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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v.

ROGER FERGUSON
AND
JACQUELINE CRYMBLE

Before: Morgan LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ

Introduction

[1] Roger Ferguson, Jacqueline Crymble and Colin Robinson were charged with the murder on 20 June 2004 of Paul Norman Crymble ("the deceased"). Two other defendants, Sonia Thompson and Dawn Margaret Ferguson, the applicant's mother, were charged with attempting to pervert the course of justice. The accused were tried before McLaughlin J and a jury. Roger Ferguson and Jacqueline Crymble were convicted of murder on 17 May 2007. McLaughlin J sentenced Roger Ferguson to life imprisonment and fixed a tariff of 18 years. He sentenced Jacqueline Crymble to life imprisonment and fixed her tariff at 20 years. The single judge Stephen J refused leave to appeal. He considered that the verdict could not be considered unsafe. There was in his view voluminous evidence implicating the accused.

[2] The Crown case against Roger Ferguson and Jacqueline Crymble was that they had a common intention to kill the deceased and acted together to bring about his death. The case against the applicants was a strong circumstantial one. The Crown evidence can be summarised thus:-

(a) Prior to 20 June 2004 Paul and Jacqueline Crymble lived at 77 Ballybreagh Road, Portadown, Craigavon, Co Armagh. It was alleged by Jacqueline Crymble that at approximately 2.27 am on the morning of Sunday 20 June 2004 Paul Crymble had been abducted from his home. Prior to that on the evening of 20 June 2004 Jacqueline

Crymble and the deceased went to a local bar where they consumed alcohol. For Paul Crymble this was an unusual event. The two left the bar at 1.20 am and returned home. A '999' call was made from the house at 2.30 am. The police arrived at 3.01 am to find Jacqueline Crymble on her knees on the left hand side of the hall. Her hands but not her feet were tied with cable ties. There was no objective reason why the applicant should have been on her knees. A police officer released her hands from the ties using a pen knife. Crymble told the police that intruders had taken the deceased claiming that they demanded drugs or money. She told police that she was surprised by two armed intruders as she entered her own house. They had pushed her husband down to the ground and given him a beating. They then placed a plastic bag over his head and taped it. According to Jacqueline Crymble no one else was in the house at the time of the attack. Their two children were with their grandmother in Carrickfergus when the incident occurred. Jacqueline Crymble alleged that she had vomited but no vomit was found at the scene. The doctor who examined her after the events in question found that her pulse and blood pressure were normal which would be an unusual finding after a trauma of this kind.

(b) On 20 June 2004 at 10.00 am the body of the deceased was found in Meadow Lane on the main Markethill to Portadown road in the back of his own vehicle. The body was examined by Dr Paul McConnell. There was a black bag over the head of the corpse. The body was clothed. It was slouched forward to the rear of the seat area with the legs curled up. The bag had been taped very tightly around his neck several times. His hands were tied behind his back. Professor Crane examined the body on 21 June 2004 and concluded that death was due to plastic bag suffocation. Although the deceased had a number of other injuries including a head injury these would not have been fatal in themselves.

(c) The Crown adduced evidence of the relationship between Jacqueline Crymble and Roger Ferguson. This evidence established that it was on-going for a period of time before the abduction and killing of the deceased. Although they attempted to conceal the information from the police during interview under caution the two

applicants had a sexual relationship. The evidence showed that they had visited Donnelly Brothers garage in Dungannon together on 4 May 2004 to enquire into the purchase of a motor vehicle. Roger Ferguson's mother was also present. At that time neither Jacqueline Crymble nor Roger Ferguson had the means to purchase the vehicle. The evidence also established that they had been in direct contact at or about the time of the attack on the home of Paul and Jacqueline Crymble on the evening of 4 May 2004 when two intruders entered the house, one apparently carrying a spade.

(d) The evidence established that Jacqueline Crymble had on numerous occasions made serious and unpleasant allegations against her husband including allegations of violence and assault, sexual abuse of herself and her daughter, venereal disease and causing her to miscarry. She had told Roger Ferguson that she had been pregnant by him and that the deceased had kicked her to the point of causing her to miscarry.

