No. 2003/02883/B4

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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 16 July 2004

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Rose)

MR JUSTICE CURTIS

and

MR JUSTICE WAKERLEY

R E G I N A

- v -

SION DAVID CHARLES JENKINS

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(Official Shorthand Writers to the Court)

MISS C MONTGOMERY QC and MR J KNOWLES
appeared on behalf of **THE APPELLANT**

MR CAMDEN-PRATT QC and MR A GARDNER
appeared on behalf of **THE CROWN**

J U D G M E N T

(As Approved by the Court)

Friday 16 July 2004

LORD JUSTICE ROSE:

1. On 2 July 1998, at Lewes Crown Court, following a trial before Gage J, the appellant was convicted of murder on the unanimous verdict of the jury and sentenced to life imprisonment. He appealed to the Court of Appeal Criminal Division who, on 21 December 1999, dismissed his appeal.

2. He now appeals on a reference from the Criminal Cases Review Commission under section 9 of the Criminal Appeal Act 1995. He does so on three bases: first, new scientific evidence in relation to bloodstains which presents the defence in a different way to that presented at trial or to the Court of Appeal in 1999; secondly, interviews of his two daughters by the Criminal Cases Review Commission in 2002 are said to demonstrate the falsity of the accounts given by the girls' mother as to what they had said to her, as recorded in police reports, disclosed to the defence before trial, so that, it is suggested, the defence were mislead into not calling the girls, which they would otherwise have done; and, thirdly, evidence in relation to 'X', a man about whose existence the defence knew at the time of trial, who, it is suggested, might have carried out the murder.

3. In view of the course which we have decided to follow in this case, we do not believe it is either necessary or desirable for us to embark on a detailed analysis of the evidence or of the rival submissions which we have heard. But it will be necessary to set out the new scientific evidence so as to demonstrate the way in which it differs from that previously before the court, in order to substantiate the conclusion which we have reached. Before embarking on that, we summarise the facts, many of which were not in dispute at trial and are not disputed now.

4. The appellant lived with his then wife Lois at 48 Lower Park Road, Hastings. They had four natural daughters, Annie then 12, Lottie then 10, Ester then 9, and Maya then 7. The seventh member of the household was Billie-Jo, then 13, whom the appellant and his wife had fostered since 1992 and whom it was intended would soon be adopted by them.

5. On 15 February 1997 Billie-Jo was battered to death with an 18-inch long metal tent peg while painting the doors which lead from the dining room onto the patio at the back of the house.

6. The timing of events on the afternoon that day was such that the window of opportunity open to the killer was a small one. At about 2pm Lottie and her friend Ellen had a music lesson. They were picked up from the teacher's home soon after 3pm by the appellant in his MG motorcar. They drove to Ellen's home where, according to her mother, she was dropped off between

3.15 and 3.20. They then drove home, a journey which would take about 4½ minutes. When they arrived at 48 Lower Park Road, Mrs Jenkins and the two younger daughters were out. At trial, the appellant said that he, Annie and Lottie all went inside. Lottie went upstairs to her bedroom and put her clarinet there. Billie-Jo was painting the patio doors, the appellant having, the previous day, bought paint and brushes for the purpose. At some point, and the accounts of the appellant and the two girls differ as to when and where, the appellant told Annie and Lottie that he needed some white spirit. (There was, in fact, a 2-litre container partly full of white spirit in a cupboard in the house). He set off with Annie and Lottie in the MG intending to go to Do-it-All. About 15 minutes later, they returned home. During the journey it had appeared that the appellant had no money. He did not go into Do-it-All and, for no obvious reason, he drove twice round Alexander Park nearby and back past the house. On their return Billie-Jo was lying on the patio with fatal head injuries. At 3.38pm the appellant made the first of two 999 calls for an ambulance and a neighbour, Denise Franklin, came to help. A second 999 call was made at 3.46pm. The appellant said in evidence that, when he found her on the patio floor, he had pulled Billie-Jo by her right shoulder from the dining room side. He had also pushed her from the garden side. He had no recollection of her breathing. He saw a bubble in her nostril but did not see anything up her nose. Denise Franklin described how Billie-Jo was lying completely flat with the left side of her face on the floor on a black bin liner, which the appellant had earlier provided, with a rug inside for her to kneel or sit on. The body was warm. There was no pulse or any sign of breathing. Part of the plastic bag was pushed up the girl's left nostril as far as it would go. She pulled it out and blood poured out. The appellant denied having caused the girl's injuries.

7. Examination of the appellant's clothing, in due course, revealed Billie-Jo's blood on his shoes, trousers and jacket. That blood spattering on his trousers and jacket was the crux of the case against the appellant. The prosecution said that, like similar blood spatter on Billie-Jo's leggings, it had got there when the appellant bludgeoned the girl with the tent peg. Mr Wain, a forensic scientist called by the prosecution, said the spatter was typical of what he would expect from the infliction of blows on a wet surface. The larger spots would travel forwards towards the French windows and the fine spray would travel backwards and upwards. Another forensic scientist called by the prosecution, Mr Stockdale, gave similar evidence. For the defence, Mr McKirdy, a forensic scientist, said there could be a considerable range in the size of droplets from battering. The spattering on the front of Billie-Jo's leggings was consistent with her head, when wet, having been hit and the spattering on her trousers looked the same size as that on the appellant's clothing. Mr Webster, another forensic scientist called by the defence, also said the spots on the appellant's clothing could have been from impact splatter although they were not completely typical. The defence at trial was that the blood spattering could be explained by exhalation of blood through Billie-Jo's nose. Mr McKirdy and Mr Webster had carried out experiments showing that a substantial exhalation of air could expel blood so as to create a

