Neutral Citation No: [2023] NICA 84	*Ref:* **OHA12341**
	ICOS No: **18/072668**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **15/12/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

STEPHEN McKINNEY

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Mr McCartney KC with Mr D Halleron (instructed by Roche McBride Solicitors) for the Appellant
Mr R Weir KC with Mr M Chambers (instructed by the Public Prosecution Service) for the Crown

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Before: Keegan LCJ, O'Hara J and McFarland J

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O'HARA J (*delivering the judgment of the court*)

Introduction

[1] On 21 July 2021, the appellant was convicted by a jury of the murder of his wife at the end of a trial presided over by McBride J ("the judge"). Mrs McKinney died on 13 April 2017, in the early hours of the morning. The appellant had made a 999 call at 01:15 seeking help. At the time the whole family, including their two children, were on a boat on Lough Erne, the boat having been moored overnight at Devenish Island. When the police and the RNLI arrived at the scene, they found Mrs McKinney in the water immediately beside the boat. Despite being taken out of the water and given emergency medical attention, Mrs McKinney was pronounced dead at 02:52. The conclusion of the pathologist who conducted the postmortem was that she died from drowning. There was no evidence of a struggle. Tests revealed that she had Zopiclone (a sedative) in her blood at a level beyond what would be regarded as therapeutic.

[2] The appellant's case was that Mrs McKinney had fallen into the water and, despite him jumping in, he had been unable to save her. He said in interview that she had awoken from her sleep, gone out to the back of the boat to check if it was moving and had then fallen in. The prosecution relied on a number of strands of

circumstantial evidence including differing accounts given by the appellant and his demeanour during the 999 calls as well as in the aftermath of the incident.

[3] Before this court, Mr McCartney KC on behalf of the appellant, advanced seven grounds of appeal. Leave had been granted by Humphreys J on three grounds which were:

(ii) The failure to stop the trial and discharge the jury following the publication of the outcome of the application for a direction of no case to answer.

(iii) The failure to stop the trial and discharge the jury following the death of junior counsel for the appellant.

(iv) The admission of bad character evidence.

[4] It was Mr McCartney's case for the appellant that individually and collectively the grounds which he advanced made the guilty verdict unsafe. Those seven grounds will be dealt with below. We are grateful to all counsel for the helpfully succinct way in which each ground was addressed.

Ground 1 – The judge erred in law in failing to accede to the defence application for no case to answer

[5] At the conclusion of the prosecution case, Mr O'Rourke submitted that there was no case for the defendant to answer. The judge heard extensive submissions on this issue and delivered a 30 page ruling, rejecting the application. No issue of substance was taken by the appellant in this court with the legal approach followed by the judge in giving her ruling. She cited the classic authority of *R v Galbraith* [1981] 2 All ER 1060 at page 1062 where the court said:

> "How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, upon a submission being made, to stop the case. (b) Where, however, the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts

> there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[6] Having referred to *Galbraith*, the judge continued by stating:

> "In a case where all the critical evidence is indirect and inferential, the ultimate question for the trial judge is: could a reasonable jury, properly directed conclude so that it is sure that the defendant is guilty?
>
> In order to reach such a conclusion, a reasonable jury, properly directed, must be able to exclude all realistic possibilities consistent with the defendant's innocence."

[7] She continued by referring to other aspects of the legal test as it has been considered and developed over the years. These include two propositions of real significance. The first is that matters of assessment and weight of the evidence are for the jury and not for the judge. The second is that in assessing a circumstantial case (such as the present), the court should have regard to all of the strands of evidence relied upon and consider the prosecution evidence as a whole – see *R v Courtney* [2007] NI 178 and *R v Meehan* (No.2) [1991] 6 NIJB 1.

[8] Mr McCartney's attack was based on the judge's analysis of the evidence as it stood at the end of the prosecution case. At that point there were only three possible explanations for the death of Mrs McKinney – murder, suicide or accident. In her ruling the judge found that there was "really no evidence about suicide", so, in effect, that possibility was excluded by her. In dealing with the question of accident the judge focused on the deceased's taking of a number of Zopiclone tablets. On her analysis, the effect of her taking Zopiclone was to induce sleep which made the accidental falling or slipping over the side of the boat significantly less likely. Notwithstanding Mr McCartney's attack on that reasoning, the court is not persuaded that the reasoning is flawed.

