM was consistent with his consumption of about half the volume missing from the bottle of Abelour whisky found next to him. The judge went on to comment on the inference that could be drawn from this that the two of them had been drinking together. The evidence of both Dr Bailey, the pathologist who conducted the first post-mortem, and of Dr Lockyer who conducted the second, was that the quantity of alcohol ingested by PF was, of itself, just sufficient to have caused death.¹⁸

Tab 33 (p651)

Tab 33 (p650)

Tab 47 (p1234)

¹⁸ Summing up DCS item 5 at p. 118H-119A for Dr Bailey and transcript of of the evidence of Dr Lockyer DCS item 31 at internal pages 13H-14A .

52. It would have been open to the jury to find on the evidence that BF had given drink to PF by giving him the whole bottle or alternatively by filling his glass. It appears from the jury question that it was considering the implications of BF and PF drinking together with the glasses being filled by each:¹⁹

Tab 34 (p736)

‘Could we have clarity on the 4th paragraph on p 22 of your legal directions, especially regarding the implications if Ben and Peter were drinking together on 25 October 2015?’

53. If the jury had found, as was open to it, that BF had given drink to PF by filling his glass, there was no evidence as to how much of the whisky BF had given to PF by filling his glass, as opposed to the whisky that PF had taken for himself by filling his own glass. There was therefore no evidence on which the jury could base a judgement as to whether the drink given by BF had been more than a minimal cause of death.

54. The minimal cause direction given in relation to the giving of drink ought to have distinguished between drink given by Field to PF and drink poured for himself by PF. Only if it was sure that the former, relative to the latter, would have been a more than minimal cause of death could murder by giving whisky alone have been a cause of death. There was no such direction.

55. As to the evidence relating to the effect of the Dalmane, while there was evidence that the combination of alcohol and Dalmane would have had a potentiating effect (Summing Up p.119G-H), there was no evidence as to how much a therapeutic dose of Dalmane would have contributed to the potentiation. It is entirely possible that it would have contributed very little because the alcohol consumed was, of itself, just sufficient to have caused death.

56. There was therefore no evidence that the Dalmane consumed by PF was capable of being a more than minimal cause of death.

¹⁹ The jury question at DCS item 12.

57. As to the minimal cause direction in relation to the giving of Dalmane, the only reference to this was at page 24 as part of the ultimate questions. This bare reference to minimum cause was meaningless without an explanation as to how the jury should assess whether the Dalmane given had been more than a minimum cause.

58. The prosecution's response to this ground is at paragraph 90 of its written case. While the prosecution is correct to say that causing the ingestion of either alcohol or Dalmane could have been found by the jury to be an act which was more than a more than minimal cause of death (and so contradicting its claim that there were but two mechanisms of death), it does not deal with the fact that there was no evidence on which such a finding could be based.

4. CACD Judgement 1, what it actually decided and how it has been misinterpreted by both CACD Judgement 3 and the prosecution.

59. This appeal sets two judgements of the CACD against each other. In order to resolve this contest, it is essential that there should be an accurate analysis of what each judgement actually said. CACD Judgement 1 has been misinterpreted by both the prosecution and CACD Judgement 3. The effect of this is that CACD Judgement 3 criticised CACD Judgement 1 for a finding that it had not made, and failed to criticise it for the errors that it did make.

60. CACD Judgement 3 misinterpreted CACD Judgement 1 because it declined to consider the evolution of CACD 1 Judgement 1 between draft and final forms. As it said, at paragraph 25:

'We have not found it helpful to consider the events which occurred at trial which led to the legal directions being given as they were, or the events at and following the first appeal concerning the draft judgement and the use made of the weak swimmer analogy. We do not intend to be drawn into a detailed examination of the history of the case. The question is whether the judge's directions were right, and not how he came to give them. The question is whether the court in CACD Judgement 1 was right in its final judgement as handed down, and not how it reached its decision.'

