**CODING SCHEME**

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| **SAMPLE DESCRIPTION** | |
| 1. Case | Henderson v R. [2010] EWCA Crim 1269 |
| 2. Date of appeal hearing | 220107 |
| 3. Date of original trial/conviction | 160307 |
| 4. Keywords found in case | 5 |
| 5. Decision *Provide quote if short, otherwise summarise* | 1 |
| 6. Number of pages | 23 |
| **DEFENDANT DEMOGRAPHICS (code as 99 if not stated and cannot be inferred)** | |
| 7. Defendant’s gender? | 1 |
| 8. Defendant’s age (at time of offence)? | 99 |
| 9. Defendant’s nationality (at time of offence)? | 2 |
| 10. Defendant’s employment status (at time of offence)? | 99 |
| 11. Defendant’s education level (at time of offence)? | 99 |
| 12. Defendant’s relationship status (at time of offence)? | 2 |
| 13. Did defendant have any children (at time of offence)? | 1 |
| 14. Was defendant homeless (at time of offence)? | 2 |
| **APPEAL CASE/HEARING FACTORS (code as 99 if not stated and cannot be inferred)** | |
| 15. When was appeal initiated? (e.g., post-trial, post-conviction, post-sentence, other) | 3 |
| 16. Who is appellant? (e.g., prosecution, defence, other) | 1 |
| 17. What is appeal against? (e.g., conviction, sentence, both, other) | 2 |
| 18. What are the grounds/reason(s) for appeal? *Provide quote if short, otherwise summarise* | Evidence from two experts demonstrating that the first brain injury sustained was more likely to be the result of an accident, rather than shaking, predisposing the victim to risk of a further accidental trauma. The possibility that the deceased had been dropped by the co-; whether what the experts described as the second brain injury was in fact not a separate injury, but a re-bleed (or secondary bleed) from an earlier brain injury. There are two grounds of appeal in respect of which permission has been given and which do not concern the medical evidence. First, it is contended that the judge wrongly admitted evidence from a homeless prevention officer. The second ground concerns the evidence of a cell confession from a serving prisoner, which the appellant submits was wrong of the judge to leave as evidence for the jury to consider |
| 19. Was fresh evidence presented at appeal? **19b.** If yes, was it fingerprint/DNA/Digital evidence? **19c.** If no, what was it? | Q19: 1  Q19b: 99  Q19c: Expert evidence from a Neuropathologist and Biomechanical Engineer |
| 20. Were new techniques used to re-examine old evidence at appeal? | 1 |
| 21. Were new fingerprint/DNA/Digital experts consulted by defence after original trial? | 99 |
| 22. Were new fingerprint/DNA/Digital experts consulted by prosecution after original trial? | 99 |
| 23. Did new prosecution fingerprint/DNA/Digital experts present evidence at appeal hearing? | 99 |
| 24. Did new defence fingerprint/DNA/Digital experts present evidence at appeal hearing? | 99 |
| 25. Was concern expressed at appeal hearing about qualifications, knowledge, skills or experience of any new prosecution fingerprint/DNA/Digital expert(s)? | 99 |
| 26. Was any concern expressed at appeal hearing about qualifications, knowledge, skills or experience of any new defence fingerprint/DNA/Digital expert(s)? | 99 |
| 27. Did prosecution and defence fingerprint/DNA/Digital expert conclusions disagree at appeal hearing? | 99 |
| 28. What were the main areas of disagreement between prosecution and defence fingerprint/DNA/Digital experts at appeal hearing? *Provide quote if short, otherwise summarise* | 99 |
| 29. Did fingerprint/DNA/Digital expert express his/her confidence in conclusion at appeal hearing? **29b.** If yes, how? *Provide quote if short, otherwise summarise* | Q29: 99  Q29b: 99 |
| 30. Were any new probabilities of fingerprint/DNA match mentioned at appeal hearing? | 99 |
| 31. For DNA evidence, were any new contamination/error rates presented at appeal hearing? | 99 |
| 32. For fingerprint evidence, were any (new) points of dissimilarity between sample and print presented at appeal hearing? **32b.** If yes, how many? | Q32: 99  Q32b: 99 |
| 33. Did appeal court raise concerns about prosecution or defence team misunderstanding fingerprint/DNA/Digital evidence? **33b**. If yes, who raised it? | 99 |
| 34. Did appeal court raise concerns about jury at original trial misunderstanding or having difficulty understanding fingerprint/DNA/Digital evidence? **34b**. If yes, who raised it? | 99 |
| 35. Did appeal court raise concerns about judge at original trial misunderstanding fingerprint/DNA/Digital evidence? **35b.** If yes, Who raised it? | 99 |
| 36. Did appeal court raise concerns about application of either wrong case law at original trial or ignoring right case law? If yes, who raised it? | 2 |
| 37. Did appeal court raise concerns about errors in judge’s summing up of case at original trial? **37b.** If yes, who raised it? | 2 |