pattern of very fine blood spots on a target placed at an angle of about 45 degrees to the nose. During the experiments, Mr Webster exhaled 2.3 litres of air in 2 seconds. Mr Sinar, a neuro-surgeon called for the defence, said that, where there is an open head injury, the victim can go on breathing and making efforts to clear the airways for some time. Mr Sinar felt from what he had read that the deceased was still alive when first seen by the appellant on his return from the Do-it-All trip. Professor Douglas, a specialist in respiratory disease, for the defence, said it did not matter how much air Mr Webster had expelled; what mattered was the speed of flow and it was necessary to breathe in 2.3 litres of air to produce a peak flow of 55 litres per minute. Dr Hill, a pathologist relied on by the prosecution, said any breathing by Billie-Jo after she had been injured would have been very mild and very slight. The Webster and McKirdy experiments were wholly unrealistic. An exhalation of 2.3 litres in two seconds would be a huge amount for anyone to exhale, let alone a 13 year old girl injured in this way and, had it happened, anyone present would have seen big breathing movements. He considered the possibility of the spraying of droplets by breathing to be so remote that it could be discounted. Professor Southall, a very experienced paediatrician concerned with respiratory physiological research, said it would have been impossible for Billie-Jo in her state to expel 2.3 litres of air. Mr McAughey, a scientist called by the prosecution, had performed experiments of his own with a female volunteer. He said a peak airflow of 55 litres a minute was necessary to get expulsion of blood droplets to hit targets 40 and 60 centimetres away.

8. Before the Court of Appeal on the last occasion, Professor Denison, a physiologist who had been instructed after the trial, gave evidence of experiments which he had carried out. He used a 3-litre syringe feeding into a tube leading to a small nozzle. The syringe represented the deceased's lungs and the nozzle her nasal valve. He performed 85 experiments initially, showing that, when three drops of fresh blood were placed behind the exit opening, a brief pulse of low pressure, 15 mmHg, displacing 63ml of air (about half a wine glass) was sufficient to fragment the drops of blood and propel them a metre. If the nozzle was angled 30 degrees upward the droplets reached a height of 85 centimetres above ground level at a distance of half a metre. Experiments on female volunteers of the deceased's build, lying on a couch, picked up by the shoulders and then released, produced passive expulsion of about half a litre of air from lungs. Dr Hill at post-mortem had found hyper-inflation of the lungs. Professor Denison said that transient release of an upper airway obstruction sufficient to release 50-65 ml of air via a bloody nostril could generate the blood spatter pattern found on the appellant's clothing. If the blockage was far down in the airways, pressure would have dissipated. He postulated blockage and release at nasal valve level. Dr Hill, however, had found no evidence of upper airways obstruction and nothing to suggest a sudden removal of a blockage to allow brief exhalation. In a reconstruction of the likely distance between the nape of the appellant's neck and the floor when squatting by Billie-Jo, the distance was 84 centimetres, which was significantly further than any blood spattering height

achieved by Professor Denison; the highest spot on the appellant's clothing was on the zip of his jacket towards neck level.

9. Professor Widdicombe, emeritus professor of physiology at the University of London, was dismissive of Professor Denison's model, which Professor Denison then altered. But Professor Widdicombe was still critical because it made no allowance for air escaping through the mouth and the blockage which had caused the hyper-inflation found by Dr Hill must have been close to the lungs. No evidence of blockage at a high level was found by Dr Hill. Furthermore, the pressure of 15 mmHg envisaged was more than Billie-Jo could have achieved breathing normally. Professor Widdicombe said, “I find the idea that a lung hyper-inflated due to internal obstruction can exert a pressure in the nose to cause a blood spray both mechanistically and numerically untenable unless the lung were to collapse completely”.

10. The Court of Appeal did not question the integrity of Professor Denison or the validity of his experiments but concluded that

> “His exhalation theory does not fit the facts of this case since it depends on the existence of an obstruction of blood in the nasal valve. We are satisfied from the evidence of Dr Hill that the only obstruction was in the lower airways. It is now possible to say that looking at the case as a whole including the evidence which was before the jury (1) the appellant was the last known adult to see the deceased alive and the first known adult to see her dead; (2) his clothing was found on examination to be spattered with blood in a way which was consistent with him being her attacker; (3) the clothing of others who went to the aid of the deceased was not similarly splattered; (4) the spattering on his clothing matched precisely the spattering on the leggings of the deceased which latter spattering was undoubtedly caused by her attacker; (5) during the initial stages of the police enquiry the appellant repeatedly failed to reveal that he had been into his house about fifteen minutes before the body was discovered and indeed stated that he had been away for much longer than that; (6) the appellant's explanation for his absence from the home during the fifteen minutes or so immediately prior to discovery of the deceased was itself unusual in that he went without money by circuitous route to buy an item he did not need; (7) although it may be possible for an injured person to exhale a fine spray of blood on the clothing of someone nearby (a) no one claims to have seen any signs of the deceased breathing (b) in order to spatter the appellant with the blood which was found upon him, the deceased while unconscious and in the prone position flat on the ground, would have to have had her head in such a position that one nostril was about 20 centimetres above the ground and angled upwards to the extent

> of 30 to 40 degrees towards the appellant at a time when he was crouched down beside her. At that moment she would have then had to release about 62.5 ml of breath at a pressure of 15 mmHg for 0.1 second. The amount of breath released and the period of release might have been greater but not so great as to render her lungs when her airways became re-obstructed less than hyper-inflated; (c) even if all that were achieved, blood spattering would not it seems reached the height on the appellant's clothing at which spattering was found."

11. The court concluded that the fresh scientific evidence then available, though relevant and credible, added so little to the weight of the defence that any doubt which it induced would not be reasonable. Other grounds of appeal related to depriving the defence of the children as alibi witnesses by the way in which they had been dealt with by the police in a de-briefing session, pursuant to a child psychiatrist's advice, on 20 March 1997, the admissibility of part of the evidence of Detective Constable Hutt and criticisms of the summing-up. These grounds also having been rejected, the appeal was dismissed.

