Neutral Citation Number: [2025] EWCA Crim 1135

Case No: 202403291 B4

IN THE COURT OF APPEAL, CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT WOOLWICH
HH JUDGE JONATHAN MANN KC
T20220876

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/09/2025

Before:

LORD JUSTICE HOLROYDE,
VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
MRS JUSTICE MAY
and
MR JUSTICE MOULD

- -

Between:

EAC	**Appellant**
- and -	
THE KING	**Respondent**

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- -

Sasha Wass KC and Ranjeet Dulay (instructed by **Dobsons Solicitors**) for the **appellant**
Jane Osborne KC and Nicholas Alexander (instructed by **CPS Appeals and Review Unit**) for the **respondent**

Hearing dates: 26 June 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 2 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holroyde:

1. The appellant was convicted of two offences of cruelty to a person under 16 years, contrary to s1(1) of the Children and Young Persons Act 1933. On 7 October 2024 she was sentenced to concurrent terms of 4 years 6 months' imprisonment for each offence. Her applications for leave to appeal against her convictions and sentence were referred to the full court by the Registrar. At the conclusion of the hearing on 26 June 2025 we refused the application for leave to appeal against conviction but granted leave to appeal against sentence, quashed the sentences imposed below and substituted for them concurrent terms of 3 years' imprisonment. We indicated that we would give our reasons in writing at a later date. This we now do.

2. The victim of the offences was the appellant's daughter, aged 2 years 9 months at the material time, whom we shall call "C". The court has directed, pursuant to s45 of the Youth Justice and Criminal Evidence Act 1999, that whilst C is under the age of 18, no matter may be included in any publication if it is likely to lead members of the public to identify her as a person concerned in these criminal proceedings. In order to give effect to that direction, the appellant's name has been anonymised for listing purposes by using the randomly-chosen letters EAC. We direct that nothing may be included in any report of this appeal which names or may otherwise lead to the identification of the appellant, who must be referred to only as EAC. We shall refer to relevant hospitals by letters of the alphabet, in order to avoid a risk that using their correct names may lead to the identification of C.

Summary of the background facts:

3. The appellant, aged in her mid-20s at the material time, has three children, of whom C is the youngest.

4. When C was only 6 weeks old, she suffered a brain injury which left her blind and severely disabled with cerebral palsy. She was admitted to hospital on a number of occasions. She had feeding difficulties. From September 2018 she was fed through a jejunal tube which went into her small bowel, the jejunum, without going into the stomach. Food was slowly pumped by a machine through the tube. She was later fitted with a gastric bag which received stomach secretions.

5. Another consequence of C's cerebral palsy was that on occasions she suffered dystonia, a condition which involves muscle spasms.

6. In late 2019, C was significantly underweight. She was admitted to the "D" hospital on 20 November 2019. Nine days later, C was transferred to the "E" hospital.

7. The appellant spent long periods at the E hospital each day until her arrest on 12 December 2019. Other members of the family visited C at night time.

The criminal proceedings:

8. The appellant was not charged until November 2022, nearly three years after her arrest. She pleaded not guilty to both charges, and a trial date was fixed for November 2023. The defence indicated an intention to adduce expert evidence, and directions were given for the service of that evidence, and of any expert evidence which the prosecution

wished to adduce in response. In the event, no defence report was served. In the meantime, however, the prosecution had instructed an expert witness, Dr Bunn, whose report was served on 5 October 2023. The defence sought disclosure of medical records and other material to which Dr Bunn's report referred. There was delay, as a result of which the November 2023 trial date had to be vacated.

9. The prosecution provided disclosure of the medical evidence by way of a hyperlinked list, which we understand corresponded to the list of medical evidence identified by Dr Bunn in her report.

10. Dr Bunn had been provided with a bundle of witness statements. In her report she referred to a chronology, which she set out in an appendix. The first entry related to an outpatient consultation with a speech and language therapist on 6 September 2017, when C was aged 7 months; the last was a doctor's letter dated 1 March 2022. Dr Bunn stated that she had "extracted information from the medical records that I felt was less well represented in the witness statements".