| 38. Did appeal court raise concerns about judge’s instructions confusing jury at original trial? **38b.** If yes, who raised it? | 2 |
| 39. Did appeal court raise concerns about how fingerprint/DNA/Digital evidence was presented at original trial? 39b. If yes, who raised it? | 99 |
| 40. Did appeal court raise concerns that weight of fingerprint/DNA/Digital evidence was overstated in court by either prosecution/defence/judge at original trial? **40b.** If yes, who raised it? | 99 |
| 41. Did appeal court raise concerns about inadmissible evidence being presented at original trial? **41b.** If yes, who raised it? | 1 |
| 42. Did appeal court refer to any existing case law? **42b.** If yes, which? | Q42a: 1  Q42b: R v Harris & Others [2006] 1 Cr App R5; R v Reid & Ors [2009] EWCA Crim 2698; R v Holdsworth [2008] EWCA Crim 971; R v Bonython [1984] 38 SASR 45; R v Kai-Whitewind [2005] 2 Cr App R 31 |
| 43. Name of appeal judge(s) | Lord Justice Moses, Mrs Justice Rafferty and Mr Justice Hedley |
| 44. Name of lawyer(s) in appeal hearing, including who they represent | Mr N P Valios and Miss K Arden (instructed by Mackesys Solicitors) for the Appellant. Miss S M Howes and Mr B P J Kelleher (instructed by the Crown Prosecution Service) for the Respondent |
| **ORIGINAL CASE/TRIAL CHARACTERISTICS (code as 99 if not stated and cannot be inferred)** | |
| 45. Date of crime (first date) | 181005 |
| 46. Was defendant immediately treated as a suspect? **46b.** If no, then how was defendant immediately treated? | Q46: 99  Q46b: The deceased was initially subjected to an autopsy |
| 47. Were there other suspects (arrests)? | 2 |
| 48. Did the defendant plead guilty or was he/she convicted at trial? **48b.** If convicted, then was the jury verdict unanimous or other? | Q48: 1  Q48b: 99 |
| 49. Was this the first trial? | 1 |
| 50. What offence(s) was defendant convicted of/plead guilty to? | Count 1 Murder, and count 2 causing or allowing the death of a child |
| 51. Was there circumstantial evidence in the case? **51b.** If yes, what? | Q51: 1  Q51b: Eyewitness testimony from members of staff at a GP surgery and at a hospital |
| 52. Was there any other evidence in the case? **52b.** If yes, what? | Q52: 1  Q52b: The prosecution called five expert medical witnesses: a Histopathologist; Dr Harding, a Neuropathologist; a Professor of Pathology and Ophthalmologist; Paediatric Radiologist and a Consultant Paediatric Neurosurgeon. The Defence called a Home Office Pathologist; Biomechanical engineers; “Cell confession” from a serving prisoner who shared a cell with the appellant; direct independent evidence from a homeless Prevention Officer on co-defendants ability to appreciate risk |
| 53. Did defendant provide an alibi for whereabouts at time of crime? **53b.** If yes, was it corroborated? | Q53: 2  Q53b: 99 |
| 54. What was the defendant’s original sentence? | life imprisonment with a minimum term of 13 years |
| 55. Was case originally tried in Crown court or magistrates’ court? | 1 |
| 56. Name of judge(s) in original trial | Judge Focke |
| 57. Name of lawyer(s) in original trial | 99 |
| **INVESTIGATIVE STAGE (code as 99 if not stated and cannot be inferred)** | |
| **COLLECTION** |  |
| 58. Was concern expressed at original trial or appeal about there being a chance of contamination of fingerprint/DNA evidence prior to sample collection from the crime scene? | 99  **Annotations:** |
| 59. For DNA evidence, was concern expressed at original trial or about where the DNA came from? **59b.** If yes, where? | Q59. 99  Q59b. 99  **Annotations:** |
| 60. Was concern expressed at original trial or appeal about there being potential for evidence tampering/planting? | 2 |
| 61. Was there over a week delay between crime being committed and collection of fingerprint/DNA or Digital evidence from crime scene? | 99 |
| 62. How many fingerprint/DNA samples were taken from crime scene? | 99 |
| 63. Was only one method used to collect the sample(s) or multiple methods? | 99 |
| 64. Was concern expressed at original trial or appeal about the method(s) used to collect the sample? | 2 |
| 65. Was the fingerprint/DNA sample or Digital evidence in question considered by either the prosecution or defence experts to be partial or ambiguous? | 99 |
| 66. Were evidence requests made according to the legal rules? | 1 |
| 67. Was concern expressed at original trial or appeal about broken chain of custody i.e., who was looking after the fingerprint/DNA sample(s) or Digital evidence after they were collected? | 2 |
| **ANALYSIS** |  |
| 68. How much experience did the prosecution forensic examiner have? | 99 |
| 69. How much experience did the defence examiner have? | 99 |
| 70. Was concern expressed at original trial or appeal about the methods of fingerprint/DNA/Digital analysis used? | 99  **Annotations:** |