12. Before turning to the further fresh evidence before us in relation to blood spatter, which, again, is at the heart of the appeal, it is convenient to say a little about the two other bases on which the appeal before us has been advanced.

13. As to 'X', there is nothing in the material before us to suggest that this aspect of the matter renders the appellant's conviction unsafe. It seems implausible that 'X', could have walked from the park to the scene of the killing unobserved, arrived during the small window of opportunity in time, entered apparently occupied premises, removed a bag of peat which was leaning against the yard gate and bludgeoned a girl, with whom he is not shown to have any connection, for no reason. There is no evidence that he killed her. There is forensic evidence and also evidence of him being sighted in the park at the crucial time, which points to the contrary. Such evidence as connects him with plastic does not establish or suggest that it was he who inserted the bin liner into Billie-Jo's nostril. But, in any event, the point is unarguable as a ground of appeal in the light of the evidence before us from Mr Anthony Scrivener QC, who appeared for the defence at trial and on the first appeal. He told us that an enquiry agent had investigated the matter for the defence and 'X' in consequence appeared to be eliminated, having an alibi. Mr Scrivener, accordingly, deliberately took the tactical decision at trial not to canvas this aspect, because the evidence against 'X' was not strong enough and it would be hazardous for the defence to invite the jury to choose between the defendant and 'X'. All the material in relation to 'X' was available at trial, save the report and addendum from Dr Mckintock obtained earlier this year by the defence; they provide no more than speculation. There is no reason for re-opening this aspect at this stage. This ground therefore fails.

14. [Omitted for publication]

15. In these circumstances, we do not accept that the prosecution deprived the defence of the girls as alibi witnesses, any more than they did by the March 1997 de-briefing session on the advice of the psychiatrist, Dr Bentovim, which founded a similar, unsuccessful, complaint in the first appeal. All the evidence we have heard, and the contemporary documentation which we have seen, shows that there was, in the defence team, a reluctance to call the girls which was manifest over many months. On 7 January 1998, prior to the February 1998 disclosure to the defence of the reports, Mr Scrivener is recorded as saying he did not feel he wanted to call the girls, he wanted to cross-examine them. The reports never were evidence and, at the abuse hearing before the trial judge, the defence did not seek, by calling evidence or otherwise, to challenge the accuracy of the reports. Nor did the defence choose to disclose to the trial judge, or, for that matter, the Court of Appeal in 1999, Mrs Mellor's reports on the girls made during the trial. Indeed there was a rather curious attempt by the defence, in correspondence, to persuade the mother's solicitors to obtain a further report on the fitness of the girls to give evidence. The trial judge found, on the abuse hearing, that there was no reason to believe that the girls would not tell the truth. And, as the defence knew, the girls had said nothing to Mrs Mellor to suggest hostility by them to their father and had indicated a wish to tell the truth. We accept that, if Mr Scrivener had thought it to be in the interests of the defence for the girls to give evidence, he would have called them, regardless of Mrs Mellor's view that, if they gave evidence, they would be further damaged. It is not in the least surprising that, in the period between the murder and the trial, when they were living with their mother and in contact with their father, girls initially aged 10 and 12 became confused in recollection and mixed in feelings, when presented with substantial media comment about what their father was said to have done. Nor is it surprising that there was concern in the defence team as to what the girls might say and a strong preference for being able to cross-examine them if they were called by the prosecution or the judge.

16. In this context, the defence made a deliberate decision, late in the trial, not to call either of the girls. At the time, the defendant himself said he would be more comfortable not involving the girls. It was the sort of decision which has to be made frequently in criminal trials, although we accept that the circumstances in the present case were exceptional and made the decision particularly difficult. But it was a decision made in the light of all the factors known to the defence and there is nothing relevant to that decision before us which was not known to the defence then. It is also to be noted that the decision not to call the girls was not finally made until after the defendant had given his evidence and, as Mr Scrivener believed, had acquitted himself reasonably well. Had that decision been made when, or soon after, the contents of the police reports first became known to the defence, several months before trial, we would have been more inclined to accept that they were the overriding factor in the decision not to call the girls. As it is, the

reports were, in our judgment, an important factor, but only one of many, in that decision. In any event, as we have said, the reports were accurate and properly disclosed and if the defence misread the position that cannot be laid at the prosecution's door. This ground therefore fails without the need for any analysis of whether or not the evidence which we heard in relation to it was properly admissible before us in accordance with section 23 of the Criminal Appeal Act 1968.

17. We turn to the scientific evidence in relation to blood. On this topic, we have found it necessary and expedient in the interests of justice, to receive, under section 23 of the Criminal Appeal Act 1968 as amended, fresh expert evidence which was not available either at the time of trial or on the previous appeal. We heard the evidence of Professor Milroy, a forensic pathologist, Professor Denison, and Professor Schroter, an eminent bio-engineer on behalf of the appellant; and Dr Hill, Professor Widdecombe, Mr Wain and Dr Marshall, a specialist in aerosol science, on behalf of the Crown.

18. At the post-mortem examination of Billie-Jo, Dr Hill took and preserved specimens from each of the four main lobes of the lungs from which a few slides were prepared. Dr Hill did not then consider it necessary to conduct histological examination of that material; nor did Dr Sheppard, the pathologist then instructed on behalf of the appellant. No doubt they believed such examination would not add to their knowledge of the state of the lungs as observed at post-mortem examination, namely that they contained some blood and were hyper-inflated, indicative of a blockage of the lower airways trapping air within the lungs. It would have been preferable for histological examination to be carried out and, if it had been, different conclusions as to the possible mechanics of blood exhalation by Billie-Jo might have been reached at an earlier stage. But it has to be said that eminent pathologists, Professors Whitwell and Milroy, on their first observation of the slides after the last appeal, missed the condition of interstitial emphysema, to which we now come.