61. The draft²⁰ and approved versions²¹ of CACD Judgement 1, and a schedule of the changes made between them are attached to these submissions.²²

62. This court will decide for itself what helps it and what does not. It is the respectful submission of the defendant that history usually informs the present and certainly does so in this case. The defendant, in asking this court to consider some of the history of this case, is not seeking to ‘draw it in’ to a line of enquiry in the sense of distracting it from the essential questions raised by this case; it is doing so in order to facilitate the correct answering of those questions and in order to avoid the error made in the interpretation of CACD Judgement 1 by CACD Judgement 3.
63. CACD Judgement 3’s refusal to consider the evolution of CACD Judgement 1 led it to misinterpret what CACD Judgement 1 had found, and so to address the wrong question when it said at paragraph 36:

‘In our judgement the key questions we have to address in deciding this appeal are:-

i) Whether the judge and CACD Judgement 1 erred in finding that the undisclosed intention of the person with whom Mr Farquhar drank the whisky would in law, render his decision to drink it involuntary for the purpose of the rule explained in R v Kennedy (No 2).’

64. CACD Judgment 1 had made no such finding. This was precisely the finding that CACD Judgement 1 had been scrupulous to avoid making.
65. The prosecution makes the same mistake when, at paragraph 56 of its written case, it claims that CACD 1 ruled that PF’s uninformed decision to take drink could not, in law, break the chain of causation. This claim is repeated at paragraphs 60 (ii) and paragraph 84 of its written case.

²⁰ Draft of CACD Judgement 1 DCS item 58.

²¹ Approved version of CACD Judgement 1 DCS item 62.

²² Schedule of changes made between draft and approved versions DCS item 63.

Tab A35 (p2042)

66. The same error has been made by some of the academic commentators. But they, of course, did not have the opportunity of considering the changes made between draft and approved judgement.²³

67. An enquiry into what CACD Judgment 1 actually decided cannot be avoided if it's merits are to be assessed against those of CACD Judgement 3.

68. There are two other reasons, other than the interests of accuracy, why a consideration of the evolution of CACD Judgement 1 would be helpful. First, because the many who have been affected by the lengthy and continuing delay in obtaining finality in this case, a list that does not have the defendant at its top, are entitled to an explanation of what has gone wrong. And secondly because the wider interests of justice require that the failures of the criminal appeal system to confront and correct legal error that have been demonstrated in this case should be acknowledged so that they are not repeated.

69. In order to understand how CACD Judgement 1 avoided applying the law to the facts of this case it is first necessary to identify the arguments of prosecution and defendant at the first appeal.

4.1 The arguments of prosecution and defendant at the first appeal

Tab 16 (p223)

70. The defendant's arguments were set out in the Perfected (first) Grounds of Appeal of the 13.10.2019,²⁴ and the Appellant's argument of the 14.12.2020.²⁵ The prosecution's arguments were set out in its Respondent's Notice,²⁶ and its Skeleton Argument for Hearing of the 12.01.2022.²⁷

Tab 18 (p268)

Tab 19 (p309)

Tab 17 (p238)

²³ See, for example 'Free, Deliberate and Informed by AP Simester in his text book Modern Criminal Law at page 13 where he falls into the same error as CACD Judgement 3 of concluding that CACD Judgement 1 found that the FDI principle did not apply.

²⁴ Perfected (first) Grounds of Appeal dated 13.10.2019 DCS item 14.

²⁵ Appellant's Argument of the 14.12.2020 DCS item 45.

²⁶ Respondent's Notice DCS item 1.

²⁷ Prosecution Skeleton Argument for Hearing of the 12.01.2021 DCS item 46.

71. The only references to the example of the weak swimmer made in these arguments were at paragraph 22 of the Appellant's argument of the 14.12.2020, and as a footnote (footnote 41 to paragraph 45) of the Respondent's skeleton argument of the 12.01.2021. Yet the example of the weak swimmer, referred to in passing in the submissions of the parties, was to become the centrepiece of CACD Judgement 1.

72. In its Skeleton Argument for Hearing of the 12.01.2021 the prosecution set out its submission on what it described as the 'core issue' of the appeal. This was that PF's ignorance of BF's true intentions rendered him 'uninformed' so that his decision to drink was not capable *as a matter of law* of breaking the chain of causation (see paragraph's 31(ii) - miss-typed as (i) - 49, 53, 54 and 78 of the prosecution's skeleton argument of the 12.01.2021). As was said at paragraph 54:

'Since the deceased lacked knowledge of the Appellant's intention (as the jury found), there was no act capable, as a matter of law of breaking the chain of causation.'

73. This was the finding of law that the prosecution invited CACD 1 to make. The jury directions had not left the question of whether PF's choice to drink had been free voluntary and informed to the jury to decide and so this was a finding of law that CACD 1 had to make if those directions were to be upheld.