11. The trial, in the Crown Court at Woolwich before HH Judge Jonathan Mann KC and a jury, was heard in August 2024. It lasted for four weeks.

Summary of the evidence:

12. Each of the two counts alleged wilful ill-treatment of C "on or before the 13th day of December 2019".

13. The particulars of the offence charged in count 1 alleged that the appellant had wilfully ill-treated C, in a manner likely to cause C unnecessary suffering or injury to health, by "interfering with the gastronomy and PEG-J tubes restricting the administration of feed" to C. A note on the indictment explained that this count related to

> "Detaching the giving set causing milk to leak from the gastronomy tube.
>
> Clamping/unclamping of the gastronomy and PEG-J tubes when not appropriate to do so.
>
> Physically kinking/pinching the gastronomy and PEG-J tubes preventing it from functioning properly."

14. The ill-treatment alleged in the particulars of the offence charged in count 2 was that the appellant had deliberately administered fluids to C's PEG-J feeding and/or gastro tube –

> "… resulting in excessive aspirates to be collected in the gastric losses bag. This caused the medical team to incorrectly calculate the amounts of replacement fluids to be administered to [C]"

15. The prosecution adduced evidence in support of those charges from a number of nurses and members of hospital staff, and from the mother and grandmother of another patient on the ward, who had become concerned about the appellant's behaviour and had used their mobile phones to film her actions.

16. In brief summary, the prosecution case on count 1 included the following features:

i) Whilst C was an in-patient at the E hospital, the pump that should continuously administer feed to her frequently sounded an alarm to indicate that it was blocked. The evidence of medical professionals was that this was unusual. After a time, a log was kept of who was present and what (if anything) was seen when the alarm sounded.

ii) The alarms predominantly sounded during the daytime, when the appellant was with C. At night, when one of C's grandparents was present, alarms were rarely recorded.

iii) The records showed that on occasions when the alarm sounded, nursing staff found that the tubes carrying the feed were kinked or bent, preventing the feed from flowing and causing a blockage.

iv) On occasions the appellant was observed disconnecting the feed tube, leaving the feed to seep into a tissue and not reach C.

v) The appellant would sit with C on her lap or between her legs and with a blanket over them both. Her hands, frequently under the blanket, were seen by nurses to be moving or "fiddling". This happened even when the nursing staff asked the appellant to uncover C and/or to keep her hands visible.

vi) After the appellant had been arrested, she was prohibited from having unsupervised access to C. It was noted that C absorbed nutrition well and gained weight rapidly. By February 2020 the jejunal feeding had stopped and C was taking nutrition orally.

vii) Although the appellant suggested that C's dystonia had caused the difficulties with her feeding, Dr Bunn provided expert evidence that dystonia (which affects the skeletal muscles of the limbs) could not have affected the muscles of the stomach and small bowel in such a way as to prevent the administration of feed.

viii) Dr Bunn further gave evidence that there was no natural, organic or medical explanation for C's failure to absorb nutrition and to gain weight.

ix) On 4 December 2019 C was prescribed the drug Gabapentin. From 8 December, the pump ceased to alarm. It was the defence case that the improvement was attributable to the Gabapentin. Dr Bunn, however, discounted that as an explanation. Her evidence was that the prescribed dosage of Gabapentin was not strong enough to treat dystonia, and in any event Gabapentin would normally take ten days to take effect, not four. Moreover, C continued to improve steadily after the Gabapentin was withdrawn on 31 December 2019.

17. The prosecution invited the inference that the blockages of the feed tube, and C's failing to gain weight, were caused by the appellant interfering with the administration of the feed.

18. The defence case was that the feeding pump had frequently occluded over a period of more than a year before C's admission to hospital, when C was predominantly being cared for by her grandmother and the appellant: the pump would block, the alarm would sound, and the pump would record that feed was being delivered when in fact it was

not. The jejunal tube had had to be changed at least every six months. The appellant, and members of her family, gave evidence to that effect, and stated that problems with the pump occurred whether the appellant was present or not.