19. After the earlier appeal, the slides of the lungs, but not the blocks of tissue from which they were taken, were examined by Professor Milroy on behalf of the appellant. Before us he helpfully described the anatomy of the airways, using the analogy of a tree. The upper airway to below the larynx representing the trunk (although itself divided between the mouth and the nasal passages); then the bronchi, representing the main branches; then the bronchioles, representing smaller branches and twigs; and finally, the alveoli where oxygen is absorbed, representing the leaves. The slides which Professor Milroy was able to examine represented a very small proportion of tissues from the lungs. But he observed, and has demonstrated to us by computer graphics, that, although blood could be seen in some bronchioles and alveoli, many were not obstructed by blood. Further, Professor Milroy observed that many alveoli were distended, and some were collapsed and their linings torn. He then showed the slides to Professor Denison who concluded that the lungs showed

clear evidence of interstitial emphysema, that is a condition in which air has been forced under pressure into the interstices or membranes separating the lobes of the lungs. Again, this condition has been demonstrated to us from the slides by computer graphics.

20. Professor Denison has studied interstitial emphysema. His opinions expressed in evidence to us are as follows:

(i)Absent any natural disease of the lungs, interstitial emphysema, with associated distention of the alveoli, can only occur where there is pressure of air within the lungs of upwards of 70 mmHg and more likely in this case approaching 110 mmHg.

(ii)That is consistent with Billie-Jo fighting for breath in the initial stages of the attack with such pressure of air within the lungs maintained by a blockage of the airways, which blockage must have been in the upper airways.

(iii)Such blockage was capable of being caused by a temporary spasm of the larynx on the insult of blood trickling down the throat, or by the tongue, or by a clot of blood which must have been later dislodged so as not to have been seen by Dr Hill at post mortem examination.

(iv)The blood in the lower airways, as observed by Dr Hill and Dr Shepherd, had not totally blocked them so as to be capable of causing the interstitial emphysema. The source of such blood was likely to have been inhalation of blood during the attack, or blood trickling from the upper airways ante or post mortem on movement of the body, or, at least in part, ruptures of the alveoli or linings of the bronchioles.

(v)Billie-Jo survived for several minutes after the attack whereby some alveoli had collapsed, a condition known as atelectasis, tending to show that oxygen and nitrogen within them had been absorbed in life.

(vi)The hyper-inflation of the lungs observed by Dr Hill at post mortem was consistent with expansion caused by air retained within the interstices and some distended alveoli as seen on the slides.

21. Although Professor Denison arrived at these conclusions only a few days before the start of this appeal, they have been considered by Dr Hill and Professor Widdecombe. They agreed with the findings of interstitial emphysema and distension of some alveoli. They commented that the available slides could not indicate the state of the lungs as a whole. Nevertheless, Dr Hill accepted that, at some stage after the attack upon Billie-Jo began, there must have been a substantial blockage at the level of her upper airway. He considered that the most likely cause of that blockage was laryngeal spasm.

22. We accept that this is fresh evidence not available at trial or the hearing of the

earlier appeal. Its effect is to undermine the finding of this Court, in the earlier appeal, based on the then evidence of Dr Hill that the only obstruction was in the lower airways and it also undermines the opinions of Dr Hill and Professor Widdecombe reviewed at paragraphs 8 and 9 above, that in particular there was no blockage in the upper airways. It means that there is now evidence that, at some time after the beginning of the attack, Billie-Jo's upper airway was blocked or substantially blocked, maintaining behind the blockage and in her lungs a pressure of upwards of 70 mmHg. That is the context in which the evidence of experiments conducted by Mr Webster and Mr McKirdy before the jury, and by Professor Denison on the earlier appeal and before us, must now be seen.

23. The experiments of Mr Webster and Mr McKirdy, had postulated a substantial exhalation of air (2.3 litres in 2 seconds) *from the lungs* so as to produce fine blood spatter from the nose. Such exhalation by Billie-Jo, when she was seen by the appellant on his return from the Do-it-All trip, was dismissed by Dr Hill and Professor Southall as wholly unrealistic, as we have described in paragraphs 7 and 8 above.

24. Furthermore, the conditions in which blood spatter might be produced from the nose or mouth were described in evidence before us by Professor Schroter. In his opinion, what mattered was not the *volume* of air passing over liquid blood in the mouth or in the nasal passages but the velocity gradient of the air passing through those upper airways. On exhalation, the air at the very wall of the upper airway is stationary; the greater the change in velocity of the successive layers of air adjacent to the wall, the greater is the velocity gradient and the higher is the force of the air against the wall so as to create shear stress removing droplets from the blood lining the wall. This production of spray from liquid is a fast phenomenon capable of being created instantaneously, given the appropriate conditions. Some blood in the upper airways was observed by Dr Hill at post-mortem examination. To Professors Schroter and Denison, it is entirely credible that a relatively small volume of air released into the upper airway, whether to the mouth or to the nasal passage, from the release of a pressure of upwards of 70 mmHg by removal of a blockage at, say, the level of the larynx, might produce the spatter of blood as created in Professor Denison's experiments. However, Professor Denison in his experiments produced a very audible snort or articulated the sounds “esse” or “per”; whereas the appellant heard no sound except a “squelching sound” and saw no movement from Billie-Jo as he tended to her. But, contended Professors Denison and Schroter, the sounds and movements made by Professor Denison in his experiments were the only practical means of creating the pressure of air and velocity gradient which might have obtained in the upper airway of Billie-Jo on release of the blockage. The exhalation or expulsion of air from Billie-Jo contemplated by them on the release of the blockage may or may not have been silent. They further contended that the release or partial release of the upper airway blockage might have been induced by the appellant in raising Billie-Jo's shoulder or by gently touching

her back outside the area of the rib cage, thereby marginally increasing the pressure of air in the lungs behind the blockage. Professor Schroter had conducted experiments to demonstrate the increase of pressure which might be caused in these ways.