(e) The forensic evidence established that there was a footprint from a Caterpillar boot size 10 found in the hallway at the scene of the crime, consistent with a boot mark from Roger Ferguson. There were the remnants of a rolled up cigarette found in the house in the aftermath of the death which was found to contain the DNA of Roger Ferguson. The Crown accepted that these pieces of evidence could have come from the time when Roger Ferguson stayed with Jacqueline Crymble in the matrimonial home before 20 June 2004 when the deceased was away in Spain cycling with a friend. The cable ties securing the deceased's wrists and ankles were found to contain DNA from the applicant. The fingerprints of Jacqueline Crymble were found on the black plastic bag used to suffocate the deceased. Her finger print was also found on the next bag on the roll of plastic bags from which that bag had been removed. Both the roll of plastic bags and the roll of tape from which the masking tape had been taken to put round the deceased's neck had been returned to the drawer where they were found by the police. This indicated that the roll of plastic bags and the masking tape had been put back in the drawer after use.

(f) There was evidence of telephone contact between Jacqueline Crymble, Roger Ferguson and Colin Robinson at relevant times including in particular at 2.21 am on 20 June 2004.

(g) Colin Robinson in giving his evidence accused Jacqueline Crymble and Roger Ferguson as being involved in the murder of the deceased.

[3] Mr O'Donoghue QC appeared with Mr Barlow on behalf of Roger Ferguson. Mr McCreanor appeared on behalf of Jacqueline Crymble. Mr Chambers, led by Mr Mooney QC, presented arguments on behalf of the Crown. At the conclusion of the applications for leave to appeal the court indicated that it rejected all the grounds of appeal with one exception. The grounds of appeal, upon which leave was granted, related to the way in which the trial judge dealt in the course of his summing up with the question of lies by Roger Ferguson and Jacqueline Crymble. In this judgment we propose dealing in paragraphs [4] to [34] with the reasons why we refused leave on the other grounds and we shall then consider the question of the ground upon which leave was granted.

The joinder of Dawn Ferguson in the indictment

[4] Roger Ferguson contends that the decision to prosecute the applicant's mother on the same indictment had the effect of diminishing the alibi evidence to be called on his behalf rendering the trial process unfair.

[5] Mr O'Donoghue on behalf of the applicant contended that the applicant made the case from the time of his interviews that at all relevant times he was in his bed at his home where he lived with his mother Dawn Ferguson. His mother had allegedly told him that she had checked on him at about 2.00 am and saw him in bed. Dawn Ferguson also told the police that she checked on the applicant and said that he was in bed at the relevant time although when she was initially spoken to by the police she did not know his whereabouts. Mr O'Donoghue argued that it was improper to prosecute Dawn Ferguson for the offence on the same indictment as Roger Ferguson given that he was being prosecuted for the offence of murder. It was crucial that the applicant had the opportunity to present the alibi evidence in a manner which was fair. While Dawn Ferguson did give evidence she did so as a defendant coming from the dock. This must have undermined her reliability and credibility in the eyes of the jury. The applicant should have been allowed to present his alibi evidence in a neutral environment. Counsel relied in particular on the approach adopted by the trial judge in Rodenhurst [2001] EWCA Crim 1508 to support his argument on this point.

[6] In Rodenhurst a number of individuals came forward purporting to provide alibi evidence in support of the accused who was charged with a number of serious offences. The Crown took the view that their evidence was false and they were charged with attempting to pervert the course of justice. The accused who had been unavailable earlier was arrested and the charges against him were added to the indictment against the alibi witnesses. Application was made to stay the proceedings as an abuse of process. This arose out of the argument that the alibi witnesses were not compellable and were tainted by the stigma of being in the dock for making false statements. The trial judge concluded that:-

> "Perhaps with the benefit of hindsight one can see that it, really, perhaps was not appropriate necessary and necessary to arrest the alibi witnesses and charge them . . . I am concerned with the narrow point as to the fairness of the trial of R and it seems to me that that can be dealt with in the most simple way which is to quash the counts relating to all defendants apart from R."

Rodenhurst was convicted on the remaining charges and appealed contending that the trial judge should have in fact quashed the indictment as a whole against all defendants including the appellant. This contention was rejected by the Court of Appeal, the view being taken that the alibi witnesses remained compellable. The conviction of Rodenhurst was accordingly not unsafe.