19. The appellant suggested that the occlusions of the feeding tube had been caused by C's dystonia. She further suggested that the pump had ceased to alarm after 8 December 2019 because of the prescription of Gabapentin with effect from 4 December.

20. The prosecution case in relation to count 2 was that the appellant had added fluid to the gastric drainage bag, with the result that medical staff administered additional fluids to C, thereby unwittingly exposing her to a risk of overhydration which could lead to organ failure. Features of the prosecution evidence included the following:

    i) Overnight, when the appellant was absent from the ward, there was almost no drainage, and it was rarely necessary to empty the gastric drainage bag; but when the appellant was present during the daytime, the volume of fluid in the bag was greatly increased, and it was sometimes necessary to empty it twice within one hour.

    ii) The appellant's "fiddling" with her hands beneath the blanket which covered C often coincided with the gastric drainage bag being full.

    iii) The fluid in the bag was often lighter in colour, and colder, than would be expected of fluid discharged from C's body.

    iv) The relatives of another patient on the ward made video recordings of the appellant using a syringe to inject fluid from a cup into the gastronomy port, and of the appellant appearing to squeeze C very hard whilst looking at the gastric drainage bag.

    v) Dr Bunn's evidence was that for a child of C's weight, the gastric losses which had daily been recorded (up to a maximum of 1,039 ml) could not occur naturally, being almost equal to the fluid and feed administered.

    vi) During the period when the appellant was prohibited from having unsupervised contact with C, the volume of fluid in the gastric drainage bag decreased substantially. By 22 December 2019, the drainage was less than 10ml per day.

21. The defence case in relation to count 2 was a denial that the appellant had artificially inflated the contents of the gastric drainage bag, and a denial of responsibility for C's high gastric losses. The appellant gave evidence that she had occasionally used boiled water to flush C's gastronomy, which she believed she was not only permitted, but encouraged, to do.

22. It was further the defence case that there had been many occasions when a high quantity of gastric losses had been recorded. The appellant and her witnesses gave evidence that medical professionals had commented on this, but had never suggested that there was a danger to C's health or that the quantity of gastric losses was impossibly high. The appellant suggested that the large amounts of gastric losses occurred naturally.

Dr Bunn's evidence:

23. In her report, Dr Bunn listed materials under 11 categories: for example, electronic patient records from the E hospital. It was initially intended that she would give her evidence in two parts, first dealing with C's history and condition, and then secondly (later in the trial) presenting and explaining her conclusions regarding the pump malfunctions, gastric secretions and the effect of Gabapentin. In the event, she was recalled to give evidence on a third occasion, in order to give her opinion in respect of video recordings of C, taken at home before her admission to the E hospital, which the appellant had adduced. The appellant relied on these recordings, one of which was said to show C having dystonic spasms, in support of her case, that the pump alarms were caused by C's dystonia.

24. The defence challenged the reliability of Dr Bunn's evidence, in particular on the ground that her analysis was based only on what had happened from 29 November 2019 and did not take account of the factual position before that date. In cross-examination after the second part of her evidence, Dr Bunn was asked to confirm that the only hospital notes which she had seen were those relating to the period from the time of C's admission to the E hospital. She replied:

> "I have only seen medical history from the time she presented to the [E hospital] on 29 November. I've seen some letters about her previous history, but I've not seen the actual medical records."

25. After Dr Bunn had given evidence, further Agreed Facts were put in by the defence. These set out, amongst other things, episodes of increased gastric secretions and pump alarms, all of which had been taken from the medical notes disclosed in the evidence and noted in Dr Bunn's report.

26. In her closing speech to the jury, Miss Wass KC emphasised that Dr Bunn's knowledge of C's medical history was incomplete, and that Dr Bunn had not considered medical materials relating to C's earlier admissions to hospital. The jury were invited to conclude that Dr Bunn's opinions and conclusions were therefore unreliable.