25. Further, Professor Schroter said that, in assessing the extent and range of the blood spatter produced on exhalation, insufficient attention had previously been paid to the effect of the airflow in which blood droplets were carried from the nose or mouth or to atmospheric air currents and eddies which may have obtained on the patio. In evidence at the trial, Professor Douglas said that the movement of droplets through the air was a very complex matter; they might be moved “in a convective current of exhaled air.... the situation (is) very difficult to analyse and although the experiments described so far are inadequate for the purpose, unfortunately there is a paucity of reliable work in this difficult area”. This was not developed further at trial. Before us, however, Professor Schroter said that the spots of blood on the appellant's jacket and trousers were variable in size but all were tiny; the droplets of blood which caused them must have been smaller in diameter, all being of a mass less than 500 microns and most being of a mass of less than 200 microns. The later experiments had demonstrated that such particles travelled further in the air than mathematical calculations under Stokes' Law had predicted. That was so in the closed environment of laboratory conditions. Air currents caused by movement of those taking part in the experiments affected the trajectory of such tiny particles. Professor Schroter said that it was possible to contemplate gentle upward currents of air on the patio which might overcome the settling velocity of these tiny droplets of blood so as to project them further from their source on to the appellant's clothing.

26. Dr Marshall accepted the general principles applied by Professor Schroter and considered that mathematical calculation of the likely trajectory of particles of blood from Billie-Jo's mouth or nose relied on at trial was inappropriate, since the initial velocity of the airflow could never be known. He said that he would not expect the droplets of blood which produced the spots on the appellant's clothing to have been significantly affected by air currents or eddies on the patio, since they were of such variable mass. He considered it difficult to contemplate the tiny droplets travelling the distance between Billie-Jo's mouth or nose and the appellant's jacket and trousers. Nevertheless, he conceded that he could not rule out entirely, as a matter of science, the possibility that the airflow from Billie-Jo's upper airway produced by passive release of a blockage at a pressure of upwards of 70 mmHg, might create droplets of blood so as to contaminate the appellant's clothing. That depended on the velocity of the airflow and the geometry of Billie-Jo's mouth and nasal passages at the relevant time. He remained sceptical that the necessary conditions of geometry of Billie-Jo's mouth or nose applied. Professor Widdecombe expressed similar opinions to us.

27. In our judgment, the source of the spatter of Billie-Jo's blood on the

appellant's clothing is the fundamental issue in this case. The jury had to be satisfied so as to be sure that the source was her bloodied head as it was repeatedly struck by her attacker with the tent peg. There remains circumstantial and expert opinion evidence that such was the source. At trial, the appellant contended that it was reasonably possible that the source of the contamination was the active or passive exhalation of air directly *from Billie-Jo's lungs* producing droplets of blood from her nose. That was a difficult proposition having regard to the expert evidence then adduced. The jury never had the opportunity to consider the issue on the basis of passive exhalation of air under considerable pressure from the release of a blockage *in her upper airways* and the fresh evidence which we have heard from Professors Denison and Schroter and the concessions of Dr Hill and Professor Widdecombe as to the consequences of that.

28. We have been invited by the Crown to find that Dr Hill, though unaware of the interstitial emphysema, could not have been mistaken, as Professor Denison suggests, about the nature of the hyper-inflation of the lungs at post-mortem examination and thereby to conclude that any upper airway blockage could not have persisted until the time at which the appellant tended to Billie-Jo on his return from Do-it-All; and, even if it did, we are invited to review all the scientific and circumstantial evidence in support of the prosecution case. We think it inappropriate for us to do so, as it will be for a jury to assess the interrelationship, weight and conclusions to be drawn from the whole of the evidence in this case.

29. Following the opinions of the House of Lords in R v Pendleton [2002] 1 Cr App R 441, we ask ourselves whether the fresh evidence in relation to blood spatter, if given at trial, might reasonably have affected the decision of the jury to convict. In our judgment it might.

30. Accordingly, the conviction is unsafe; the appeal is allowed and the conviction quashed.

31. Miss Montgomery QC on behalf of the appellant initially accepted that a re-trial might be appropriate. But she later advanced four reasons why she said it would not. First, there is a scientific dispute among reputable experts. She sought sustenance from a passage in the judgment of Judge LJ in R v Cannings [2004] 1 All ER 725, at paragraph 178. That passage relates to unexplained infant deaths. In the present case we are concerned with the undoubted murder of Billie-Jo, and the evidence is not confined to experts. Secondly, she said, disclosure of legally privileged material for the purposes of this appeal has irretrievably prejudiced the defendant's position so that a re-trial could not be fair. We disagree. Disclosure was voluntarily made to a limited extent, during the hearing before us, in order to further the appellant's interests on the appeal. Legal privilege is commonly waived on appeals without impairing the fairness of a subsequent re-trial. The prosecution will not be permitted in this case to use the privileged material at a re-trial. Thirdly,

evidence has been lost or destroyed in that 75% of the blood spots, particularly the smaller ones, have now disappeared from the clothing, the house has been sold and its contents dispersed and the lung tissue blocks are no longer available, although the slides still exist. We are unpersuaded that these matters prejudices the defence or would make a re-trial unfair. Finally, she said, the passage of time will have impaired memories and the girls, who are living in Tasmania, may be unwilling witnesses. Bearing in mind, first, the recording, in February 1997, of the girls accounts on video and the defendant's account in interview; secondly, that the expert scientific evidence depends not on recollection but on recorded observation and opinion; and thirdly, that the trial judge will give the jury appropriate directions as to delay, the passage of time in this case is not, in our view, such as to preclude a fair trial.

32. The offence of murder here alleged is of the gravest, and in our judgment the public interest requires that a jury should decide the matter on the basis of all the evidence now available, to the extent that it is called on retrial by prosecution or defence.