[7] The Crown resisted Mr O'Donoghue's argument pointing out that no application had been made to have the indictment severed. In fact the applicant had a significant advantage in having Dawn Ferguson prosecuted on the same indictment. She did in fact give evidence and the applicant's submission in effect complained of a hypothetical unfairness which did not come to pass. Dawn Ferguson was the only alibi witness. She had initially told the police that she had not seen the applicant on the night of the death. When the alibi evidence was so weak and contradictory it was proper to prosecute Dawn Ferguson on the same indictment. To have tried her separately may have led to inconsistent verdicts. The applicant had a full opportunity to cross examine Dawn Ferguson.

[8] The joinder of two or more accused in one indictment notwithstanding the absence of a joint count against them is governed by Assim [1966] 2 QB 249. The appellant in that case argued that it was bad in law to charge two different people on one indictment. It was argued that offenders could properly be joined in one indictment only as principals said to have jointly committed one offence or as principals and accessories. The Court of Appeal extensively reviewed the authorities and concluded that the question of joinder is a matter of practice "on which the court has unless restrained by statute inherent power

both to formulate its own rules and to vary them in the light of current experience in the needs of justice." The propriety of the joinder of offenders is unaffected by the Indictments Act 1915 or any other legislation. Since joinder of offenders is merely a matter of practice errors in the application of the relevant rules though amounting to an irregularity in the proceedings will not deprive the trial court of jurisdiction. Consequently, the Court of Appeal is entitled to dismiss an appeal against conviction advanced on this ground if there has been no miscarriage of justice and especially where there has been a failure by the defence to object to the joint trial.

[9] Sachs J giving the judgment of the court said at [1966] 2 QB 249:-

> "As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts on one indictment and can, subject always to the discretion of the court, be tried together. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert but is not limited to such cases.
>
> Again, while the court has in mind the classes of case that had particularly been the subject of discussion before it, such as incidents which, irrespective of their appearing a joint charge in the indictment, are contemporaneous (as where there has been something in the nature of an affray) or successive (as in protection racket cases), or linked in a similar manner as where two persons individually in the course of the same trial commit perjury as regards the same or a closely connected fact, the court does not intend that the operation of the rule to be restricted so as to apply only to such cases as have been discussed before it."

[10] The offence separately alleged against Dawn Ferguson was closely related to the primary offence relating as it did to an alleged alibi which, if true, exonerated the applicant but which if shown beyond reasonable doubt to be false was highly relevant to the case against the applicant. Whatever

theoretical prejudice might have occurred if Dawn Ferguson had declined to give evidence and could not have been compelled to do so, such an eventuality did not in fact arise. If it had, the trial judge may have concluded that separate trials were necessary. If an application had been made at the outset for severance he might have been persuaded to follow the course adopted in Rodenhurst. However no such application was made and the applicant did not object to the joint trial. Indeed as pointed out by the Crown he gained a technical advantage in the events as they turned out by being able to cross examine Dawn Ferguson.

[11] Accordingly we reject the applicant's case that the joinder of the counts was improper and unfair. Having regard to the way in which the trial was conducted no miscarriage of justice has been demonstrated under this ground of appeal.

The events of 4 May 2004

[12] The second ground of appeal was that the evidence of the attack on the house of the deceased on 4 May together with the evidence of the phone calls between Jacqueline Crymble and the applicant Ferguson ought not to have been admitted in evidence against the applicant Ferguson. If it was to be admitted at all it could only have been as evidence as against the applicant Crymble. It was argued that the trial judge ought to have stated that clearly to the jury.