74. For the reasons given in CACD Judgement 3, at paragraphs 38 to 43, CACD Judgement 1 would have been wrong to make such a finding, but not as wrong as the reasoning by which CACD Judgement 1 did dismiss this appeal. This is considered next.

4.2 The reasoning by which the draft of CACD Judgement 1 dismissed the appeal

75. The draft of CACD Judgement 1 did not even refer to the submissions made by the prosecution. It neither adopted them nor explained why it had not adopted them. Its reasoning was based on a concession that it claimed had been made on behalf of the appellant, and a factual comparison between the facts of this case and those of the

hypothetical weak swimmer.

76. The court's reasoning is set out at paragraphs 59 to 64 of the draft judgement. This can be contrasted with the same paragraphs in the approved judgement which are set out at paragraph 26 of CACD Judgement 3. Paragraphs 59 to 64 of the draft judgment said (underlining added):

'59. The concession made by Mr Jeremy in relation to the weak swimmer is both correct in our view and important. As he accepts, the victim's uninformed state of mind in this example as to the accused's real intention would have changed the nature of the undertaking on which the victim embarked, by rendering it more dangerous. The false friend was potentially liable to a conviction for homicide on account of his or her undisclosed intention that the victim should die by not providing assistance in the event of difficulty. This is highly pertinent in the present case. Mr Jeremy's concession also recognises that whether the victim's ignorance of the accused's real intention does relevantly change the nature of the undertaking on which the victim embarks, as in his example, will depend on the specific nature of the individual case. The concession acknowledges, moreover, the appropriateness of the trial judge addressing the nature of the individual case in deciding how to direct the jury. Mr Jeremy accepts that, in his weak swimmer example, it would be appropriate for the judge to give the jury a direction on causation referable to the victim's knowledge or ignorance of the accused's intentions.

60. The undisclosed murderous intention of the appellant, in our judgment, substantively changed the nature of the undertaking upon which PF embarked, in this particular case. As the appellant accepts, the jury must have rejected his account that he was not present when the victim drank this large quantity of whisky which had been supplied by the appellant. PF, therefore, would have believed that he was drinking 60% proof whisky in the company of someone who loved and would care for him, not someone who wished for his death. As a consequence, PF would not have had an informed appreciation of the truly perilous nature of what was occurring. He was being encouraged to consume a significant quantity of a powerful alcoholic drink, provided by the appellant, which inevitably would have started to impair his judgment, most particularly as it interacted with the Delmane. Engaging in this

activity was not, as a consequence, the result of a free, voluntary and informed decision by PF. To the contrary, he was being deliberately led into a dangerous situation, as with the weak swimmer, by someone who pretended to be concerned about his safety: as was undisputed on the evidence in the case, the appellant posed as his lover and partner – someone who PF would undoubtedly have assumed would be solicitous of his wellbeing – whereas, in reality, the appellant simply desired PF's demise. The appellant, therefore, manipulated and encouraged PF into a position of grave danger, given the combination of the sedative effects of the substances risked decreasing the levels of the victim's consciousness, thereby fatally impairing his airway. The appellant's undisclosed homicidal purpose, in these circumstances, changed the nature of the act: PF was to a material extent unwittingly lured into a perilous drunken and drugged position by someone who feigned to be his loving partner. Once the effects of the substances started to affect PF's judgment and as he succumbed, the appellant would have been a mere bystander, or worse. He certainly would not have sought medical assistance, given he admitted he wanted to increase the risk of PF dying.

61. It follows we are of the view that the position of the appellant is to be likened to that of the deceived swimmer. Both victims (real and fictional) would have been lured into a false sense of security by the accused's undisclosed murderous purpose, embarking as a consequence on a fatal course of action uninformed as to or unaware of the true dangers of the undertaking.

62. Whether or not the deceased acted freely and voluntarily, when in a position to make an informed decision, will always depend on a close analysis of the facts of the case. If, in the context of a decision by the deceased, there is a significant deception by the accused that changes the truth or the reality of what is happening, such as materially to increase the dangerous nature of the act, then he or she may be criminally liable for what occurred. That 'deception' as to the 'nature of the act' may – as in the weak swimmer example – be directly linked to the undisclosed intentions of the accused. The judge incorporated the idea of 'deception' as to 'the nature of the act' thus in a ruling given on 4 July 2019 in relation to the charge of conspiracy to murder AMM by encouraging suicide (count 3 TI):

“[...] a Defendant’s conduct may amount to murder if he drives the victim to suicide by force, duress or deception (with the deception being as to the nature of the act encouraged) such that the suicide was not the voluntary act of the victim. [...]”