33. Accordingly, we shall order that the appellant be re-tried. We remind representatives of the media of the order which was made earlier under section 4 of the Contempt of Court Act postponing publication of any report of the evidence given to us by Mrs Jenkins in relation to violence. That order remains in force and will continue to do so until further order by this court or by the re-trial judge.

34. Mr Camden-Pratt and Miss Montgomery, as to venue, subject to any submissions which you may have, we are minded to direct that this be at the Central Criminal Court or such other Crown Court as may be ordered by a presiding judge on the South Eastern Circuit. Anything on that?

35. **MISS MONTGOMERY:** No, my Lord, we were going to suggest the Central Criminal Court.

36. **LORD JUSTICE ROSE:** Thank you. We shall order that a fresh indictment be preferred within 28 days and that the defendant plead to that indictment within eight weeks of today. We make a representation order for two counsel and solicitors for the retrial.

37. **MISS MONTGOMERY:** My Lord, two matters. One is in relation to an order for costs out of central funds. The appellant has been legally aided in these proceedings. He was not legally aided for at least part of the proceedings in front of the first Court of Appeal which your Lordships have now held decided the case, as it has turned out, on the wrong factual basis. So I would ask for an order that the earlier costs be costs in the trial?

38. **LORD JUSTICE ROSE:** Yes, we shall make an order that the appellant's costs be paid out of central funds.

39. **MISS MONTGOMERY:** My Lord, I would also seek a renewal of Mr Jenkins' bail to reflect the conditions he had before his first trial.

40. **LORD JUSTICE ROSE:** Just pause a second. Because of the media interest in this case, I think I should say at once that whatever decision we make in relation to bail affords no basis for any implication as to what we may think in relation to guilt or otherwise. As we have sought to explain in the course of the judgment, that is not a matter for us. That is a matter for decision by a jury in due course. So whatever decision we make in relation to bail does not affect that.

41. **MISS MONTGOMERY:** My Lord, can I hand up the conditions that applied before trial, which, as your Lordships know, were observed for over a year by Mr Jenkins. I do not have a spare copy for Mr Camden-Pratt, so I will read them out. There were three sureties in the total sum of £250,000. He was required to live and sleep at an address --

42. **LORD JUSTICE ROSE:** Are those sureties still available?

43. **MISS MONTGOMERY:** My Lord, one is not because they are abroad, but his father, who is one of them, is able to stand in the entire sum. There is also a family friend, if you would rather have two sureties rather than one. The address in Aberystwyth would remain the same. There was a reporting condition. There was a condition to assist with reports and inquiries and restricting his visits to East Sussex, an undertaking not to apply for travel documents or to leave the jurisdiction and then details in relation to contact, which obviously would not need to be re-imposed, the children being in Tasmania.

44. **LORD JUSTICE ROSE:** So you are seeking bail, subject to the seven conditions, possibly amended in relation to sureties?

45. **MISS MONTGOMERY:** Yes, I ask that there be a single surety. The father, who was one of the sureties, is able to stand that entire sum.

46. **LORD JUSTICE ROSE:** Of £250,000?

47. **MISS MONTGOMERY:** Yes.

48. **LORD JUSTICE ROSE:** Mr Camden-Pratt?

49. **MR CAMDEN-PRATT:** My Lord, the Crown opposes bail in this case. It is our submission that, when one considers the three aspects of bail, heading 1 would be the failure to surrender to custody. Here is a man who has been convicted.

50. **LORD JUSTICE ROSE:** He did not fail to surrender to custody the first time, did he?

51. **MR CAMDEN-PRATT:** No, but we are in a different situation here because here is a man who, on his own case, has faced a trial and on his own case been wrongly convicted. So he is a man who, on the face of it, is facing a trial by jury which for him would have let him down already. So he faces a different state of affairs from that which he faced originally.

52. There is, without doubt, a substantial amount of evidence implicating this defendant in the crime of murder. It is not a case where the weight of evidence against him is slim, and so, notwithstanding the basis upon which your Lordships have allowed the appeal, there remains a substantial body of opinion that the jury found obviously favourable to the Crown at the last hearing which will weigh heavily against this defendant.

53. **LORD JUSTICE ROSE:** But what are the grounds on which, having regard to the terms of the Bail Act, bail could be refused?

54. **MR CAMDEN-PRATT:** They would be failing to surrender to custody, first of all, and the seriousness of the charge is relevant to that, as it is in all murder cases, which is why, in our submission, it is unusual that there should be bail in a murder case. It may be that some of the evidence appears to be slight of that decision making kind, but the time that your Lordships are now addressing -- and you have been through the evidence or have been taken through it -- and it is quite clear, in our submission, that there is a substantial body of material. Whatever was the position when bail was granted by Mr Justice Smedley back in February --

55. **LORD JUSTICE ROSE:** But there was a substantial body of material before the first trial.

56. **MR CAMDEN-PRATT:** My Lord, there was.

57. **LORD JUSTICE ROSE:** But he was on bail and turned up.

58. **MR CAMDEN-PRATT:** He was on bail and turned up, no doubt in the belief that a jury would acquit. We are now in a position where a man has faced a trial, where a jury has convicted him, and he has served a substantial period of imprisonment. We say that the circumstances are different and the pressures must be much more increased upon a person who has faced a trial and been convicted. It is not a case where the conviction, although your Lordships have ruled it unsafe, is one that is not understandable given the weight of the evidence.

59. **MR JUSTICE CURTIS:** But where are the substantial grounds on which we could find that he would, if released, not surrender?

60. **MR CAMDEN-PRATT:** It would have to be on the basis of the gravity of the offence, the weight of evidence, the consequences for him of a conviction and the consequences of what happened last time. That would be the basis upon

which you would deal with it under the failing to surrender to custody. The second limb is the question of the risk of committing an offence. So far as that is concerned, the allegation of the Crown, as it remains, is that this appellant, with a sudden loss of temper, committed the most violent of crimes. You have heard statements which show that he has displayed such explosions of temper resulting in violence both to his wife and to Billie-Jo and to Annie.

