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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980

REGINA

v.

GARETH ANDERSON

Before: Higgins LJ, Girvan LJ and Coghlin LJ

The judgment of the court

Introduction

[1] This is an application by Gareth Colin Anderson ("the applicant") for leave to appeal against his conviction for the murder of David Hamilton deceased who died on 29 November 2004 at No 26H Gleneagles Gardens, Dundonald ("the deceased's flat"). The applicant and his two co-accused William Anderson and Mark Kincaid were convicted by a jury on 17 October 2007 and sentenced by Hart J to life imprisonment with a minimum term of 16 years each on 30 November 2007. They were arraigned on 17 November 2006 and all pleaded not guilty. The applicant was convicted by the unanimous verdict of the jury.

Grounds of Appeal

[2] The initial grounds of appeal against conviction asserted that the verdict of the jury was unsafe for the following reasons:

(a) the verdict was against the weight of the evidence;
(b) there was insufficient evidence to support a conviction for the charge of murder;
(c) the jury was not justified on the basis of the expert evidence (namely the evidence concerning the DNA and a palm print of the applicant on a laboratory bag found on William Anderson's premises containing a sock with the appellant's DNA and other socks having

incriminating material) in concluding that the accused had participated in any act leading to the death of the deceased;

(d) that the trial judge erred in law in permitting the issue of murder to go to the jury at the conclusion of the prosecution case;

(e) there was no evidence either direct or inferential that Gareth Anderson had participated in any event leading to the death of the deceased;

(f) that the prosecution case was that the death of the deceased was the result of a joint enterprise in which all three defendants participated in acts leading to his death, there being no evidence capable of that construction on the case against the applicant; and.

(g) even allowing for the fact that the case against the applicant was said to be a circumstantial case the trial judge did not highlight with sufficient vigour those parts which were contradictive of participation in the murder.

[3] The applicant filed so called perfected grounds of appeal which added to the grounds of appeal and alleged that:

(1) the trial judge ought to have left to the jury the alternative verdict of assisting offenders under Section 4(2) of the Criminal Law Act (Northern Ireland) 1967;

(2) the trial judge's charge was on occasions inaccurate and lacking specificity; and

(4) important evidence suggestive of another person's involvement in the incident was not adduced at the trial.

Evidential background to the appeal

[3] On Monday 29 November 2004 police attended at the deceased's flat. The police had been alerted by work colleagues and neighbours about concerns for the safety of the deceased who was a diabetic as he had failed to attend work and was not answering his door or telephone.

[4] The police were compelled to force entry to the deceased's flat around 2.00 pm and discovered his body lying on the living room floor lying face down naked from the waist up. There was a lot of blood and the body was badly marked. The head had been covered by a heavily bloodstained fleece and a bloodstained brick was lying near the head. Fragments of fibre were found on the bloodstained brick. A television set was also partly lying on top of the body. The evidence was to the effect that the deceased normally kept his

home immaculate but when he was discovered the living room was in a state of total disarray. The TV and stereo were lying on the floor with the wires ripped out; a wooden shelf on a brick ledge had been pulled off; the coffee table glass top had shattered; and cassette tapes, empty beer cans, upturned ashtrays and clothes were lying on the floor. A forensic medical officer confirmed life extinct at 5.10 pm. He noted the presence of at least one deep gash to the back of the deceased's head, several wounds to his back and left arm and numerous bruises.

[5] The autopsy report confirmed that the deceased who was 40 years of age and of slim build weighing 10 stone 3 lbs and 5 foot 9 inches tall had died from a subdural haemorrhage. The deceased had sustained a number of injuries to his head, chest and upper limbs. There were four lacerations on the left side of scalp associated with extensive bruising on the scalp and left side of the face. The skull had been fractured and had caused bleeding over the surface of the brain which led to his death.