63. For these reasons we consider that the approach of the judge was correct. He left it to the jury to determine whether the appellant’s actions were a more than minimal cause of PF’s death. He told the jury if they were sure that, with intent to kill, the appellant in person gave PF drink, and PF drank it, it was open to them to conclude that the giving of drink was a cause of the death; but he told them that conclusion would not be open to them if PF knew the drink being offered was intended to cause his death. These directions rightly recognised that in this particular case – if the jury was sure that the appellant was giving PF drink with intent to kill him, of which intention PF was ignorant – then PF’s act of drinking could not be a free, voluntary and informed decision, because in those circumstances PF was being deceived by the appellant as to the nature of the act. The judge’s directions captured the essence of the issue in a clear and admirably succinct manner. Those directions were, moreover, given in the broader context of the supposedly caring and protective nature of the relationship, whose falsehood lay at the centre of the undisputed evidence in the case, as the jury undoubtedly understood.

64. We dismiss the appeal against conviction.’

77. The wording of paragraph 60, in particular, paints an emotive picture of what might have happened on the night that PF died. But that is all it does. It paints a picture that has no basis in evidence. All that can be deduced from the evidence, and the verdict of the jury, is that BF was present and that he gave PF malt whisky, a drink to which PF was partial, that he drank regularly and whose effects he was familiar with. A slightly more prosaic interpretation of what happened that night is posited by the jury question:²⁸

‘Could we have clarity on the 4th paragraph on p.22 of your legal directions, especially regarding the implications if Ben and Peter were drinking together on 25th

²⁸ The jury note DCS item 12.

October 2015?’

78. The reasoning of the draft of CACD Judgement 1, as set out in these paragraphs, can be reduced to a concession, a comparison and a conclusion. The concession was expressed in the final sentence of paragraph 59:

“Mr Jeremy accepts that, in his weak swimmer example, it would be appropriate for the judge to give the jury a direction on causation referable to the victim’s knowledge or ignorance of the accused’s intentions.”

The comparison between the facts of the two situations was made at paragraph 60, and its result declared in the first sentence of paragraph 61:

‘It follows we are of the view that the position of the appellant is to be likened to that of the deceived swimmer.’

This lead to the conclusion, as stated in the first sentence of paragraph 63:

‘For these reasons we consider that the approach of the judge was correct.’

79. CACD Judgement 1 did say, at lines 11 to 15 of paragraph 60:

‘Engaging in this activity was not, as a consequence, the result of a free, voluntary and informed decision by PF. To the contrary, he was being deliberately led into a dangerous situation, as with the weak swimmer, by someone who pretended to be concerned about his safety.’

But, as CACD Judgement 3 said at paragraph 47 when considering CACD Judgement 1’s analysis of the case, this was no more than:

‘... the view of the facts formed by the Court of Appeal.’

80. CACD 1’s view of the facts, in the context of comparing the facts of this case to those of the weak swimmer, should not be confused with a finding of law. This was not the finding of law argued for by the prosecution that PF’s act of drinking while

uninformed as to BF's intention was not capable as a matter of law of being free, voluntary and informed.

81. CACD Judgement 1 in draft form was therefore a judgement on the facts (the facts of the concession and of the comparison). The closest that it came to making a finding of law was at paragraph 63 of the draft judgment when it said:

'These directions rightly recognised that in this particular case – if the jury was sure that the appellant was giving PF drink with intent to kill him, of which intention PF was ignorant – then PF's act of drinking could not be a free, voluntary and informed decision, because in those circumstances PF was being deceived by the appellant as to the nature of the act.'

82. But these words were to be removed from the approved judgment in the circumstances set out below and replaced by the assertion that the directions *had* required the jury to be sure that PF's act of drinking had not been free voluntary and informed. There would have been no need to, and no sense in, asserting that the directions had required the jury to be sure that PF's act of drinking had not been free voluntary and informed if CACD 1 considered that it had already made the finding that, as a matter of law, PF's decision to drink could not have been free, voluntary and informed.