[9] This court notes that the judge's ruling on the application of no case to answer is not a short off-the-cuff response to the submissions. It was obviously prepared with care and against a background that the prosecution evidence over a lengthy period had been analysed, understood and scrutinised by her. Taking all of these factors together, we are entirely satisfied that the ruling on the application of no case to answer was well-founded and well-reasoned. In these circumstances, we find there is no basis for this ground of appeal which is rejected.

Ground 2 – The judge erred in law and in principle in failing to discharge the jury following publication in several local newspapers and on the BBC news website

[10] At the end of the prosecution case the defence applied to the judge for a direction that there was no case for the defendant to answer and that the charge should therefore be dismissed. The judge heard submissions on this issue on 2, 5 and 6 July 2021. As is always the case those submissions were heard in the absence of the jury. The judge's ruling on 7 July, that there was a case to answer, was delivered in the absence of the jury.

[11] Unfortunately, and regrettably, the ruling that there was a case to answer was reported in the media. Specifically, it was reported on 7 July online on the BBCNI website. It was also reported on 8 July in the Strabane Chronicle, that being a local newspaper whose circulation (we will assume) is mainly in Co Tyrone. (The jury was sitting in Dungannon, Co Tyrone.) In each report it was revealed that the judge had dismissed an application that the defendant had no case to answer. It was also more prominently reported that the defendant would not give evidence on his own behalf, a fact which had been made known to the court (and the jury) on 7 July after the ruling that there was a case to answer.

[12] It is a long established principle that juries are excluded from court when submissions of no case to answer are made and when the judge gives his/her ruling. More than that, it is also firmly established that the jury is not told what the judge's ruling is on such an issue. The reason for keeping the jury in the dark is that if it heard the competing submissions and the judge's ruling, it might be inappropriately influenced when it came at a later stage to consider its verdict.

[13] The question for the judge to consider, if asked to do so at the end of the prosecution case, is whether there is evidence on which it would be safe for a reasonable jury, properly directed on the law, to convict the defendant. In other words, the question for the judge alone to decide at this point is whether a jury could convict. The question is not whether a jury should convict. The concern about a jury being present is that a jury which heard the exchanges and then the judge's ruling might be influenced or steered towards a conviction if it heard the prosecution submissions and especially if it heard the judge say that a jury could convict. Such an indication by the judge might conceivably lead a jury to conclude that it should convict. That would be wrong and would encroach on the jury's exclusive role at the final stage which is to decide whether to convict or acquit.

[14] There was no information before the judge in July 2021 as to whether any members of the jury had read or seen or even heard about the offending pieces in the Strabane Chronicle or on the BBC website. She was entirely correct not to explore that question with the members of the jury because she could not have done so without wrongly disclosing to them precisely what should not have been disclosed, i.e., that having heard submissions, she had concluded that a reasonable jury could convict the defendant of murder.

[15] In these circumstances, on behalf of the defendant, an application was made to the judge to discharge the jury. The basis of the application was that there was a real possibility that some or all of the jurors had read the BBC website or the Strabane Chronicle, or both, and concluded that the judge agreed with the prosecution about the sufficiency of evidence without distinguishing properly between could convict and should convict. The prosecution response to that application was that while it was regrettable that there had been any reporting at all, that reporting was limited with more focus being on the fact that the defendant would not give evidence, something which the jury was entitled to know.

[16] In the course of submissions the judge was referred to Blackstone at D16.66 and, in particular, to *R v Smyth and another* (1987) 85 Crim App R 197 in which an appeal against a conviction for burglary was allowed partly because of what the trial judge himself had said to the jury. The prosecution in that case depended significantly on identification evidence. In the course of his summing up to the jury the trial judge went astray in a matter summarised as follows at page 200 of the judgment:

> "In the course of summing up the judge went to considerable trouble to outline to the jury the difficulties encountered in cases where identification is at the core of the issues to be resolved. No criticism whatsoever can be made of him for the manner in which he dealt with such matters as fleeting glances and the reliability, or lack of it, of witnesses and of observation and so on. Nobody could possibly complain that the jury were not alerted to the dangers of relying upon unsure or unsafe evidence in that respect. Unfortunately, he went on to say to the jury as to that evidence words to the effect that if he had not thought that there was sufficient evidence of identification available to the jury, he would have withdrawn the case from them. That is an improper observation for a judge to make to a jury. Submissions which are made to that effect are made in the absence of the jury. There is very good reason for that, as all who take part in trials know. The question as to whether or not there is a sufficiency of evidence is one which is exclusively for the judge following submissions made to him in the absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they might convict because they think the judge's view is a sufficient indication that the evidence is strong enough for that purpose."