[6] The lacerations on the scalp and the fracture to the skull were consistent with the deceased having been struck at least twice with a heavy blunt instrument or instruments probably inflicted whilst he was lying on the floor. The head injury had not been immediately fatal. There were bruises on the right side of the forehead, a laceration to the left side of the forehead, bruises to the nose and lacerations to the lips. He also had a fracture to the right cheek bone. Some of these latter injuries were caused by blows to the face or due to a fall but none would have contributed to death. On the back of the chest there were numerous irregular abrasions and two distinct circular bands of bruising consistent with his having been kicked or stamped. Three ribs on the left side had been fractured leading to small tears on the surface of the left lung. There were five fractures of the rights ribs consistent with being kicked or stamped on. There were numerous bruises, abrasions and lacerations on the upper limbs and distinct abrasions on the left upper arm and left side of the chest consistent with him having been struck by the edge of a television decoder box. There was also bruising to the left testis possibly due to a kick or stamp. The evidence showed that the deceased had been moderately intoxicated when he died which would have caused unsteadiness and incoordination, hindering his ability to escape or adequately defend himself.

[7] The pathologist estimated that time of death was most likely to have been between 6.00 am and 8.00 am on 29 November but it was likely that the deceased had survived for 4 to 6 hours after the attack. It was estimated that the attack occurred between 1.00 am and 3.00 am however, the pathologist emphasised that these timings were highly variable and it was not possible to say the exact time of death.

[8] The evidence had established that the deceased was last seen alive around midnight on 28 November when he left a party being held in a flat of Steven Hunsdale and Pauline Stewart at Dundonald.

[9] One of the co-accused William Anderson lived at No 26E Gleneagles Gardens which shared a landing with the deceased's flat. The applicant lived at No 26C Gleneagles Gardens. All three defendants and several others had spent part of the afternoon of Sunday 28 November in William Anderson's flat at No 26E watching a football match on Sky television and drinking. Kincaid left the flat at 4.00 pm. The applicant remained there watching a football match and he had then gone drinking in the Moat Inn with William Anderson and others.

[10] The evidence against the applicant was of a forensic and circumstantial nature. Bloodstains were found on the bedroom door and wardrobe of the bedroom of William Anderson's flat at No 26E. The bloodstains had DNA profiles which matched that of the deceased. There was also evidence of footprints on No 26E which matched those in the deceased's flat although the footwear was not recovered.

[11] The evidence against the applicant centred on a plastic laboratory bag containing two pairs of white sports socks which was recovered from the bedroom floor in William Anderson's flat at No 26E. The applicant's left palm print was discovered on the plastic bag near the top. The evidence showed that the applicant was left-handed. Bloodstaining was present on one of the socks ("Sock A") and DNA testing confirmed that the blood matched that of the deceased. A sample taken from the sole of one of the other socks ("Sock D") gave a DNA profile which matched that obtained from the applicant. Other mixed male and female DNA profiles of at least three unidentified persons was recovered from the sock. There was also a sample on the ankle/cuff of the bloodstained sock which an unidentified female DNA profile. Fibres recovered from all four of the socks were indistinguishable from dark coloured fibres which were found on a bloodstained brick found in the deceased's home close to the deceased strongly supporting the proposition that the socks had been in direct contact with the brick or the fabric which was the source of the fibres on the brick. The two pairs of socks also contained many fragments of glass. Forensic examination strongly supported the proposition that the fragments of glass originated from broken glass found in the deceased's flat.

[12] The defence put forward the case that the applicant's DNA could have been transferred to the sock when he changed clothing in William Anderson's bedroom before they had gone out to the Moat Inn. The applicant's case was the he had spent Sunday afternoon in No 26E drinking and watching television. He then changed his clothes leaving his old clothes at No 26E and had put on a pair of jeans and a white t-shirt and was wearing black cotton socks when they left to go to the Moat Inn. However, a waitress in the Moat

Inn gave evidence that she knew the applicant and had observed him wearing a dark blue long sleeved shirt that night. There was also evidence that the applicant had cleaned his flat with bleach early on Monday, something which was unusual for him to have done. The co-accused William Anderson had also done the same thing in his flat.