83. So, while CACD Judgement 1, at paragraph 58, described *Kennedy (no 2)* as '*the critical authority for the resolution of the issues raised on this appeal*' and went on to quote from that judgment, it made no further reference to *Kennedy (no 2)*. CACD Judgement 1 neither applied *Kennedy (no 2)* nor made the finding – that PF's act of drinking *could not* have been voluntary as a matter of law – that could have enabled it to distinguish *Kennedy (no 2)*.

4.3 The defendant's application for a rehearing

84. On receipt of the draft of CACD Judgement 1 the defendant pointed out to the court that the concession that the draft judgement relied upon had not been made. In an e-

mail sent by counsel for the defendant to Daniel Worker, clerk to Lord Justice Fulford, at 18:37 on 07.03.2027, in relation to the last sentence of paragraph 59 of the draft judgement, it was said:

'This has never been accepted in written or oral argument.'

85. This, and the other errors in the draft of CACD Judgement 1 provoked the defendant to apply for a rehearing²⁹ before publication of the approved judgement. This application, at paragraph 8, quoted the following extract from paragraph 63:

'These directions rightly recognised that in this particular case – if the jury was sure that the appellant was giving PF drink with intent to kill him, of which intention PF was ignorant – then PF's act of drinking could not be a free, voluntary and informed decision because in those circumstances PF was being deceived by the appellant as to the nature of the act.'

And, at paragraph 9, said that:

'The finding that, on the facts of this case, BF would have caused PF's death because PF's decision to drink could not be a free, voluntary and informed one, is a finding of law.'

At paragraph 31 of the application for a rehearing it described CACD Judgement 1 as:

'A judgement of law that purports to be a judgement on the facts.'

86. The application for a rehearing also submitted at paragraphs 20 and 21 that, as has now been found by CACD Judgement 3 at paragraph 41, the analogy that CACD Judgement 1 drew with the facts of the weak swimmer example was flawed. The weak swimmer chose to swim because his false friend had expressly promised to provide assistance if he encountered difficulties; a promise intended to impact on his decision to swim. There was no evidence that Mr Farquhar had been deceived into

²⁹ Application for a rehearing dated the 15.03.2021 DCS item 60.

drinking or taking Dalmane on the night that he died.

Tab 23 (p364)

87. The application for a rehearing was refused by e-mail of the 16.03.2021 from Daniel Worker, clerk to Lord Justice Fulford.³⁰ In the third paragraph of that e-mail it was said:

'They (counsel for the appellant) make separate criticism to the effect that the Court has mischaracterised as matters of law certain matters of fact which should properly be left to the jury, namely whether the deceit in any given case did cause the death, The Court does not accept that it has fallen into error in that way, but it recognises that confusion has crept in. The Court as a consequence has clarified its conclusions at para 61 and 63.'

88. Counsel for the appellant had not criticised the draft of CACD Judgement 1 for mischaracterising matters of fact as matters of law. Their criticism had been to the opposite effect: that CACD Judgment 1 had mischaracterised itself as a judgement of fact when, at paragraph 63, it had made a finding of law.
89. In the approved version of CACD Judgement 1 the suggestion made in the last sentence of paragraph 59, that it had been conceded by the appellant that jury directions referable to the victim's knowledge or ignorance of the accused's intentions would have been appropriate in the example of the weak swimmer, was removed.
90. Without having been asked to do so, CACD 1 also amended paragraph 63 by removing the statement that PF's act of drinking could not be free, voluntary and replacing it with the assertion that the directions had recognized that the jury had had to be sure that PF's act of drinking was not a free, voluntary, informed decision such as to break the chain of causation. These changes are most easily seen in the schedule of changes attached.
91. This amendment changed the meaning of paragraph 63 from a claim that Mr Farquhar's choice to drink *could not* have been free voluntary and informed, (so that

³⁰ E-mail of 16.03.2021 from the clerk to Lord Justice Fulford DCS item 61.

this question did not have to be decided by the jury), to a finding that this question *had been* decided by the jury. It thus changed the rationale of the judgement.

92. The claim that this issue had been decided by the jury was wrong. The directions had not left the question of whether PF's act of drinking had been free, voluntary and informed to the jury. They could not reasonably have been interpreted as having done so. They were not understood by the parties to have done so.