| 71. Was concern expressed at original trial or appeal about there being a chance of the fingerprint/DNA samples being degraded? | 99  **Annotations:** |
| 72. Did analysis involve ‘cold’ match from a database or comparison against a suspect? | 2  **Annotations:** |
| 73. Did initial examination of sample lead to conclusion that origin could not be determined? | 99  **Annotations:** |
| 74. Did initial examination of sample lead to conclusion that sample originated from defendant? | 99  **Annotations:** |
| 75. Was sample re-examined? **75b.** If yes, did re-examination change initial conclusion? | Q75. 99  Q75b. 99 |
| 76. Was fingerprint/DNA/Digital examiner opinion/conclusion verified by another examiner? | 99 |
| 77. For fingerprint examination, how many points of similarity were found (if any)? | 99 |
| 78. Was fingerprint/DNA/Digital evidence destroyed before trial? | 99  **Annotations:** |
| 79. Was concern expressed at original trial or appeal about the quality of notes taken/report of the fingerprint/DNA/Digital examiner? | 99 |
| **EVIDENTIARY STAGE (code as 99 if not stated and cannot be inferred)** | |
| **EXPERT TESTIMONY** |  |
| 80. Did (main) prosecution fingerprint/DNA/Digital expert present evidence at original trial? | 2  **Annotations:** |
| 81. Was concern expressed at original trial or appeal about the qualifications, knowledge, skills or experience of prosecution fingerprint/DNA/Digital expert(s)? | 99  **Annotations:** |
| 82. Was prosecution fingerprint/DNA/Digital expert witness cross-examined by defence at original trial? | 99  **Annotations:** |
| 83. Did (main) defence fingerprint/DNA/Digital expert present evidence at original trial? | 99  **Annotations:** |
| 84. Was concern expressed at original trial or appeal about the qualifications, knowledge, skills or experience of defence fingerprint/DNA/Digital expert(s)? | 99  **Annotations:** |
| 85. Was defence fingerprint/DNA/Digital expert witness cross-examined by prosecution at original trial? | 99  **Annotations:** |
| 86. Was there a disagreement in conclusions made by prosecution and defence fingerprint/DNA/Digital experts at original trial? | 99  **Annotations:** |
| 87. Was concern expressed at original trial or appeal about quality of prosecution expert reports? | 2 |
| 88. Was concern expressed at original trial or appeal about quality of defence expert reports? | 2 |
| 89. Were probabilities of fingerprint/DNA match mentioned at original trial? | 99  **Annotations:** |
| 90. Did fingerprint/DNA/Digital expert express his/her confidence in conclusion at original trial? **90b.** If yes, how? | Q90. 99  Q90b. 99 |
| 91. For DNA evidence, were probabilities of match presented by prosecution expert at original trial? | 99 |
| 92. For DNA evidence, were contamination/error rates presented at original trial? | 99 |
| 93. For fingerprint evidence, did the prosecution expert declare a match/individualisation at original trial? | 99 |
| 94. For fingerprint evidence, how many points of similarity between sample and print were presented at original trial? | 99 |
| 95. For fingerprint evidence, were any points of dissimilarity presented at original trial? | 99 |
| 96. Did (prosecution or defence) fingerprint/DNA/Digital experts try to explain any inconsistencies in evidence at original trial? | 99 |
| 97. Was hearsay evidence presented at trial? | 1  **Annotations:** |
| 98. Was any bad character evidence presented at trial? | 1  **Annotations:** |
| 99. Did prosecution team fail to share relevant information with defence team before original trial? | 2  **Annotations:** |
| **JUDGE’S INSTRUCTIONS/JURY BEHAVIOR** |  |
| 100. Were visual images used to present fingerprint/DNA/Digital evidence at original trial? | 99 |
| 101. How did judge instruct jury to deal with fingerprint/DNA evidence? *Provide quote if short, otherwise summarise* | 99 |
| **ADDITIONAL DIGITAL QUESTIONS** | |
| **APPEAL CASE/HEARING FACTORS (code as 99 if not stated and cannot be inferred)** | |
| 102. For Digital evidence, were any technical problems presented at the appeal hearing? If yes, what? *Provide a quote if short, otherwise summarise* | Q102: 99  Q102b: 99 |
| **DIGITAL - INVESTIGATIVE STAGE (code as 99 if not stated and cannot be inferred)** | |
| **COLLECTION** | |
| 103. For Digital evidence, was concern expressed at original trial about problems securing the data? | 99 |
| 104. For Digital evidence were there any concerns about data being missed during investigation? | 99 |
| 105. For Digital evidence, was any data hidden over the network? | 99 |
| 106. For Digital evidence was any data hidden inside storage areas to make them invisible to the system commands and programs? | 99 |
| 107. For Digital evidence, was any data corrupted? | 99 |
| 108. For Digital evidence, was there any residual data wiping? | 99 |