[13] The applicant William Anderson and some of the others left the Moat Inn around 11.30 pm and had all got a lift together. It was the applicant's case that he had been dropped of at St Mary's Church and then made his way to his girlfriend's flat at No 21D Bute Park, Ballybeen arriving around midnight. His girlfriend Heather Todd was angry with him for being late and drunk and they had a bit of an argument. He went to sleep in one of the children's beds while she slept on the sofa with the two children who were unwell. The applicant stated that he had known the deceased and had sometimes signed for the deceased's mail and delivered it to him. He said that the deceased had been in his flat two to three weeks before his death and that he had also been in the deceased's flat on a few occasions, particularly a couple of weeks previously when he had enquired from the deceased if the deceased would sell him his music centre. He denied that he had gone to the deceased's flat after returning from the Moat Inn or was present or involved in any way in the deceased's death.

[14] The applicant denied ever having seen the plastic laboratory bag which contained the socks before unless it had been lying outside his rubbish or he had lifted it and put it inside a bag. He had no other explanation as to how his handprint could be on the bag. The prosecution suggested that the plastic lab bag had originated from the deceased as he worked as a porter in the Ulster Hospital.

[15] The applicant denied that the socks and the bag were his. He did not recall wearing socks of that type although he admitted that he could have done so. He did not recall putting any such socks in a bag in 26E. During his police interviews he told the police that he had been wearing black cotton socks. As the interviews progressed he expressed himself in less certain terms. Similarly he had first maintained he could not have changed his socks but then conceded that he might have changed them.

[16] In her evidence Heather Todd stated that the applicant had arrived at her flat shortly after midnight and he did not leave after he came in so far as she was aware. She agreed that she was angry with him and had words with him when he came in. As to the time when he arrived at her flat she said in evidence "it was definitely after midnight but I can't be sure of the time." Her evidence was that he was wearing a white t-shirt not a long dark blue shirt. In his charge judge pointed out to the jury that Heather Todd's evidence was not challenged as untrue or unreliable. The Crown case was that the applicant must have gone back to Gleneagles Gardens and taken part in the attack before

he then came to Heather Todd's flat and her evidence did not establish that he could not have done so. Her evidence gave the applicant an alibi after he returned to the flat. The crucial question was as to the time when he came to her flat.

The applicant's argument

[17] The applicant contends that the evidence against him was insufficient to found a conviction, or in the alternative, if the court found against the applicant in that primary submission the court was invited to substitute a conviction of the alternative offence of assisting offenders contrary to Section 4(2) of the Criminal Law Act (Northern Ireland) 1967. The applicant's contentions may be summarised thus:

(a) It was submitted that as the trial judge pointed out the evidence linking the accused to the death was in large measure the forensic evidence. The applicant submitted that he had no obvious motive for being involved in the killing. No eyewitness or other evidence placed him at the scene or near it at or near the relevant time. He had made no admissions. He co-operated with the police and gave evidence at the trial as had his girlfriend. The forensic evidence did not link the applicant to the scene of the killing and there was no evidence as to any role that the applicant played in the attack on the deceased. The prosecution case was almost exclusively based on the forensic evidence consisting of DNA fibres and glass fragments found in the plastic lab bag found in the flat of the first defendant William Anderson. The applicant's partial palm print was found on the outside of the bag. Sock A had DNA from the deceased. Sock D had the applicant's DNA on it. All four socks had mixed profiles from at least three contributors. On Sock D which had the applicant's DNA there were three separate profiles recovered from the top and one of these was that of a female. Fibres recovered from a brick adjacent to the deceased's head an on a television at the scene of the attack matched fibres also recovered from a wardrobe shelf and on the socks in the plastic laboratory bag. The source of those fibres was never identified. The small pieces of glass recovered from the socks in the bag matched control samples of glass recovered from the scene. However, the fact that the socks were together in the bag led to the possibility of cross contamination. The glass may have been in the

bag originally or the glass may have been on one of the socks and then transferred to the others.