[17] Perhaps surprisingly, notwithstanding that error by the trial judge, the Court of Appeal continued as follows on page 200:

> "That, however, would not in the circumstances of this case be a reason standing by itself, having regard to the other directions given to the jury on identification, for declaring that these verdicts are unsafe or unsatisfactory. What is more disturbing to us is, having read a transcript of [the evidence of the eye witness] the impression which that has made upon us.
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> From this it can be seen that while the jury should not be informed about the fact of or result of any application for a direction of no case to answer, the fact that such information may come to their notice does not inevitably mean that the jury should discharged."

[18] In rejecting the application to discharge the jury in the present case the judge made a number of observations. For the appellant in this court, Mr McCartney attacked, in particular, the following observation:

> "Further, the court recognises that juries, or some jurors could certainly be aware – while all the jurors in this case were aware that they were asked to retire so that the court could discuss legal matters with counsel. Many jurors, no doubt from a number of recent high profile cases, would be aware that the court has granted an application by the defence after the end of the Crown case that there is no case to answer. Now in this case the jurors knew that legal matters were being discussed after the Crown case closed. Now, even if there had been no reporting, the jury would know when they came back and the case proceeded that the court must have ruled in respect of that matter to decide that there was a case to answer, and, therefore, I consider no prejudice arises because the press report had given no more information than that."

[19] The extent of the jury's familiarity with the legal system and trial process is not properly a matter for speculation. For our part in this court, we would not have dealt with the issue in those terms. The judge might well have been right to suspect that some members of the jury would have known or guessed that the defence probably applied for a direction, but that is necessarily speculative. Our criticism of the judge's approach is not however fatal to the conviction if we are satisfied that the integrity of the trial process has been maintained.

[20] Notwithstanding that limited finding of fault with the judge's reasoning, we agree with the judge that in the circumstances of this case it was not necessary to discharge the jury because of the two media reports. We agree with her decision for the following main reasons:

- In every case in which this issue arises, it will be important to consider the nature and extent of inappropriate media reporting. The greater the degree of inappropriate reporting the more likely it is that the jury will have to be discharged.

- In the present case the two very short reports each made two points. The first, that the defendant would not give evidence, was legitimately and prominently reported. The second, that the judge had refused a direction of no case to answer, was not legitimately reported and was only a secondary part of each report with no details added of the submissions made or of the reasons given for rejecting the application.

- If the reporting had been more intrusive the risk of discharge of the jury would have been greater.

- If, as in *R v Smyth* above, the judge herself had raised a question about the adequacy of the evidence, the risk of discharge would have been significantly greater. We also note that *R v Smyth* is not exactly on point – in that case the judge himself introduced his personal views in the summing up in a manner which each juror must inevitably have noticed.

- Any risk to the integrity of the trial process in the present case could have been adequately reduced by the jury being reminded, as it inevitably was at the end of the case, that it is the jury and the jury alone who decides on the outcome, guilty or not guilty.

[21] For all these reasons, we reject this ground of appeal. We add simply that we would not expect inappropriate media coverage of issues such as this to be repeated in the future. It is a testament to the media's understanding of what can and cannot be reported that, so far as we can discover, this issue has not previously been raised in this court. We trust it will not recur.

Ground 3 – The judge erred in law and principle in failing to stop the trial and discharge the jury following the death of junior counsel for the appellant

[22] During the trial the appellant was represented by Mr M O'Rourke KC with Mr M McCann as junior counsel. The solicitor who instructed them was Mr Roche of Roche McBride. Mr McCann had been deeply involved in the case from a very early stage. As is clear from an affidavit sworn by Mr Roche for the purposes of the appeal against conviction, the prosecution did not challenge the extent of Mr McCann's involvement and the judge was herself aware of it, not least because

the trial had run for some weeks in February/March 2020 before it had to be discontinued with the outbreak of Covid-19.