61. **LORD JUSTICE ROSE:** (To the representatives of the press) Pausing there, what prosecuting counsel has just said is subject to the same order previously made under section 4 of the Contempt of Court Act, postponing publication until further order.

62. **MR CAMDEN-PRATT:** So that if the Crown are right in their allegation, the person that your Lordships are dealing with -- if that is right -- is a man who is very dangerous by reason of the very nature of the crime alleged and the way in which, if the Crown are right, it came about. So that is how we would put that limb.

63. The third limb in the Bail Act is interference with witnesses. The only way I would want to deal with that is simply this. It is quite clear that the witnesses in this case -- or the potential witnesses in terms of Charlotte and Annie -- are in a very difficult, vulnerable and sensitive position. They have, as you know, been written to by their father prior to this case with a view to their attendance to give evidence on his behalf. It is, in our submission, of the utmost importance that pressure on those witnesses should be of the most limited sort, and there can be no doubt that a change in circumstances of the sort that would be envisaged by his release on bail in the period pending the hearing of a trial, would exert pressure upon the family who may well be witnesses on the evidence you have heard. So we invite the court to say that in the circumstances of this case it is not appropriate that the position should change and that he should be granted bail. So the Crown objects on those three bases.

64. **LORD JUSTICE ROSE:** If -- and I do not by this indicate what our decision may be -- but if we thought bail was appropriate, would you have any objection to one surety of £250,000?

65. **MR CAMDEN-PRATT:** My Lord, I have not taken instructions on that. I have been told that there were to be three sureties and I have worked on the assumption that that was satisfactory, but I can take some instruction on that matter.

66. **LORD JUSTICE ROSE:** Can you conveniently do that?

67. **MR CAMDEN-PRATT:** I will try, yes. My Lord, we are in the position that in principle there is no objection to one surety, although it is something that we were not aware of.

68. **MISS MONTGOMERY:** It is just convenience. One is in Lourdes, so he is difficult to get hold of. The other one is in Worcestershire and would therefore have to be taken to a police station there. Since it represents an adequate protection, we suggest one for administrative convenience.

69. **LORD JUSTICE ROSE:** Mr Camden-Pratt, passions have run high on both sides in this case. Is there any fear for the defendant's safety if he were released?

70. **MR CAMDEN-PRATT:** There have been, I know, issues raised both inside and outside custody as to the concern for his safety, but I can go no further than those matters of which the court is probably aware. You know the family background -- the difficult background -- in this case.

71. **LORD JUSTICE ROSE:** Thank you. Miss Montgomery?

72. **MISS MONTGOMERY:** My Lord, can I deal with the last point first? In fact the risks to Mr Jenkins' safety in relation to this case are equally great in prison as they are out of prison. I do not need to explain the reason for that. But in any event there is, as I understand it, no life threat, and the fact that he will be living in Aberystwyth, well removed from the area --

73. **LORD JUSTICE ROSE:** Well, so far as in prison is concerned, is he on Rule 43?

74. **MISS MONTGOMERY:** No, he has not been on Rule 43 because it obviously means being effectively on your own. But he has been subject to terrible conditions for reasons your Lordships are no doubt only too familiar with. I do not go into the details.

75. So far as the failure to surrender is concerned, my Lords, this was a point that has been raised at least once before by the Crown who tried to have bail withdrawn at the point of committal. In fact, I would submit that so far as Mr Jenkins is concerned, looking at the matter dispassionately, his prospects at his retrial are much better than they were at the first trial because, as your Lordships have already observed, the scientific defence was at best a thin one and it is now, we would submit, a substantial one. So if any assessment were to be made by Mr Jenkins as to whether he should attend, fearing a conviction or an acquittal, he is more likely to attend now than he did before, and he did attend before. So in our submission the clearest possible way to rebut the inference which Mr Camden-Pratt asks you to draw is the fact that he has already attended and surrendered to a trial where it must have been appreciated the risk that he was running.

76. **MR JUSTICE CURTIS:** Was bail continued to verdict?

77. **MISS MONTGOMERY:** To verdict, yes, my Lord. He has had full appreciation of the case and how it has gone and still attends.

78. **LORD JUSTICE ROSE:** Speaking entirely for myself, Miss Montgomery, the aspect which causes me most concern is the witnesses because we have heard some evidence capable of construction of an attempt to influence Annie at an early stage. I appreciate the geographical gap, but there are aeroplanes.

79. **MISS MONTGOMERY:** My Lord, of course there are but, as your Lordship knows, he would not be permitted to take an aeroplane flight and whether he is in custody or out of custody, if he were minded to arrange for somebody else to do it, his presence in Wakefield or otherwise would not make any difference to the arrangements that could be made. But the important point which your Lordships might want to bear in mind is that, although you have referred to the letters being unsupervised, they have of course always been available to be read by Lois Jenkins and, although I did not take your Lordship to the evidence, she has in fact --

80. **LORD JUSTICE ROSE:** It was not the letters I had in mind. It was the incident during the first week after the murder.

81. **MISS MONTGOMERY:** My Lord, there was no incident, despite the greater ease of communication leading up to the first trial when the children remained in the UK. In my submission, there would be no purpose to such an approach now. What is likely to happen on trial, I expect -- and anyone hearing the judgment would have to form their own views -- is that the children will be asked if they will come. If they say “No”, an application will be made under section 23 because they are out of the country, which triggers the condition of a section 23 application, and the judge would then grant that on its merits. The case would then proceed having their video evidence rather than any requirement for them to give evidence live, and that completely obviates the danger of him making contact with them for that purpose.