The jury's question:

27. No criticism is made of the judge's directions of law to the jury, or as to any aspect of his summing up.

28. The jury retired to consider their verdicts on 28 August 2024. On 29 August, they asked two questions. The first of those questions is irrelevant for present purposes. The second asked:

> "What medical notes did Dr Bunn see, were they only from [the E hospital], what date were the notes?"

29. Submissions were made by counsel as to how that question should be answered. The judge took the view that it would be misleading to answer it by simply reading the answer given in cross-examination which we have quoted at paragraph 24 above. Having considered the competing submissions, the judge brought the jury into court, answered their first question, and continued:

> "Now, second question, 'What medical notes did Dr Bunn see? Were they only from the [E hospital]? What dates were the notes?' So, she gave evidence about her notes on a number of occasions. Firstly, when she first gave evidence, the first time she gave evidence in very general terms about what she saw, and I will remind you of that. 'I have seen the medical records', pause, 'the hospital system that included all the entries from her hospital admissions, and I also saw the notes made by all the doctors and nurses that dealt with her during her admission in 2019'. Now, just to expand on that slightly, and give you exact dates, she was shown e-notes from 7 July 2017 to 21 February 2022, from the [E hospital]. And that is 307 pages, though some of that may have been repetition. She was also shown e-patient records from June 2019 to June 2022, that was 636 pages, though again some of that may be repetition. She was not shown notes from the [D hospital], and she also said and was shown copies, various discharge letters from outpatients. She was asked about that in cross-examination, and I am going to remind you of precisely what she said, but that is the - it is agreed that is what she was shown. So, there are two parts to this: Cross-examination it was on Wednesday, 14 August, morning and afternoon, so cross-examination by defence counsel: 'Would you accept you have not seen the entire medical history of the child?' 'Yes, I absolutely accept that. I've only seen the medical history from the time she presented to the [E hospital] on 29 November, I've seen letters - some letters about her previous history, but not the actual medical records'. So, question, 'This child has been seen by many doctors and hospitals over her short life by the time she came to the [E hospital] on the 29th, agreed?' 'I agree'. 'Do you agree on each of the occasions that she was brought to the hospital this was a result of a parent, whether mother or father, bringing the child to the attention of medical professionals?' Answer, 'Like I said, I've not seen the medical records from the other hospitals, so I can't comment on that'. Later that afternoon, 'And that brings me to the second area that you're giving an opinion on, and that's the gastric losses, now again your analysis has really been in a window, a small window, of [C's] life between 29 November until December some time'. We know it is a little bit wider than that. 'You have not, as I understand it, familiarised yourself with the medical records of her gastric losses prior to that period, have you?' She answered, 'I've not been given any documentation about her gastric losses prior to that period'. Well, you know the periods that she was shown material from, but that is what she said in cross-examination."

30. On 30 August 2024 the jury returned guilty verdicts on both counts. Sentencing was adjourned.

The sentences:

31. The appellant, now aged 31, had only one previous conviction, for an offence of shoplifting to which she had pleaded guilty in 2022.

32. At the sentencing hearing, the judge was assisted by a pre-sentence report; a psychiatric report; a psychological report; character references relating to the appellant; letters from the appellant's two older daughters; and a letter from the appellant herself.

33. In his sentencing remarks, the judge said that the prosecution case began "in one sense" when C was admitted to hospital at the end of November 2019, and that the charges referred to a period on or before 13 December 2019, but –

> "… the clear evidence, made manifest by the description of [C] when she was admitted as being extremely malnourished, create an almost overwhelming inference that she was being deprived of feed before she was finally admitted in November of 2019. Given that once you were unable to see [C] unsupervised, she regained weight very quickly and regained full health very quickly. It's difficult to conclude otherwise."

34. The judge highlighted that the offending was repeated multiple times every day, even in the face of warnings and instructions from nurses. It was, he said deliberate and determined. He considered the issue of dangerousness but held that an extended sentence would not be proportionate.

35. The judge identified the principal mitigation as being the delay in the case coming to trial; the effect of the appellant's prosecution and conviction on her relationship with her children; the effect of imprisonment on her mental health; and the loss of her accommodation, support network and pets which would result from her imprisonment. He said, however, that he could not avoid the conclusion that if the appellant's actions had not been observed by others, her continued activities would have led to C's serious injury or worse.