[23] The new trial which culminated in the guilty verdict started in April 2021. Mr McCann was ever present with Mr O'Rourke until Mr McCann became ill on 5 June 2021. It soon became clear that he would not be able to resume his representation of the appellant. Tragically, Mr McCann died on 11 June 2021.

[24] It is the appellant's case that the judge should have granted a defence application made on 8 June 2021 to discharge the jury as a direct result of Mr McCann's unavailability. In essence, the case advanced then and now is that Mr McCann's illness and death meant that his client, the appellant, was denied a fair trial. This contention is advanced on grounds which we summarise as follows:

(i) Mr McCann was an important part of the defence team.

(ii) His absence weakened the defence team when there were still significant issues to be dealt with before the jury retired to consider its verdict.

(iii) The prosecution had an unfair advantage because its full team of counsel continued as before.

(iv) Mr O'Rourke was disadvantaged in not having Mr McCann's input into decisions about how the trial might be conducted for the appellant.

(v) The prospective involvement of a new junior counsel was of very limited value when he had no working knowledge of the background of the case and all of the twists and turns which the trial had taken.

[25] As against that, this court notes, as did the judge, that:

(i) Mr O'Rourke had conducted all the questioning of witnesses in the six weeks during which the trial ran before Mr McCann's tragic illness and death.

(ii) Mr O'Rourke had also made all of the applications which had been put before the judge on evidential issues.

(iii) The continuing availability of Mr O'Rourke was not in question.

(iv) Mr Roche would also continue to be available and to make a significant contribution to the defence team.

(v) Much (though not all) of the most controversial evidence had already been given.

[26] In this context, the judge correctly identified the triangulation of interests which is present in all cases. There is the defendant's interest in being fully and professionally represented to ensure he gets a fair trial. In addition, there is the interest of the family of the alleged victim of the murder in concluding the trial process. Thirdly, there is the public interest in a determination of the defendant's guilt or innocence and of finality being achieved in legal proceedings.

[27] Weighing up all these issues the judge concluded that the appellant would not be denied a fair trial if the trial continued without Mr McCann. She set out some steps which she would take to accommodate the defence but held that the trial must continue.

[28] On appeal Mr McCartney has argued, with perhaps some justification, that in her ruling the judge underestimated the extent to which controversial evidence remained outstanding. However, even acknowledging that possibility, this court concludes that the judge's decision to continue with the trial was correct. There is no ready made authority for this court to refer to in this context but, as a general rule, our view is that in each case the trial judge must consider how much evidence has already been given, what remains outstanding and what the extent of any potential disadvantage to the defendant might be. On that approach, one might generally anticipate that if a counsel dies or takes seriously ill at an early stage of a long trial the possibility of discharging the jury might be greater. Even that, however, is not necessarily so. The fact that a legal aid certificate is granted for two counsel does not mean that there cannot be a fair trial without two counsel. A case by case approach is required with one essential and inevitable consideration being that the further advanced the trial is the more difficult it will be to conclude that a fair trial requires the jury to be discharged.

[29] For these reasons, we reject this ground of appeal.

Ground 4 – The judge erred in law and principle in admitting bad character evidence against the appellant

[30] An important part of the prosecution case was its effort to show to the jury that the appellant's marriage to the deceased was an unhappy one, that he was a controlling coercive husband and that he knew that she wanted a divorce. It was argued that this was relevant and important because he had falsely painted to the police during interviews a picture of a marriage which was a happy one, give or take the occasional argument which would not distinguish it from many or most marriages.

[31] In order to prove this contention, the prosecution applied to introduce evidence, including bad character evidence, which can be summarised as follows:

(a) MK37 – Video of a domestic argument between the appellant and the deceased on 29 September 2016. The argument related to lifting items which

had fallen on to the floor and a discussion about divorce and the children. (The prosecution said this was not bad character evidence while the defence contended that it was.)

(b) MK36 – Video recording of a threesome involving the appellant, the deceased and another woman which took place in China in 2014.

(c) MK39 and MK40 – These videos show anal sex between the appellant and the deceased. Each video records the same incident from two different angles.

(d) MK14 – This is a recording of an argument between the appellant and the deceased during which the appellant chastises the deceased about her care of their son. The appellant then proceeds to forcefully spank the deceased and have sex with her. This video is dated June 2014 and takes place in China.