(b) In relation to the proposition that the judge had erred in law in permitting the charge of murder to go to the jury after the close of prosecution case the applicant submitted that there was no evidence that he was in the deceased's flat at or around the material time and if there was such evidence, it was of such a tenuous character that a properly directed jury could not properly convict the applicant. It was suggested that it was significant that sock A with the deceased's DNA was not the same sock or one of the pair of socks that bore the applicant's DNA. The applicant's DNA was only recovered on sock D and none of the deceased's DNA was present on it. It was a reasonable inference that, if sock D was worn by the applicant he also wore sock C, the other sock in the pair. Yet no DNA matching his was recovered from sock C or any other sock in the bag. It was possible that sock D picked up some of the applicant's DNA whilst being worn or handled by somebody else. The forensic scientist, Mr Bennett in his evidence accepted that it was not possible to say how long the applicant's DNA trace had been on the sock. He accepted that it was only a small amount of DNA and was unable to say whether the DNA had derived from the inside or outside of the sock and that the sock material was retentive and the socks had not been laundered in the recent past. The palm print on the bag could not be dated. It was recovered from William Anderson's flat which the applicant had frequently visited. The applicant submitted that an alternative explanation for the forensic evidence existed and the prosecution could not establish a case to answer purely on the forensic evidence. The forensic evidence did no more than raise the suspicion that the applicant may have been in the deceased's home at the relevant time but there was no evidence of any joint enterprise to commit murder and the theory advanced by the prosecution that given the level of damage in the deceased's flat there must have been more than one person involved was entirely speculative.

(c) The applicant submitted that consideration of the evidence was more suggestive of his involvement after the assault than involvement in the assault. Although

this alternative was not suggested by his counsel at the trial ultimately the trial judge should have alerted the jury to the fact that this was a possibility. The applicant was a close friend and neighbour of the co-accused William Anderson. The deceased's flat was subjected to extensive forensic examination and no evidence was found connecting the applicant to having been in the deceased's flat. The contents of the bag may have been used to clean up after the attack. The evidence was consistent with a clean-up operation on William Anderson's flat as opposed to the applicant having been in the deceased's flat. The deceased's blood was found on several places within William Anderson's flat. The deceased's flat was covered in blood and the fact that there was no blood on the bag suggests that it may never have been in the deceased's flat.

(c) It was submitted that the trial judge's charge was on occasions inaccurate and lacked specificity and in particular, the applicant cited five examples of what he submitted were inaccurate and imprecise descriptions -

(i) The trial judge said, "Indeed one of the other socks in that bag you will hear had a DNA profile that of Gareth Anderson, so there is a link between the socks of Gareth Anderson, socks in the attack and therefore a link between Gareth Anderson and his being present at the attack".

The applicant submitted there was no evidence to suggest that the applicant wore any of the socks at all or owned them. There were several DNA profiles on sock D.

(ii) The trial judge said, "The forensic case against him depends on the evidence linking him to the socks in the laboratory bag in 26E, socks which are connected to the violence in 26H, as you will know but I will repeat very briefly linked to that violence in three ways." The applicant submitted that this phrasing suggested that the prosecution proved the socks were

connected to the violent attack and it was therefore prejudicial.

(iii) The judge said, "Well the contents of the bag are clearly linked to the murder you may think." The applicant submitted this form of words undermined any inference the jury may have been contemplating that the applicant's involvement was after the murder. His phrase linked to the murder was suggestive of a direct link.

(iv) The judge said, "His left hand print is on the bag in a position where you may think that the bag was carried by Gareth Anderson." The applicant submitted that there was no evidence given as to whether the print left was consistent with holding the bag or simply leaning or resting a hand on the bag.

(v) The judge said, "Mr Bennett's opinion being that the most likely explanation for Gareth Anderson's DNA being on the socks is that he had worn the socks." The applicant submitted that the judge incorrectly summarised the evidence. Mr Bennett's actual evidence was –

> "Given the amount of DNA there I would say it would be more likely to be primary contact as opposed to secondary contact. For example it could have come from Mr Anderson's foot but it could have come from direct contact with another source of his DNA as opposed to transfer, say from one of the other socks."