93. The removal of the words '*PF's act of drinking could not be a free, voluntary and informed decision*' from paragraph 63 of the draft judgement demonstrates that, contrary to both the prosecution's submissions and the assertion made at paragraph 36 of CACD Judgement 3, CACD Judgement 1 had made no such finding and was scrupulous to avoid making such a finding. The approved version of CACD Judgement 1 was, as its draft version had been, a judgement of fact (the fact that the directions had left the question of whether PF's act of drinking had been free, voluntary and informed to the jury).

94. CACD 1 refused the appellant's subsequent application for a certificate that a point of law of general public importance had been involved in the decision and for leave to appeal to the Supreme Court on the 22nd June 2021 without giving reasons for doing so.³¹

Tab 8 (p151)

4.4 The relevance of the evolution of CACD 1 to the first part of the second certified question

95. The first part of the second certified question is framed as a choice as to which one of two conflicting decisions of the CACD applied the law correctly. This assumes that CACD Judgement 1 applied the law. CACD 1 did not apply the law. The evolution of CACD Judgement 1 between draft and approved forms demonstrates that the rationale of CACD Judgement 1 was to dismiss this appeal but to do so without making the finding of law argued for by the prosecution that could have been the

³¹ Order refusing application for leave to appeal to the Supreme Court dated 22.06.2021 DCS item 65.

subject of appeal. But for the decision of the CCRC to refer this case back to the CACD on the ground of exceptional circumstances, the ground that allowed the defendant to reargue that the jury had been misdirected on causation, CACD Judgement 1 would have protected itself from scrutiny on appeal.

5. The answers to the certified questions

96. The defendant therefore answers the certified questions as follows:

1. No.

2. CACD Judgement 3 was essentially correct and CACD Judgement 1 was wholly wrong. No reconsideration of *Kennedy (no 2)* is necessary.

6. Commentary on the process by which this case has reached the Supreme Court

97. The route by which this case has come to the Supreme Court is an unusual one.

CACD 3 stated in its first draft judgement that it would certify a point of law of public importance and grant leave to the prosecution to appeal. It did this before the parties were aware of what the judgement said, before an application for leave had been made by the prosecution, before the question for the Supreme Court had been identified and before the defendant had been given the opportunity of opposing the granting of a certificate and leave. The order of events following the handing down of the first draft of CACD Judgement 3 is shown in the attached chronology.³²

Tab 11 (p171)

98. Following the handing down of the draft judgement the defendant made written submissions opposing the grant of a certificate and leave.³³

Tab 14 (p217)

³² Chronology of handing down of CACD Judgement 3. Not uploaded to the DCS but attached to the Respondent's Case.

³³ Appellant's submissions on certified questions and leave. Not uploaded to DCS but attached to the Respondent's Case.

99. Had the more usual procedure been followed, the prosecution's decision to apply for a certificate and for leave to appeal, would have involved a consideration of the merits of the appeal, of the delay in obtaining finality that would be caused by an appeal, and of the views of the police and of the victims of BF's crimes. The fact that CACD 3 had already indicated in its draft judgement that it would certify and grant leave made that important process a redundant one. This is an appeal that, in practical terms, has been imposed on the prosecution by the CACD rather than one that has been brought '*at the instance of the defendant or prosecutor*' as required by s.33(1) of the Criminal Appeal Act 1968.
100. No procedural point is taken on behalf of the defendant resulting from these events. The defendant is content to contest this appeal on its merits. But this by-passing of the usual procedure has had regrettable consequences both for this case and for the wider interests of justice.
101. First, the Supreme Court has been denied the opportunity of considering whether to grant leave in a case which involves no point of law of public importance. The question as to whether the CACD should apply the law is not one that needs to be asked of the Supreme Court.
102. And secondly, the central issue that has been placed before this court by both prosecution and CACD 3 – whether CACD Judgement 1 or CACD Judgement 3 is right - is based upon a misinterpretation of what CACD Judgement 1 decided. The prosecution has never argued, and it is not arguable, that the jury directions *did* require the jury to be sure that PF's act of drinking was not a free, voluntary and informed decision such as to break the chain of causation, which is what CACD Judgement 1 actually decided. A minister of justice should not have an appeal imposed on him, and certainly not one that, if pursued, requires him to argue the unarguable.

David Jeremy KC

Paul Wakerley

31.08.2026