(e) SkypeChat25 – This takes place between the appellant and the deceased between 16 and 18 May 2014. It consists of a number of text messages between the appellant and the deceased in which the appellant berates the deceased about her refusal to engage in certain sexual activities including a threesome and anal sex. He accuses her of being a stupid bitch wife, and of being solely responsible for the marriage breakdown. He tells her that he is with another woman and outlines the various sex acts they have or will engage in. The deceased expresses her desire to preserve the marriage and the appellant advises her that only she can change the situation. She, therefore, agrees to watch a video of him having sex with another woman and to engage in a threesome which is the appellant's fantasy. Later the discussion confirms that the threesome took place and that she also agreed to engage in anal sex with the appellant which appears to then take place.

[32] The introduction of this evidence was strongly resisted by the defence and led to a detailed analysis and ruling by the judge which this court finds compelling. The judge excluded the evidence summarised at (b)-(d) above on the basis that it "will trigger moral outrage and may deflect the jury from the main issue which is the question whether the defendant is guilty or not guilty of murder." This exclusion came about despite the finding of the judge that the evidence was otherwise admissible as bad character evidence within the meaning of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. In other words, while the admission of the evidence was deemed to be necessary, its admission would be so prejudicial that its prejudicial effect would outweigh its probative value.

[33] The judge then considered the admissibility of SkypeChat25, see (e) above. She distinguished that from (b)-(d) on the basis that:

> "I consider that SkypeChat25 has strong probative value as it is relevant to matters in the case and corrects the false impression created by the defendant regarding the state

> of the marriage, the defendant's view of the deceased and his controlling and coercive nature towards the deceased and sets out the basis upon which the deceased engaged in the threesome, watched the video of him having sex with another woman and subsequently having anal sex with the defendant.
>
> I consider this evidence is necessary as there is no other evidence to show how unhappy the defendant was with the deceased, how he treated her, how he berated her sexual views and how he manipulated her into engaging in a threesome and watching a video of him having sex with another woman. Mr O'Rourke submitted that the Chat 25 on its own would be prejudicial as it would give a false impression … without the jury viewing the other material. I do not accept this especially as the Crown is prepared to agree to a narrative stating that the deceased previously engaged consensually in sexual activity with her husband in the context of the marriage which was video recorded. I consider Chat 25 sets the context in which the first (and only) threesome took place and of which the deceased watched a video of the defendant having sex with another woman and subsequently engaged in anal sex. I accept there is some prejudice attached to the material, but I do not consider this prejudice outweighs the probative value of the material and unlike the videos the written word is less likely to attract the same type of prejudice. In addition, I consider directions can address any personal views the jury may have about such sexual activity so that the jury is directed to focus solely on the issue of whether Chat 25 can enable them to be satisfied to the criminal standard that the defendant was unhappy in the marriage and that he was a coercive controlling partner.
>
> I accept that Chat 25 took place in 2014 and is therefore less contemporaneous in the account given to [the deceased's solicitor]. Given the nature of what Chat 25 shows, its gravity and relevance to the issues in the case I do not consider this factor alone is a ground to exclude the evidence which is otherwise very relevant and of strong probative value."

[34] On appeal Mr McCartney submitted that the reasoning of the judge was flawed because other evidence before the jury from the deceased's solicitor had already established that the deceased was unhappy in the marriage and that the

appellant had hurt and humiliated her. Accordingly, the admission of the SkypeChat was unnecessary. He further submitted that the content of Chat 25 was outdated since it was from 2014 and less contemporaneous than the evidence from the deceased's solicitor. More fundamentally, he submitted that putting the written evidence of the SkypeChat before the jury would be almost as prejudicial, if not equally prejudicial, to playing the videos which had been excluded for that very reason.

[35] We do not accept that submission. In our judgment, the evidence of SkypeChat25 was clearly relevant to the issues in the trial about the state of the marriage and about the controlling and coercive conduct of the appellant. As Mr Weir contended, the judge had a difficult path to carve out in admitting relevant evidence which was probative without it being so prejudicial as to outrage the sensitivities of some members of the jury and turn them against the appellant on moral grounds alone. In our judgement, she achieved this difficult balance, and we find no defect in her analysis or her decision to admit this evidence.