| 109. For Digital evidence, was concern expressed at the original trial or appeal about data sources being damaged? | 99 |
| **ANALYSIS** | |
| 110. For Digital evidence was any data encrypted? | 99 |
| 111. For Digital evidence was any data hidden in a carrier file without modifying its outward appearance? | 99 |
| 112. For Digital evidence, was any techniques used to obfuscate the source of the attack? | 99 |
| 113. For Digital evidence, did the investigator have to analyse high volumes of data? | 99 |
| 114. For Digital evidence, were the investigators restricted to analysing only recent data stored on volatile memory? | 99 |
| 115. Were there any Co-defendants? 115b. If yes, how many? | Q115. 1  Q115b. 2 |
| 116. Where the case involved co-defendant/s, was there a mixed verdict? 116b. If Yes, what were the verdicts? | Q116. Yes = 1, No = 2  Q116b. Add text |
| **NOTES – PLEASE WRITE ANYTHING THAT YOU THINK IS IMPORTANT BUT WHICH IS NOT CODED ABOVE. THIS MAY INCLUDE QUOTES.** | Para 188/189. Upon querying a diagnosis, an expert suggested a further assessment be conducted by a pathologist, which the prosecution latter advanced she should not have persisted with. “She herself had recommended examination by [the pathologist] who in turn rejected the suggestion”. The prosecution furthered that the expert “did not accept that rejection and on that basis her oral evidence, casts significant doubt upon the reliability of the rest of her evidence and her approach to this case. It demonstrates, to our satisfaction, that she was prepared to maintain an unsubstantiated and insupportable theory in an attempt to bolster this appeal”… “The inadequacies of her evidence were compounded by her persistence in the suggestion that [the co-defendant] might have suffered from HIV and not from MS…[the experts] approach to that aspect of the evidence supports our views as to the unreliability of her evidence. Para 190. In the light of our view as to the quality of [the expert] evidence before us we conclude it is not capable of undermining the safety of the verdict. For those reasons, we reject the application to call fresh evidence. Subsequent to hearing the cases of Henderson, Butler and Oladapo, the court some of the general points posited included:  Para 202. The problem for the courts is how to manage expert evidence so that a jury may be properly directed in a way which will, so far as possible, ensure that any verdict they reach may be justified on a logical basis. Para 203. In Kai-Whitewind Judge LJ rejected the contention that where there is a conflict of opinion between reputable experts, expert evidence called by the Crown is automatically neutralised. He emphasised that it was for the jury to evaluate the expert evidence even where the experts disagree as to the existence of the symptoms upon which their opinions were based. But how is a jury to approach conflicting expert evidence? We suggest it can only do so if that evidence is properly marshalled and controlled before it is presented to the jury. Unless the evidence is properly prepared before the jury is sworn it is unlikely that proper direction can be given as to how the jury should approach that evidence. Thus the jury will be impeded in considering that evidence in a way which will enable them to reach a logically justifiable conclusion. Para 204. It is desirable that any judge hearing cases such as these, which depend entirely on expert evidence, should have experience of the complex issues and understanding of the medical learning. Para 205. Proper and robust pre-trial management is essential. Without it, real medical issues cannot be identified. Absent such identification, a judge is unlikely to be able to prevent experts wandering into unnecessary complicated and confusing detail. Unless the real medical issues are identified in advance, avoidable detail will not be avoided. Para 206. The process of narrowing the real medical issues is also vital in relation to another important function of the judge in advance of the trial. He should be in a position to identify whether the expert evidence which either side wishes to adduce is admissible. This assessment is as difficult as it is important. The test adopted by this court in Harris was described in the judgment of King CJ in R v Bonython [1984] 38 SASR 45: First, whether the subject matter of the opinion falls within the class of subjects upon which the expert testimony is permissible and second, whether the witnesses acquired by study or experience have sufficient knowledge of the subject to render their opinion of value in resolving the issues before the court. Bonython was cited by this court in R v Reid & Ors [2009] EWCA Crim 2698 [111(i)] with the qualification that it is important that the court acknowledges advances to be gained from new techniques and new advances in science. Reid is concerned with