(d) The applicant submitted that there was evidence which tended to show more than a suspicion that David Moffett who was living in William Anderson's flat at 26E at the relevant time may have been involved somehow in the events that took place. The forensic evidence showed strong support for the proposition

> that David Moffett's socks had been in close contact with some or all of the glass found at the scene of the murder. The jury did not hear evidence about this and were therefore unaware of the full extent to which glass fragments from the scene could have been distributed. The evidence of the glass on the socks does not seem to have been put to Mr Moffett by the police and the applicant argued that the evidence was important as it would have enabled the defence to suggest that if more than one person was involved it may have been Mr Moffett together with Mr William Anderson.

The Crown argument

[18] The Crown contended that the evidence against the applicant consisted of several strands which, when viewed together were sufficient to prove his presence in the living room of the deceased's flat and lay the basis for a conviction for murder. His left palm print on the laboratory bag and DNA on the socks inside were important pieces of evidence together with the 175 fragments of glass. The appellant was left handed. There was clear evidence of an attempt to clean the area outside the deceased's flat. Only the floor outside flats Nos 26E, H and F had been cleaned. Despite the existence of footprints in blood in the deceased's flat there were none found in any of the communal areas of No 26E Gleneagles Gardens. This suggested that after the murder cleaning activities had been confined to the flats on that floor. Cleaning had taken place in the flats belonging to Mr William Anderson and the applicant. This was an unusual event since the applicant could not remember the last time he had mopped the floor and he accepted that his flat was a "bit of dump". Since both William and Gareth Anderson had been drinking heavily during that weekend it is highly unlikely and very suspicious that they both decided to clean their flats and did so at the same time. The applicant presented unconvincing and inconsistent attempts to account for his links with the DNA evidence in the bag. The applicant claimed he wore a white shirt to the Moat Inn but a witness said she saw him wear a dark blue shirt. When he arrived at Heather Todd's house according to her evidence he was wearing a white shirt, indicating a change of clothing or a disposal of the blue shirt. There were inconsistencies in his version of going to Heather Todd's house. There was a substantial evidential link between the bag and the murder scene and the applicant and all these strands of evidence could lead a jury to convict.

[19] The Crown contended that there was no basis for leaving an alternative verdict of assisting offenders to the jury before any requirement to do so arises it must be obviously raised by the evidence. On the facts of the present case it was pure speculation that the applicant was only involved after the event and this hypothesis had never been advanced by him. The jury had a straightforward choice to either accept the prosecution case or the applicant's

account that he had been in Heather Todd's flat at the material time and therefore not in Gleneagles Gardens. The judge's duty does not extend to every possible hypothesis on the facts. In a circumstantial case the judge need not leave every possible offence that may have been committed if the facts turn a particular way unless the offences are raised in the evidence given. The Crown argued that the summing up read as a whole was entirely fair and accurate. The passages selected for criticism did not impact on the safety of the conviction. The inference that the palm print had been made by the applicant carrying the laboratory bag was one the jury could fairly reach. The prosecution had put that to the applicant and he conceded that it looked like that. The judge's summing up with Mr Bennett's evidence was fair and balanced. Finally, the Crown argued that the forensic evidence found on Moffett's socks had been properly disclosed to the defence and whether or not another person was involved in the murder did not affect the evidence against the accused.