[36] For all these reasons, we dismiss this ground of appeal.

Ground 5 – The judge erred in law and principle in refusing to exclude video evidence of a domestic argument on the grounds that it was not bad character evidence when the submission was clearly for that purpose

[37] This ground relates only to the admissibility of Exhibit MK37 which is video evidence described above at para 26(a). For the purposes of deciding this issue, this court viewed the video. It records an unpleasant argument between the appellant and Mrs McKinney on 29 September 2016, just over six months before she died.

[38] In considering its contents the judge decided that this evidence did not amount to bad character evidence because while the appellant came across, in her words, as dismissive and rude, it could not safely be said that he was behaving in a way which was "reprehensible" as required by Article 17(1) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. That provision defines "misconduct" as "the commission of an offence or other reprehensible behaviour." Since it was not admissible as bad character evidence, the question to be determined at trial was whether it should be admitted under common law rules.

[39] The appellant had made the case in police interviews that he and his wife were an "extremely happy" couple who were "always equal." He also said that he did not know anything about a divorce. The video shows him to be a liar on the potentially critical issue of divorce. While the evidence of Mrs McKinney's solicitor showed that she had spoken to her about divorce, it did not establish that the appellant himself knew about the possibilities of divorce. The video of their exchanges shows that clearly.

[40] All of this was carefully considered and analysed by the judge in her detailed and deliberate consideration of the question whether this evidence should be admitted. Her conclusion was:

> "MK37 deals with the defendant's claim that he knew nothing about the divorce. I consider this is obviously a relevant matter. The rest of the video shows a matrimonial argument which, again I consider, is relevant to the issues in the case. I do not consider there is any prejudice in showing this video and none which outweigh its probative weight. I therefore consider that MK37 is admissible."

[41] In our judgment, that ruling is unimpeachable. For that reason, we dismiss this ground of appeal.

Ground 6 – The judge erred in law and principle in permitting the prosecution to adduce evidence tending to suggest that the appellant had not entered the water in Lough Erne when the investigative police had failed to secure relevant evidence which could have proven that the appellant had done so

[42] During the trial the judge conducted a voir dire, i.e., a hearing in the absence of the jury about the admissibility of certain evidence. That voir dire related to the admissibility of the evidence of a number of witnesses. One of them was Mr DeGiovanni, an expert in 3D geomatics and visual reconstruction. A second was Professor Tipton, a specialist in thermal physiology. A third source of evidence was evidence as to reconstruction of events by way of a police officer entering Lough Erne and then trying to get back out on to the boat which was involved in the death of Mrs McKinney.

[43] The context for this evidence was that the police suspected that contrary to his version of events, the appellant had not in fact entered the water to find and save his wife at all. Rather, it was suspected that he had stayed on the boat and poured water over himself to create the false impression that he had entered the Lough.

[44] The appellant's clothing was not taken from him by the police immediately after the discovery of his wife's body. That meant that there was no forensic analysis of the type of water which had made his clothing wet. While this was a missed opportunity the judge noted in her voir dire ruling that it was one of limited significance because on the evidence of an expert called by the defence (but only during the voir dire), a Professor Jameson, who is a biologist, it was doubtful whether any tests could have been conducted which reliably confirmed whether the clothing was wet from the lake or from bottled water. For that reason, the judge rejected the fundamental objection raised by the defence which was that it was seriously prejudiced by the failure to seize and test his clothing at the time. Her

analysis was that the prejudice was not serious because it was uncertain whether the retention and testing of the clothing would have assisted the defence on that issue.

[45] The judge did, however, exclude the police reconstruction evidence of efforts to get out of the water on to the boat in the following terms:

> "I consider that this reconstruction evidence is properly to be characterised as expert evidence as it was an attempt to reconstruct the scene of the crime and to demonstrate the defendant's ability to reboard the boat. I consider that this evidence is inadmissible as it is of no assistance given the number of variables relating to the clothing worn, the fitness and ability to swim of the participant. As there are a large number of variables, I consider the reconstruction is of no probative value and, accordingly, I would exclude it."