DNA evidence but the observations of the court in relation to the admissibility of expert evidence apply with equal force to cases concerning baby shaking as it applied to the developing science of DNA. We shall return to emphasise the importance of Part 33 of the Criminal Procedures Rules 2010 in the context of these cases. We shall say no more about admissibility since the unsatisfactory state of the law has been the subject of the Law Commission Consultation paper No. 190 "The Admissibility of Expert Evidence in Criminal proceedings in England and Wales", and is likely to lead to changes in the current approach of laissez-faire, which the Law Commission suggests requires reform (3.14). Para 207. The Kennedy report cautions against doctors using the courtroom to "fly their personal kites or push a theory from the far end of the medical spectrum". It recommends a checklist of matters to be established by the trial judge before expert evidence is admitted, including:- 1. Is the proposed expert still in practice? 2. To what extent is he an expert in the subject to which he testifies? 3. When did he last see a case in his own clinical practice? 4. To what extent is his view widely held?" Para 208. We emphasise the third, which was of importance in these appeals. The fact that an expert is in clinical practice at the time he makes his report is of significance. Clinical practice affords experts the opportunity to maintain and develop their experience. Such experts acquire experience which continues and develops. Their continuing observation, their experience of both the foreseen and unforeseen, the recognised and unrecognised, form a powerful basis for their opinion. Clinicians learn from each case in which they are engaged. Each case makes them think and as their experience develops so does their understanding. Continuing experience gives them the opportunity to adjust previously held opinions, to alter their views. They are best placed to recognise that that which is unknown one day may be acknowledged the next. Para 209 made reference to Part 33 of what are now the Criminal Procedure Rules 2010. Those rules need to be deployed to ensure that the overriding objective to deal with criminal cases justly is achieved (1.1). The rules are designed to ensure that the expert opinion is unbiased (33.2.1) and in particular, by virtue of 33.3(1), that an expert report provides evidence of relevant experience and accreditation (a), details of any literature relied upon (b), that any range of opinion should be summarised and reasons given before the opinion of the expert (f) and that any qualifications to that opinion should be stated (g). Para 210. It will be necessary that the court directs a meeting of experts so that a statement can be prepared of areas of agreement and disagreement (33.6.2(a) and (b)). Such a meeting will not achieve its purpose unless it takes place well in advance of the trial, is attended by all significant experts, including the defence experts, and a careful and detailed minute is prepared, signed by all participants. Usually it will be preferable if others, particularly legal representatives, do not attend. Absent a careful record of the true issues in the case, it is difficult to see how the trial can be properly conducted or the jury properly guided as to the rational route to a conclusion. The court may be required to exercise its important power to exclude evidence from an expert who has not complied with a direction under [33.6(2), 33.6(4)]. The court should bear in mind the need to employ single joint experts where possible (33.7). Para 212. A case management hearing may often present an opportunity for concerns as to previous criticism of an expert and an expert's previous tendency to travel beyond their expertise to be aired. Whilst such history may not be a ground for refusing the admission of the evidence, it may well trigger second thoughts as to the advisability of calling the witness. Para 219. If the issue arises, a jury should be asked to judge whether the expert has, in the course of his evidence, assumed the role of an advocate, influenced by the side whose cause he seeks to advance. If it arises, the jury should be asked to judge whether the witness has gone outside his area of expertise. The jury should examine the basis of the opinion. Can the witness point to a recognised, peer-reviewed, source for the opinion? Is the clinical experience of the witness up-to-date and equal to the experience of others whose evidence he seeks to contradict? Para 221. We acknowledge the danger of being over-prescriptive in relation to directions to the jury. But judges, we suggest, need to remember that their directions are part of the means by which they ensure that a case which depends on expert evidence proceeds to its conclusion on a logically justifiable basis. |