Conclusion on the judge's refusal to give a direction

[20] It is clear that Hart J properly kept in mind the Galbraith test in deciding whether a direction should be granted at the end of the Crown case. We are satisfied that at the conclusion of the crown case there was sufficient evidence to justify the trial judge refusing to accede to the application. There was a clear forensic link between the appellant and the laboratory bag containing socks which were clearly linked to the appellant and which had incriminating material comprising the deceased's blood, the fragments of glass and the applicant's DNA. The jury would have been entitled to conclude that his attempts to account for the links were inconsistent and unconvincing. The jury could have concluded from the evidence that the appellant had changed out of a dark blue shirt into a white shirt in the course of the night giving rise to an adverse inference against the appellant in the circumstances. The cleaning by the appellant of his flat that weekend in the circumstances around the same time as the cleaning of William Anderson's flat and the area outside the deceased flat excites the gravest suspicion which taken with all the other matters give rise to an adverse inference. He attempted to account in advance for any scientific connection between him and Mr Anderson and the deceased's flat. He claimed he had been in every room in the deceased's flat and claimed to have touched a number of items including the television, stereo, satellite box, CDs and the coffee table which were items involved in or used as weapons in the attack on the deceased. He said he had been in every room in the deceased's flat because he wanted to see the smoke alarms that he had installed. There were only two smoke alarms in the deceased's flat so that could not have been the reason why he would have had to have been in every room of the flat. When questioned about what he might have touched in William Anderson's flat he agreed he may have touched the bath taps in turning them on to fill a bucket if he was mopping the floor. On the evidence a jury could conclude that the only time that he was involved in mopping the

floor was cleaning up after the murder. While Ms Todd said that the appellant told her on 29 November that the police might want to speak to him the appellant denied making such a comment at all. He could not remember speaking to others about the murder despite it being such a dramatic event. He considered that it was "none of his business" a comment from which the jury could draw an adverse inference. We are satisfied that there was ample justification for the trial judge's rejection of the direction application.

Alternative verdict issue

[21] The Criminal Law Act (Northern Ireland) 1967 Section 4 provides:

> "(1) Where a person has committed a relevant offence, any other person who knowing or believing him to be guilty of the offence or of some other relevant offence, does without lawful authority or reasonable excuse an act with intent to impede his apprehension or prosecution, shall be guilty of an offence . . .
>
> (2) If, on the trial of an indictment for a relevant offence, the jury are satisfied that the offence charged (or some other offence of which the accused might on that charge be found guilty) was committed but find the accused not guilty of it they may find him guilty of an offence under sub section (1) of which they are satisfied that he is guilty in relation to the offence charged (and that other offence)."

Section 6 of the same Act provides:

> "(2) On an indictment for murder a person found not guilty of murder may be found guilty of –
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> (a) manslaughter or of causing grievous bodily harm with intent to do so; or
>
> (b) of any offence of which he may be found guilty under an enactment specifically so providing or under Section 4(2); or
>
> (c) of an attempt to commit murder or an attempt to commit any other offence of which he might be found guilty

> but may not be found guilty of any offence not included above."

[22] In R v. Coutts [2006] UKHL 39 Lord Bingham stated in paragraph 23 of the speech:

> "The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obviously alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since for all their potential importance individuals they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence. By that I refer to alternatives which should suggest themselves to the mind or any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial."

Lord Hutton expressed the test in a slightly different way. He said that an alternative verdict should only be left if it is one to which a jury could reasonably come or where the alternatives really arise on the issues presented at the trial. Lord Rodger explained that a court should not, however, put the possibility of a viable alternative verdict to the jury if this was remote from the real point of the case.

[23] In R v Foster [2008] 1 Cr App R 38 Judge P stated at paragraph 61:

> "Not every alternative verdict must be left to the jury. In addition to any specific issues of fairness, there is what we shall describe as a proportionality consideration. The judge is not in error if he decides that a lesser alternative verdict should not be left to the jury if that verdict can properly be described in its legal and factual context as trivial or insubstantial or where any possible compromise verdict would not reflect the real issues in the case. He must, of course, reconsider any decision he may have reached about alternative verdicts in the light of any question which the jury may see fit to ask, . . . However, when the defence to a specific charge amounts to the admission or assertion of a lesser offence the primary obligation

> of the judge is to ensure that the defence is left to the jury. If it is not, on elementary principles, the summing up will be seriously defective and the conviction will almost inevitably be unsafe. The judgment whether a lesser alternative verdict should be left to the jury involves an examination of all the evidence disputed and undisputed and the issues of law and fact to which it has given rise. Within that case specific framework the judge must examine whether the absence of a direction about a lesser alternative verdict or verdicts would oblige the jury to make an unrealistic choice between the serious charge and complete acquittal which would unfairly disadvantage the defendant. In this context the judge enjoys the feel of the case which this court lacks. On appeal the problem which arises is not whether a direction in relation to a lesser alternative verdict was admitted and whether its omission was erroneous but whether the safety of the conviction is undermined."