[46] That left two issues to be decided. The first was the admissibility of evidence given by Mr DeGiovanni in relation to certain photographs. A photograph taken on a smartphone hours before the incident showed part of the seating area at the back of the boat. A second photograph taken on the boat after the incident shows a bottle of water in that seating area. After analysis Mr DeGiovanni concluded that the bottle would have been visible in the photograph taken some hours before the incident had it been in the same position as it was captured in this scene after the incident. The prosecution sought to introduce that evidence on the basis that it was capable of supporting the contention that the reason why the bottle was now in the seating area was that the appellant had put it there after he had emptied the contents over himself. At trial Mr O'Rourke objected to that as pure speculation and pointed out that a number of people had been on the boat after the emergency services arrived. The judge considered that objection and reached the following finding:

> "I consider that Mr DeGiovanni's evidence that the water bottle was moved in isolation is not significant, but when it is considered in conjunction with all the other evidence which includes the photographs showing two 5 litre bottles on the rear deck, one of which was half empty and one of which was a third empty, evidence by police at the scene that the desk was unusually wet, the evidence of Professor Tipton regarding the effects of cold water shock and peripheral cooling and physical performance and the fact that it would be difficult, albeit not impossible, to re-board the boat, the evidence about the location of the deceased's body viz a viz the boat, the availability of life-ring and boat hook to retrieve the deceased from the water, I am satisfied that one reasonable and logical inference which can be drawn from Mr DeGiovanni's

> evidence in conjunction with all the other evidence is that the defendant did not enter the water but rather doused himself with the bottled water."

The judge continued as follows:

> "This is but one strand of the Crown case. Each strand in isolation does not have to be conclusive of guilt and, therefore, the fact that there are other possible explanations and inferences which can be drawn from this evidence does not render the evidence itself inadmissible as this evidence together with other strands of evidence may create a strong conclusion of guilt.
>
> As I consider Mr DeGiovanni's evidence in conjunction with the other evidence is capable of bearing an inference which is probative of guilt the evidence is admissible."

[47] In addition, the judge considered the admissibility of Professor Tipton's evidence and held as follows:

> "Professor Tipton is the only witness called by the Crown who is able to give this evidence about the ability to re-board the boat …
>
> I consider that this is a matter which calls for expert opinion. Professor Tipton is an expert witness as demonstrated by his qualifications and experience, he is therefore able to give expert opinion evidence about the effect of cold water on the body. This includes not only the effect of cold water shock but also the effect of peripheral cooling and the effect all of this has on a person's physical ability to carry out various physical activities including re-boarding a boat. I further consider that his evidence is relevant to the question whether the defendant entered the lake or whether that story is implausible as the Crown contend. I therefore consider that his evidence about re-boarding is relevant, probative and admissible. Once the evidence is admitted it is thereafter a question for the jury to determine whether in fact the defendant did or did not re-board the boat having regard to all the available evidence."

[48] The effect of this ruling by the judge was that Professor Tipton proceeded in front of the jury to give his evidence about the effect of cold water on the body and the difficulties in reboarding the boat while Mr DeGiovanni gave his evidence about

the presence or absence of the bottle between different photographs. Professor Jameson did not give evidence again and the defendant gave evidence at no point in the trial.

[49] Mr McCartney did not challenge the judge's ruling on the voir dire as part of this appeal against conviction. Furthermore, he acknowledged that no challenge had been made on this issue to the judge's charge to the jury before it retired to consider its verdict. Nonetheless, it was submitted on behalf of the appellant that the evidence of Professor Tipton and Mr DeGiovanni should not have been admitted because it was speculative in the extreme and extremely prejudicial. In addition, Mr McCartney drew this court's attention to the way in which Mr Weir, for the Crown, had closed the case to the jury in a very different way to the manner in which the case had been opened on this issue.

[50] On the issue of Mr Weir's closing to the jury, we accept his response to Mr McCartney that he could not open the issue about whether the appellant may have jumped into the water to find his wife or whether he may just have stayed on the boat because at the time the case started, Mr Weir had been put on notice that the reconstruction evidence, along with the evidence of Professor Tipton and Mr DeGiovanni would be the subject of a voir dire hearing. That being so, it would have been entirely inappropriate for Mr Weir to refer to this matter in the prosecution opening of the case.

