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Judgment: approved by the Court for handing down | *Delivered:* **17/6/2011**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

DENISE MARIE BOYD

Before: Girvan LJ, Coghlin LJ and Hart J

HART J (delivering the judgment of the Court).

[1] The defendant appeals with leave of the single judge against her conviction on a single count of wounding Sarah Gardiner with intent to do her grievous bodily harm on 5 April 2009 following a trial before Her Honour Judge Smyth and a jury at Coleraine Crown Court in October 2010. No complaint is made of the conduct of the trial by the prosecution, or in respect of the judge's charge to the jury, a charge which Mr O'Donoghue QC (who did not appear below and now appears on behalf of the appellant with Mr Farrell) described as exemplary. The sole ground of appeal is that senior counsel who appeared for the appellant at the trial failed to put to Sarah Gardiner the contents of a criminal injury application form prepared for her by a volunteer with Victim Support, but signed by her, in which it is asserted that her version of events was different in a material respect from her account given to the police and in evidence at the trial.

[2] It is not disputed that the criminal injury statement had been disclosed to the defence by the court following an application by the appellant for third party disclosure, and it was available to senior counsel for the defence when he cross-examined Sarah Gardiner. It is not disputed by the prosecution that senior counsel overlooked the statement, and indeed we were informed by Mr O'Donoghue QC that senior counsel, having realised what happened, himself drafted the grounds of appeal before he felt obliged to withdraw from the case.

[3] The approach to be applied where an appeal is brought on the grounds of a failure of counsel to properly conduct an appellant's case at trial was described by Lord Carswell in the Privy Council case of Teeluck v State of Trinidad and Tobago [2005] 1 WLR at 2421 at 2432 when he said:

> "It should now be regarded as established law that in some circumstances the mistakes or omissions of counsel will be a sufficient ground to set aside a verdict of guilty as unsafe."

At page 2433 he went on to say:

> "In *Sealey v. The State* 61 WIR 491, para 30 their Lordships stated, citing *R v. Clinton* [1993] 1 WLR 1181 and *R v. Kamar* The Times, 14 May 1999:
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> > "Whilst it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, there are some circumstances in which the failure of defence counsel to discharge a duty, such as the duty to raise the issue of good character, which lies on counsel . . . can lead to the conclusion that a conviction is unsafe and that there has been a miscarriage of justice . . ."
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> There may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude: see *Boodram v. The State* [2002] 1 Cr App R 103, para 39; *Balson v. The State* [2005] UKPC2; and cf *Anderson v. HM Advocate* 1996 JC 29.
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> Their Lordships are of opinion that this case falls into the exceptional category of those where the omissions of counsel had such an effect on the trial and verdict that it cannot be said with sufficient certainty that the conviction was safe."

[4] An appellate court has therefore to consider the impact of counsel's errors on the trial and on the verdict, remembering that it is only in

exceptional cases where the omissions of counsel have such an effect on the trial and verdict that the conviction cannot be said to be safe.

[5] The prosecution case is that this offence involved the appellant striking Sarah Gardiner in the face with a glass inflicting significant injuries to her face which required some nine sutures to be inserted. That an incident occurred between Sarah Gardiner and the appellant is common case. Sarah Gardiner's evidence was that she was in a nightclub known as the "Countryman Inn" in Ballymena late on the night of Saturday 4 April or the early hours of Sunday 5 April 2009. She said that she had had about three vodkas and lemonade, and had been dancing on the dance floor. She accepted that she may have been holding a glass containing vodka and lemonade whilst she was on the dance floor. She had been dancing with some female friends, and when she finished dancing she said that she made her way from the dance floor to join her boyfriend. Her route involved her walking along the length of the bar past a stone chimney breast area. She says that as she reached the chimney breast she met the appellant and the appellant's boyfriend Stephen Milliken.

[6] Her evidence was that sometime before she and Milliken had gone out on two occasions, their relationship had not developed any further, although she would have liked it to have done. When cross examined she said that she could only account for what happened next because she believed the appellant was jealous of her previous relationship with Mr Milliken.

[7] Sarah Gardiner said that as she reached the chimney breast she was struck on the face by an object in the appellant's right hand, she had seen a glass with clear liquid in the appellant's hand, and the inference therefore was that the appellant deliberately struck her on the face with the glass she was holding, inflicting the injuries to which reference has been made. Sarah Gardiner was emphatic that there had been no altercation between herself and the appellant of any sort immediately before the blow was struck by the appellant, and that no provocative or violent action on her part occurred before she was struck by the appellant.

[8] The appellant's case was quite different. She said that she had felt intimidated by the manner Sarah Gardiner and her friends were dancing on the dance floor. She and her boyfriend were looking for a space at the bar. She had her glass in her hand when Sarah Gardiner approached her from the opposite direction and shoved the appellant in the chest with her hand, causing the appellant to drop her glass and fall back. She responded by pushing Sarah Gardiner back, causing Sarah Gardiner to fall back against the chimney breast. She said that Sarah Gardiner had a glass in her hand at the time, it cracked against the wall and Sarah Gardiner then swung the glass at her. There then followed a struggle between them in which they wrestled, pushed and pulled at each other. During this struggle the appellant alleges

that Sarah Gardiner continued to hold her glass in her hand. The two women were then separated by the appellant's boyfriend, the appellant went to the toilet before leaving on her own, and going to a friend's house where she washed and changed her clothes. She said that she did not realise at any time that Sarah Gardiner had been hurt, nor did she see any blood.