[24] The suggestion that there was a case that the appellant had only been involved in the crime after the event is a purely speculative hypothesis which was never advanced by him. His defence to the charge did not amount to the admission or assertion of a lesser offence. The Crown case was that he was obviously involved in the murder while there was evidence that a clean up had occurred there was no indication that it was distinct from the murder. The state of the flat pointed to the involvement of a number of people involved. The jury was faced with a choice between the appellant's account (which if accepted negatived any offence) and the prosecution case (which if accepted proved the charge of murder). Either he went back to Heather Todd's house after leaving the Moat Inn or he did not. There was no evidence at all to suggest that having left the Moat Inn and going to Heather Todd he returned to the scene to help clean up after the event. The jury was entitled to conclude that the cleaning up was closely connected to the actual killing.

[25] The Crown argued, correctly in our view, that the trial judge was not obliged in this circumstantial case to leave any possible offence that might have been committed by the defendant if the facts turned a particular way unless it was raised in the evidence given in the case. An alternative verdict should not be raised as a possibility where a compromise verdict would not reflect the real issues in the case. As Judge P pointed out the trial judge enjoys the feel of the case which the Court of Appeal lacks. We, accordingly, reject the applicant's second ground of appeal.

Criticisms of the judge's charge

[26] We must also reject the applicant's criticism of the summing up of the judge. We consider that the passages referred to in the summing up which were criticised do not impact on the safety of the conviction. A consideration of the connection between the laboratory bag, the socks and the murder involved considering the bag and the socks and their connection with the applicant. There was evidence which provided such a linkage, namely the presence of the deceased's blood, the fragments of glass, the presence of the applicant's DNA on one of the socks together with fibres indistinguishable from those on the bloodstained brick. The suggestion by the judge that the contents of the bag were clearly linked to the murder was thus entirely correct. The judge correctly stated:

> "Well the contents of the bag were plainly linked to the murder you may think. They are linked with the fragments of glass and the socks. The blood on one of the socks (inaudible) Hamilton's and the fibres indistinguishable from the bloodstained brick."

The applicant criticised the trial judge's suggestion that the jury might think that the left-hand print on the bag was in a position where they might think that the bag had been carried by the applicant. The judge's comment was a fair one. The judge was not telling the jury that they were bound to so conclude but it was an inference which had been advanced by the Crown and the applicant himself had accepted that it looked like he had carried the bag. The position of the print was consistent with the bag being carried by the applicant.

[27] Having considered the judge's charge in relation to the summary which he gave of Mr Bennett's evidence on how the DNA may have come to be on the sock we do not think that the judge's summing up was unfair. His summary was consistent with Mr Bennett's evidence. The sock was not the only piece of evidence with the applicant's DNA on it. It bore his palm print.

The involvement of others

[28] The possibility of the involvement of Moffett which was properly mentioned to the jury did not preclude the involvement of the applicant. The forensic link with Moffett's socks had been properly disclosed to the defence. We conclude that the judge dealt fairly with the point in his charge.

The safety of the conviction

[29] In R v. Pollock [2004] NICA 34 the Court of Appeal considered the proper approach to be taken to an argument that a jury's verdict was unsafe and set out the following principles:

> "1. The Court of Appeal should concentrate on the single and simple question does it think the verdict is unsafe.
>
> 2. This exercise does not involve trying the case again rather it requires the court where a conviction has followed trial and no fresh evidence has been introduced on the appeal to examine the evidence given at trial and to gauge how safe the verdict against that background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if having considered the evidence the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence it should allow the appeal."

Applying that approach we are satisfied that the verdict was not unsafe and, accordingly, we refuse leave to appeal.