36. Referring to the Sentencing Council's definitive guideline relating to offences of cruelty to persons under 16, the judge placed the offences into category B1. He held that the offences involved category B high culpability because there were multiple incidents of serious cruelty and a deliberate disregard for C's welfare. He held there was category 1 serious harm, because the effect on C was very significant in the short term, though she was now flourishing. The starting point was therefore 6 years' custody, with a range from 4 to 8 years.

37. The judge also referred to the Sentencing Council's guideline on sentencing offenders with mental disorders, but observed that there did not appear to be any suggestion that the appellant's culpability was reduced by a direct link between her mental health problems and her offending.

38. Taking into account that the appellant had seriously affected the health of her vulnerable child in two different ways, the judge concluded that the appropriate total sentence, before consideration of mitigation, would have been six years' imprisonment. Reflecting the mitigation which we have summarised, the judge imposed concurrent sentences of 4 years 6 months' imprisonment.

The grounds of appeal against conviction:

39. The appellant submitted that her convictions are unsafe on two grounds: first, because the judge when answering the jury's question erred in providing information which had not been adduced in evidence, and which went to a central issue as to the reliability of the prosecution's expert evidence; and secondly, because the judge demonstrated bias and hostility to the defence, the appellant, her witnesses and the intermediary who assisted her.

40. In support of the first ground, Miss Wass submitted that the jury's question went to the heart of the defence criticism of Dr Bunn, namely that Dr Bunn did not have the full picture when drawing her conclusions, which were unreliable as a result. When asked whether she accepted that it was in interests of justice to read the list of what had been considered, since it was a neutral and incontrovertible record, Miss Wass suggested that there was a difference between what Dr Bunn had been sent and what she had considered. She submitted that the judge should have restricted himself to reminding the jury of the evidence which had been given, namely the general statement made by Dr Bunn during her evidence in chief and the response given by her in cross-examination (quoted in paragraph 24 above). Miss Wass observed that although Dr Bunn could have been asked by the prosecution to give the detail of the material upon which she based her report, she had not been, either during her evidence in chief or in re-examination.

41. As to the second ground, Miss Wass submitted that there were many examples of the judge showing impatience with the defendant. She readily accepted that she could not have complained about one occasion alone, but submitted that the judge's repeated interventions, taken together, conveyed an impression of hostility to the defendant and to the defence case, which would have impacted upon the jury's decisions. Miss Wass gave a number of examples, including what she submitted was the judge displaying a wholly unsympathetic attitude towards the appellant when there was a photocopying problem as the appellant was about to start giving her evidence; preventing counsel from showing the whole of a short video recording which the defence sought to adduce as evidence of the appellant bringing C's condition to the attention of medical professionals; speaking sharply to the intermediary when she went to pick up some papers which the appellant had knocked over in the witness box; asking questions of C's grandmother in a manner which gave the impression that the witness was dishonest; and interrupting defence witnesses in a manner which the judge had not adopted with prosecution witnesses, and which gave the impression that their evidence was not significant. Miss Wass pointed to the fact that when a cousin of the appellant was called as a character witness, and began to speak effusively about the appellant's qualities as a mother, the judge interrupted the witness and told her not to make a speech. Miss Wass also submitted that when Dr Bunn was called to give evidence for the third time, the judge prevented Miss Wass from asking legitimate questions in cross-examination.