[9] The appellant's case was therefore that she had been subject to an unprovoked attack by Sarah Gardiner which caused the appellant to drop her own glass, yet Sarah Gardiner was able to hold on to her glass which broke in the ensuing struggle. The clear implication was that although Sarah Gardiner swung her glass at the appellant, somehow Sarah Gardiner managed to hit herself in the face with her own broken glass, or was struck in the face by her own broken glass, because of something that happened during the struggle, and did so without the appellant being aware of the injury being inflicted. It was put to Sarah Gardiner by senior counsel for the appellant that:

> "This unfortunate event happened in a completely different way that you have told the jury about . . . it arose out of a combination of jealousy and alcohol . . . and an accidental injury to your face in pretty well a brawl between two girls over nothing."

[10] The original account given by Sarah Gardiner to the police, and her evidence during the trial, was to the effect that she was walking from the dance floor past the stone chimney breast at the time of this incident. However, in the criminal injury application form which was written out for her by a member of Victim Support, but which she signed, and which was dated 9 April 2009, there occurred the following sentence:

> "She was on her way *to the toilet* when Denise [the appellant] in a totally unprovoked attack smashed her glass into the left side of her face." (Our emphasis).

[11] If Sarah Gardiner was, or may have been, correct in stating that she was on her way to the toilet, this would have meant that she was approaching the appellant from the diametrically opposite direction to that which she described in her police statement and in her evidence. Mr O'Donoghue based his argument upon the basis that the dynamics of the movements of Sarah Gardiner and the appellant were very clearly in issue at the trial. He submitted that the importance of the direction from which Sarah Gardiner approached the appellant was a central issue at the trial, and not a collateral issue, and as there was a clear contradiction between Sarah Gardiner's account to the police and her evidence on the one hand, and what was stated in the criminal injury application on the other, about where she was going at the time, this should and could have been put to Sarah Gardiner. Mr O'Donoghue argues that had it

been put the court could not be satisfied what view the jury would have taken of it, and therefore that the verdict is unsafe.

[12] Miss Christine Smith, who appears on behalf of the prosecution, accepted that the direction in which Sarah Gardiner was travelling before this episode was an issue at the trial, but submitted that the omission to raise the contents of the criminal injury application was not sufficient to render the verdict unsafe because the evidence of Sarah Gardiner was strongly supported by two independent witnesses. She conceded that if, contrary to the evidence of the witnesses to whom we shall refer in a moment, it had been Sarah Gardiner's word alone against that of the appellant, the omission to raise this matter may have had more significance.

[13] Roberta Hood and Kirsty Robinson were standing beside the bar in a position which meant that they were very close indeed to the altercation between Sarah Gardiner and the appellant. Indeed the photographs showed that they would literally have been within arms length of the appellant and Sarah Gardiner at the material time, and were ideally positioned to see what happened. Their evidence was that Sarah Gardiner approached the appellant from the direction that Sarah Gardiner alleged in evidence, namely, coming from the dance floor. They made statements to this effect to the police before Sarah Gardiner made her criminal injury application statement. Roberta Hood's evidence was that she knew Sarah Gardiner only to speak to, and Kirsty Robinson said that she had not met Sarah Gardiner before, and neither knew the appellant. Their evidence was that the appellant attacked Sarah Gardiner in the way that Sarah Gardiner alleged. Their evidence was completely at variance with that of the appellant, they were cross examined on behalf of the defendant and their evidence was not shaken.

[14] Mr O'Donoghue submitted that the account given by Sarah Gardiner in the criminal injury statement should have been put to Roberta Hood and Kirsty Robinson as well, and again he submitted that the court could not know how the jury would have regarded their evidence.

[15] Whilst we accept that the criminal injury application statement should have been put to Sarah Gardiner as it showed an inconsistency in her account, we do not accept that the direction in which she approached the appellant was as central to the case as Mr O'Donoghue submits. It was undoubtedly an issue in the case, but it was not pressed strongly in cross examination, although it was put to Sarah Gardiner that she had approached the appellant from a different direction. We accept that had there been a straightforward conflict of evidence between the evidence of the appellant and Sarah Gardiner alone that the significance of this matter may have been more substantial than we believe it to be in the circumstances of the present case.

[16[However, when considering whether the conviction is safe we have to consider not only the effect of the omission to put this statement to Sarah Gardiner, but the remainder of the evidence. The first significant matter is that the account given by the appellant to explain how Sarah Gardiner came to receive this significant injury to her face is implausible. We find it difficult to see how Sarah Gardiner could have injured herself in the face with a broken glass, which is the inference to be drawn from the appellant's case, and did so without the appellant being aware of that and the blood on Sarah Gardiner's face from the wound.

[17] The second is the evidence of Roberta Hood and Kirsty Robinson, evidence which the jury would have been entitled to consider was strongly supportive of the account given by Sarah Gardiner. They were in an ideal position to see clearly what happened, and there was no suggestion that either was a biased or unreliable witness. The jury had to assess the credibility and reliability of these two witnesses, and if it accepted their evidence, as the verdict suggests the jury must have done, their evidence provided powerful support for a strong prosecution case which was not solely dependent upon the evidence of Sarah Gardiner.

[18] Having considered all of the submissions made to us we are satisfied that whilst there was an omission by senior counsel to put the contents of the criminal injury application form to Sarah Gardiner, this is not a case which falls into the exceptional category described by Lord Carswell in Teeluck v. State of Trinidad and Tobago where the omissions of counsel had such an effect on the trial and verdict that it cannot be said with sufficient certainty that the conviction was safe. On the contrary, we are satisfied that the conviction was safe, and the appeal is accordingly dismissed.