82. **LORD JUSTICE ROSE:** Well, that presupposes that such an application is made, which it may be. But experience shows, as indeed happened at trial, it was not made.

83. **MISS MONTGOMERY:** Quite. It will certainly be made, having considered it before, I think in the circumstances it is likely that there will be no debate but that such condition would trigger itself if the girls do not wish to attend. As your Lordship knows, the danger of influence being brought to bear upon the children has been present throughout. If it were indeed the case that Annie were likely to be approached and cajoled and forced into giving false evidence, the opportunity and the desire to do it might have been even stronger for this Court of Appeal hearing than for any trial that was to come.

84. In my submission, whilst your Lordships of course are entitled to consider whether any inference can be drawn from conduct taking place during the first week of the investigation of this trial, you are also required to bear in mind the innocent explanation for that conduct given by Annie in her interviews, and indeed the innocent explanation for the Bexhill trip, accepted by Lois Jenkins,

and furthermore that thereafter, despite the pressures that may have existed to seek to influence Annie, nobody, either before the first trial or this Court of Appeal, has in fact done anything of that sort. In those circumstances history provides the strongest possible evidence that your Lordship's inference is not justified.

85. **LORD JUSTICE ROSE:** Thank you.

(The court conferred)

86. **LORD JUSTICE ROSE:** We are not going to deal with the bail application today because, before it is dealt with, we take the view that further information is required on two aspects of the matter. We therefore order that there be prepared within fourteen days a report by the police in relation to the extent of the risk, if any, to the defendant if he is released on bail; and secondly, within the same timescale, we require a medical report upon the defendant as to his present state of mind in the light of today's events. When those two reports are to hand within the timescale which we have indicated, an application for bail can be made either to the judge in chambers in this building, or, if by then the identity of the judge is known, to the trial judge.

87. Miss Montgomery, I direct the question to you, although it equally applies to Mr Camden-Pratt, we have had an inquiry from the media as to whether there is to be any further restriction, other than that already imposed, in relation to Mrs Jenkins' evidence and Mr Camden-Pratt's observations by reference to the terms of the judgment that we have given. I am bound to say it had not occurred to me, because I have been at some pains to sanitise the judgment so far as possible, that there would need to be any further order. But if counsel thinks otherwise, I would welcome their submissions.

88. **MISS MONTGOMERY:** My Lord, so far as your Lordships' judgment is concerned, I do not think we have any concerns about it.

89. So far as what has happened now -- the orders you have made on bail -- I would seek reporting restrictions on that, otherwise the media will no doubt pursue the issues that your Lordship is seeking to investigate.

90. **LORD JUSTICE ROSE:** May I suggest that an appropriate form of reporting -- and if necessary I will make a direction to ensure it -- is that the question of bail was adjourned?

91. **MISS MONTGOMERY:** Yes.

92. **LORD JUSTICE ROSE:** Without further reference to why. Is that clear? We make no order in relation to the report of the judgment. That also, I think, is clear.

93. **MISS MONTGOMERY:** Other than where the judgment alludes to incidents of

violence involving Annie, which may not come out in the event of the video being played. So insofar your Lordship has already restricting the reporting of --

94. **LORD JUSTICE ROSE:** It is Mrs Jenkins' evidence that I have restricted the reporting of. I did use the word “violence” because that was necessary for the context, but it does not say by whom or in whose direction.

95. **MISS MONTGOMERY:** No, but it is clearly not evidence that is going to be missed at trial and, although your Lordship's measured language would not necessarily cause any risk of prejudice, as you know sometimes language used by judges finds greater substance --

96. **LORD JUSTICE ROSE:** That is perhaps a good reason for the press actually to report what we said rather than an interpretation of something we might have said, which would be a good experience for everybody.

97. **MISS MONTGOMERY:** Well, my Lord, I am happy to go in hope rather than experience, but there surely could not be any difficulty, given that the purpose of your restriction on reporting of violence as between Sion Jenkins and Lois Jenkins and the children of the family is to ensure that any jury, who will be retrying the case very shortly, do not have any information about that. It is information that would not normally be admitted at trial.

98. **LORD JUSTICE ROSE:** What I propose to do, Miss Montgomery, is to issue an invitation to the press not to report a reference to violence in the course of the judgment. I am not making an order, but I think the ladies and gentlemen of the press appreciate the point. There must be no contamination -- or the possibility of contamination -- of a retrial. So insofar as the word “violence” was used twice in the course of the judgment, I invite you not to report that.

99. **MISS MONTGOMERY:** My Lord, two administrative matters. One is the medical -- I assume psychiatric -- report that your Lordships want. Your Lordship may not have sat for such a long time as a puisne judge that you do not know this, but sometimes it is difficult to get a prison psychiatrist to produce a report in the relevant time.

100. **LORD JUSTICE ROSE:** That is why I hope I have made it clear that this report will be prepared within fourteen days.

101. **MISS MONTGOMERY:** Would your Lordships think it appropriate for us to arrange a psychiatrist to ensure that we obtain a report within that time?

102. **LORD JUSTICE ROSE:** Certainly -- as well as, yes.

103. **MISS MONTGOMERY:** Then the other administrative matter --

104. **LORD JUSTICE ROSE:** Forgive me one moment. We make it clear that the

doctor making the report should have access to any medical notes there may be at the prison where the defendant has hitherto been held.

105. **MISS MONTGOMERY:** Yes. Then the only other matter, which probably does not require an order, is that I am going to invite the prosecution to return the privileged material and any notes they have made in connection with it. Can I just have liberty to apply in case there is any difficulty?

106. **LORD JUSTICE ROSE:** Yes, certainly -- to me personally. I do not think we need a full court.

107. **MISS MONTGOMERY:** No.

108. **LORD JUSTICE ROSE:** Anything else?

109. **MISS MONTGOMERY:** My Lord, no.

110. **LORD JUSTICE ROSE:** Thank you very much.