42. For the respondent, Miss Osborne KC relied in relation to ground 1 on the decision of this court in *R v Dunster* [2021] EWCA Crim 1555, [2022] 1 Cr. App. R. 12 as authority that a jury can be given further information where the interests of justice require. Miss Osborne submitted that the question asked by the jury gave rise to a concern that they may have been mistaken as to the material which Dr Bunn had considered, so that it was incumbent on the judge to avert that possibility. She argued that the correct position was clear to all parties, as Dr Bunn had clearly set out in her report what she

had seen and all of that material had been disclosed, by hyperlinked list. The two most important pieces of information she had noted were the e-notes and the electronic records from the E hospital. The judge reminded the jury of the evidence that she had seen no other records, in particular those from the previous admission at the D hospital. Since that was the point being relied upon by the defence in Miss Wass's closing speech, Miss Osborne submitted that there was no prejudice to the defence by the list from Dr Bunn's report being read to the jury. To the extent that the judge went beyond the list by giving the date span of the notes from the E hospital, Miss Oborne submitted that the dates were readily apparent from the e-notes and electronic records and were in that sense equally incontrovertible.

43. As to ground 2, Miss Osborne submitted that many of the judge's interventions occurred in the absence of the jury. She suggested that those which were made in the presence of the jury were of a type commonly experienced during a trial, and made submissions as to the specific instances on which the appellant relied as examples. Miss Osborne submitted that the judge had made significant adaptations to accommodate the defendant's vulnerabilities, as the jury would have seen: the appellant was permitted to sit with counsel, rather than in the dock; she was given the assistance of an intermediary whilst giving evidence; and she was permitted to have a support dog with her whilst giving evidence.

The grounds of appeal against sentence:

44. Miss Wass submitted that the total sentence is manifestly excessive, in particular because the judge erred in his categorisation of both culpability and harm, and because the judge failed to give any or sufficient weight to the appellant's mitigation.

45. In support of the first ground of appeal, Miss Wass submitted that the judge should have found category C medium culpability, because although there were multiple incidents between 29 November and 8 December 2019 they were not incidents of serious cruelty. She further submitted that the appellant was to be sentenced only for her actions during that time, not upon an inference as to any earlier activity. Miss Wass argued that the appellant did not show a disregard for C's welfare: rather, she repeatedly asked for help from the nursing staff. In answer to a question from court, Miss Wass confirmed that there was nothing which she relied on in the psychiatric and psychological reports as pointing to a reduction in culpability.

46. As to harm, Miss Wass pointed out that the prosecution in its sentencing note had identified harm as falling into category 2, and she submitted that the judge had erred in lifting it to category 1. Miss Wass argued that there had been no up to date medical evidence served by the prosecution for the purpose of sentence, and that the evidence of the appellant and of C's father and grandfather was that C was thriving, albeit with all the physical disadvantages attendant on her original brain injury.

47. Miss Wass submitted overall that the offences should at most have been placed into category B2, for which the guideline indicates a starting point of 3 years' custody and a range from 2 to 6 years.

48. As to ground 2, Miss Wass submitted that the judge failed to give sufficient weight to the long delay before the case came to trial, the evidence as to the appellant's mental health, and the evidence as to her relationship with all three of her children. Miss Wass

pointed out that nearly three years had passed between the appellant's arrest and the decision to charge her, and that almost five years passed between the commission of the offences and the sentencing hearing. The appellant had been on bail for about four year eight months, during which time she had managed to maintain a strong bond with her children. The two older children (who were living with their father) had written letters asking the court not to take their mother away from them. Miss Wass pointed to the psychiatric and psychological reports indicating that custody would have a detrimental effect on the appellant's autism and mental health, as it had done when she was remanded in custody for about three week following her convictions.

49. Miss Osborne submitted in response that because C was very poorly upon admission to hospital, actions which might not have caused serious harm to a robust child had the potential to cause very serious harm to C. Miss Osborne accepted that a single occasion of kinking or disconnecting the feeding tube would not on its own have caused serious harm, but submits that the repeated incidents, taken together, amounted to a prolonged incident of serious cruelty. She further submitted that the appellant's repeated acts in any event showed a deliberate disregard for the welfare of C, such that category B culpability was squarely engaged.

50. As to harm, Miss Osborne pointed out that the prosecution in its note had indicated "at least" category 2 harm, and she submitted that the judge had been entitled to place harm into category 1. Dr Bunn's evidence was that, if the appellant's actions had continued, the impact upon C would have been very serious, and the judge had concluded that the appellant must have intended to cause serious harm.