[51] Having considered the voir dire ruling of the judge together with the submissions on appeal, we agree that the judge was correct to exclude reconstruction evidence for the reasons which she gave. We also agree that the risk of prejudice arising from the failure by the police to take the appellant's clothing was not substantial in light of concessions made by Professor Jameson. Furthermore, we agree that Professor Tipton's evidence was relevant and properly admitted. We have some hesitation about agreeing with her about the admissibility of Mr DeGiovanni's evidence but defer to the judge's greater familiarity with and understanding of the complexities and nuances of the trial.

[52] As the appeal developed Mr McCartney's focus moved away from the admissibility of the evidence and more to the way in which that evidence had developed during the hearing before the jury. This extension of the appeal also amounted to an attack on the judge's previously unchallenged charge to the jury. We reject this attempt to supplement or change the grounds of appeal. Leave was not sought to amend the grounds. In any event, the view of this court is that evidence naturally changes as it is given. It is entirely unrealistic to believe the witnesses will adhere word for word to earlier evidence given during the voir dire. And to the extent that it did change, Mr O'Rourke challenged the relevant witnesses in his characteristically rigorous manner. More than that after the prosecution had closed its case, Mr O'Rourke had time to deal with this issue in the course of his submission and challenge whether it stood up to scrutiny at all.

[53] Lest it be suggested or implied from the preceding paragraph that Mr O'Rourke failed in any way to respond to and deal with the evidence in an effective and professional manner, we record our view that in his representation of the appellant, in uniquely difficult circumstances, Mr O'Rourke conducted the defence with conspicuous ability, focus and dedication.

[54] For all these reasons, we dismiss this ground of appeal.

Ground 7 - The appellant's trial was unfair in that the jury plainly did not give any consideration to the evidence or multiplicity of issues which they ought to have considered and upon which they were directed by the judge in her charge

[55] The basis for this proposition is that, after a particularly long trial which lasted for more than ten weeks, the jury returned a guilty verdict approximately one hour after being invited to retire. On behalf of the appellant, Mr McCartney submitted that the jurors could not possibly have considered properly the evidence and issues raised within that short timescale. Support for this proposition, it is suggested, comes from the fact that the judge had felt compelled to give a long and detailed charge to the jury including a route to verdict. Further support is said to come from what happened during the hour in question. The jury was sent out to begin its deliberations on the afternoon of 21 July. It is clear from the transcript that not long after the jury had retired, they requested the transcript of the 999 call which had been played during the trial. It was agreed between all parties that they ought not to be provided with the transcript in the jury room, but that if they wished they could hear the 999 call again and follow the transcript. It appears that they decided this was no longer necessary.

[56] The appellant's argument is effectively summarised as follows in the written submissions:

> "It is submitted that after a 12 week trial, with speeches from both counsel and a detailed charge from the court, this is a concerningly short period of time. The inference to be drawn is that the jury did not, or could not, have adequately considered all the relevant issues in this case."

[57] The prosecution response, simply put by Mr Weir, was that the speedy verdict was entirely consistent with its submission that the evidence against the appellant was overwhelming. If the jury formed that view it needed little or no time to return the guilty verdict.

[58] This court finds no substance in this ground of appeal. Appellate courts intervene in a range of circumstances eg if there are inconsistent verdicts or if there is some suggestion of undue pressure having been applied to jurors who have been deliberating for some time. There is no suggestion of such an issue here. In our judgment, it would be remarkable if we intervened to quash the conviction on the

basis that the jury had not deliberated for long enough. That would beg the unanswerable question – what timescale would be long enough?

[59] In the circumstances, and for the reasons set out above, we dismiss this ground of appeal.

Conclusion

[60] As appears from the preceding paragraphs this court has not been persuaded by any of the seven grounds of appeal advanced on behalf of the appellant. In fact, we have found almost nothing in the case which causes us any concern about the rulings given by the judge or her analysis of the evidence. Given the length of the trial and its multiple complexities, that attests to the skill and care shown by the judge who gave many rulings of which some significant ones were favourable to the defence.

[61] Leave to appeal was granted by Humphreys J on three grounds, each of which we have considered and rejected. Of course, the test which he applied at the leave stage was whether the grounds were arguable. The test which we apply on the full hearing of the appeal is the different test of whether we are of the view that for any reason or reasons the verdict is not safe. Having rejected the grounds of appeal individually, we conclude by recording our view that even taken collectively there is nothing in this appeal which makes us doubt the safety of the jury's verdict. The appeal against conviction is dismissed.