51. We are grateful to both counsel. Reflecting on their submissions, we reached the following conclusions.

Analysis – the appeal against conviction:

52. In *Dunster*, the court considered earlier case law and at [32] held that there is no longer an inflexible, absolute rule that no further evidence can be given to a jury after they have retired. A judge must instead consider what the interests of justice require. The court gave the following guidance:

> "As the decision in *Khan* itself demonstrates, it is necessary ultimately to consider whether there was some prejudice which renders the verdicts of the jury unsafe. It follows from all this that a judge considering whether to permit the jury to be given some new information in any form after their retirement must consider the matter not on the basis of some absolute rule, but on what the interests of justice require. When balancing the interests of justice, it will be important to assess the importance of the new material and to give particular, probably decisive, weight to any real possibility that the absence of an opportunity to deal with it evidentially or in closing submissions has harmed the interests of the defendant to any extent. It will not be possible at that stage to reopen the evidence generally or to permit further speeches to be made. If admission of evidence at that stage might disadvantage the defendant because further evidence or submissions are in fairness required, then the choice will be between refusing the request for new information and carrying on, or discharging the jury so that the new material can properly be addressed in the course of a retrial. The situations where this problem may arise will be many and varied and there is no absolute rule to guide the trial

judge. On appeal this court will be concerned only with the safety of the conviction, which includes deciding whether or not the trial was fair to the defendant. None of this means that the parties should have a chance to put in whatever new evidence they like after the jury has retired. The default position remains firmly that evidence should be placed before the jury during the parties' cases and not at any other stage. It is likely that new information will only be found to be in the interests of justice at that very late stage in the case on very rare occasions and where in particular:
1. It answers a question asked by the jury;
2. It is neutral or at least incontrovertible; and
3. It is clear that a defendant is not in any way disadvantaged by the stage at which it is admitted."

53. Applying those principles to the circumstances of the present case, we were satisfied that the judge was entitled to take the course he did, and that there was nothing in the first ground of appeal which even arguably cast doubt on the safety of the convictions. The key considerations, in our view, were these:

a) With the benefit of hindsight, it is unfortunate that Dr Bunn was not asked, either during her evidence in chief or in re-examination, to state more fully the medical records and other material she had seen. However, Dr Bunn had listed the materials which she had available to her when preparing her opinion. There was no room for doubt as to what the material in that list was: she had identified it, and it had been uploaded to the DCS. Whilst it is true that Dr Bunn's list did not specify the dates of the e-notes and electronic patient records, we regarded that as immaterial: the dates must have been immediately apparent on looking at the bundles concerned, and a reference to the materials without giving those dates would have invited an obvious follow-up question from the jury. It follows that what the judge said to the jury was materially correct and incontrovertible. The judge did not, for example, mistakenly suggest that Dr Bunn had received materials which were not included in her list.

b) As we understand it, it was not suggested that Dr Bunn's list was anything other than an accurate record of what was available to her.

c) Nor was it suggested that Dr Bunn had overlooked or failed to refer to anything in the listed material which could have assisted the appellant.

iv) Dr Bunn readily accepted that she had not seen everything relating to C's earlier hospital admissions. Her evidence that the records held by the E hospital included some discharge letters and other documents relating to previous admissions was factually correct. True it is that her evidence did not identify precisely what those letters or other documents were; but she could have been asked for such details if there was any point the defence wished to make.

v) The defence were entitled to, and did, emphasise the limits of Dr Bunn's knowledge of C's earlier medical history. Miss Wass had been able to cross-examine Dr Bunn, if she wished, about anything in the earlier medical records which it was suggested could affect Dr Bunn's opinion. Nothing which the judge said in answer to the jury's question in any way undermined the defence point: on the contrary, the judge rightly reminded the jury of the evidence on which the defence particularly relied.

54. In those circumstances, we were satisfied that the appellant was not in any way disadvantaged by the answer which the judge gave to the jury's question, and that the judge could not properly be criticised.

55. As to ground 2, Miss Wass realistically acknowledged that none of her individual points of criticism could assist her if viewed in isolation. The issue for us was whether the convictions are unsafe because the overall effect was to undermine the appellant's case or to suggest to the jury that the judge was supportive of the prosecution and dismissive of the defence case. In considering that issue, we were willing to assume in the appellant's favour (though without deciding) that all of the descriptions which Miss Wass gives of the judge's tone and manner are accurate. But even making that assumption, we could not see any basis for saying that the convictions are even arguably unsafe. This was a trial of some length. No criticism was made of the content or tone of the summing up. There was no basis for saying that the judge was deliberately trying to undermine the defence case. As to whether he did so unintentionally, we recognised, of course, that Miss Wass has assisted us with examples rather than with a comprehensive list of every remark by the judge which might be criticised; but the examples chosen were no doubt those which are said to be most significant. They amounted to a selection of short passages, at different times during the trial, which in our view could not be said to have influenced the jury's view of the evidence or otherwise to have prejudiced the fair trial of the appellant.

56. For those reasons, we were satisfied that there is no arguable ground of appeal against conviction.

Analysis – the appeal against sentence:

57. Turning to the grounds of appeal against sentence, we took the view that the judge had been faced with a difficult sentencing process. The appellant was on any view guilty of serious crimes against a defenceless child. C should have been safe in her mother's arms and in a hospital setting. Instead, she was subjected to repeated, deliberate acts of harm, which the judge could properly find would have continued if they had not been stopped by the appellant's arrest. On the other hand, the appellant clearly had a significant amount of personal mitigation; and her mental health and autism issues, though of limited significance in relation to her culpability, were highly relevant to the impact of imprisonment on her, as compared to its impact on other prisoners.

58. With respect to the judge, we were troubled by his reference to what had happened before the indictment period began. The fact that C was seriously underweight at the time of her admission to hospital was a relevant consideration, because it meant that the offences were directed against a frail and vulnerable child; but it is important to be clear that the appellant was only to be sentenced for the proven offending, which was limited to a comparatively short period.

59. With reference to the sentencing guideline, we were satisfied that the judge was correct to place culpability into category B, for two reasons. First, the repeated individual acts of kinking or bending the tube, or altering the contents of the drainage bag, could in our view properly be regarded as "multiple incidents of serious cruelty", which is one of the factors indicating high culpability. Secondly, and in any event, the appellant had undoubtedly acted with "deliberate disregard for the welfare of the victim", another

high culpability factor. However, that high culpability offending was, as we have said, committed over a comparatively short period.

60. We rejected the submission that the judge should have placed harm into category 3. The factors indicating that category are "little or no psychological, developmental, and/or emotional harm" and "little or no physical harm". Neither of those factors could be said to apply to the circumstances of this case. We saw some force in the argument that harm might be placed into category 2 on the basis of "a high likelihood of category 1 harm being caused", and we noted the category B2 starting point and category range referred to in paragraph 47 above. However, the judge was in our view entitled to find category 1 harm, on the basis that C's failure to take nutrition and to gain weight was "serious developmental harm" or "serious physical harm" . But if putting the case into that category, the judge should in our view have treated it as a case falling towards the lower end of the range covered by category 1 harm.

61. For that reason, and also keeping in mind the limited duration of the offending, the judge should have made an initial downwards adjustment from the category B1 starting point. In our view, an initial adjustment from 6 years to 4 years 6 months was appropriate.

62. There was, as the judge rightly recognised, significant mitigation. The judge reflected that by making a substantial reduction of 18 months from his provisional sentence. We were not persuaded that he was bound to make a greater reduction.

63. However, the combined effect of the initial adjustment of the starting point, followed by the reduction for mitigation, should have been a total sentence of 3 years' imprisonment. We therefore concluded that the total sentence of 4 years 6 months' imprisonment was manifestly excessive.

Conclusion:

64. It was for those reasons that we concluded that the application for leave to appeal against conviction must be refused, but that leave to appeal against sentence should be granted, the sentences imposed below quashed, and concurrent sentences of 3 years' imprisonment on each count substituted.