[13] As part of the circumstantial evidence in the case against Roger Ferguson the Crown relied on events which occurred on 4 May 2004 at a time in the evening when Jacqueline Crymble was unusually away from the house shopping with the children at a late hour. Two men, one of whom was carrying a spade, called at the house of the deceased. The deceased had gone to bed about 8.45 pm. He heard whispering in the hall. He saw a tall figure at the bedroom door wearing a hood over his head and appearing to brandish a spade. He became aware of a second intruder. He shouted at them to get out. The two men ran away and the deceased called the police and rang his wife telling her to go to the nearest police station. His telephone call occurred at 10.45 pm. The applicant telephoned Jacqueline Crymble at 10.46 and she rang back at 10.48. In dealing with this part of the case the trial judge asked the jury to consider whether there was anything suspicious about the phone calls between the applicant and Jacqueline Crymble or whether it was part of jigsaw that all fitted together or whether it was little strands of evidence coming together or not. He said that the "evidence was presented by the prosecution in the context of a suggestion, as Colin Robinson put it, something nasty was going to happen." He pointed out the lateness of the hour for Jacqueline Crymble to be going shopping, the length of time that she was out of the house, the fact that she had taken her children from the house and that she did not

return until 11.00 pm at a time when the children would have been expected to be normally in bed for school the next day.

[14] It was clear from the evidence that the deceased did not identify either of the intruders on 4 May. There was no direct evidence adduced to prove that the applicant was one of them. Having regard to the applicant's case that he was not at the scene of the crime on 20 June an intrusion on 4 May by an unidentified intruder was therefore not of itself inconsistent with his case. In a circumstantial case there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but the whole taken together may create a strong conclusion of guilt (Exall [1866] 4 F&F 922 at 929). The events relating to the intrusion of 4 May must be taken in conjunction with:-

(a) Jacqueline Crymble's clearly suspicious absence from the house;

(b) her taking of the children from the house at an unusual time;

(c) the close relationship between Jacqueline Crymble and Roger Ferguson;

(d) the earlier visit that day to Donnelly Brothers' garage in suspicious circumstances;

(e) the evidence of a later conspiracy by individuals to break into the house to do something unlawful to the deceased; and

(f) the telephone communication between Jacqueline Crymble and the applicant during the events and particularly at a time very close to communications from the deceased to Jacqueline Crymble and the reporting of the incident to the police.

This combination of facts lead to the conclusion that the events of the evening of 4 May were of relevance when considering the overall case against the applicant. It was a strand of evidence in a circumstantial case no more and no less. The judge correctly explained to the jury the nature of circumstantial evidence and how the jury should approach a case based on circumstantial evidence. He correctly reminded the jury that if they considered that something was of peripheral significance then it should stay on the periphery but "if something is relevant, even if it is relevant only to a point, then put it in its context and at the end of all, you are going to weight it up."

[15] We conclude that the applicant failed to make out the second ground of appeal.

The evidence of Colin Robinson

[16] The fourth ground of appeal was that the trial judge failed to caution the jury adequately or at all on the dangers of relying on the evidence of Colin Robinson.

[17] Full mandatory corroboration warnings were once required in respect of prosecution evidence given by accomplices. That requirement was abolished by statute and the current approach to accomplice evidence is to be found in the guideline principles stated in Makanjuola [1995] 2 Cr App R 469. The position in relation to co-defendants running cut throat defences is somewhat different since a co defendant giving evidence against a co accused is not giving Crown evidence as such. The temptation for one defendant to lie in his defence and to blame a co defendant must be a temptation obvious to a jury. This was recognised in R v. Stannard [1965] 2 QB 1 where the co defendants ran cut throat defences each blaming the other for the crime charged. The court held that there was no special warning required because "the jury could not have been unaware of the fact that each had a possible motive for lying." In R v. Knowldon [1983] 77 Crim App Reports 94, however, the court held that the judge "is at least to be expected to give the customary clear warning to the jury where defendants had given damaging evidence against one another, to examine the evidence of each with care because each has or may have an interest of his own to serve."

[18] It is clear from cases like R v. Muncaster [1999] Crim L R 408 that while no particular structure or form of words is required the judge may need to say something, "not a technical direction of law but merely an observation of commonsense; the extent and detail in which he needs to go into is very much a question for him as we consider the case of Makanjuola to hold."

[19] In R v. Burrows [2000] Crim L R 48 the Court of Appeal held that, in cases involving mutual cut throat defences, it will often be better for the trial judge to avoid saying anything that might appear to prevent the jury approaching the case with open minds. Commonsense and discretion appears to be the key concept in determining what if anything a judge should say. (See also Andrew and Hurst on Criminal Evidence 4th Edition at pages 255 to 257).

[20] We are satisfied that this ground of appeal has not been made out. The trial judge did correctly warn the jury of the need for caution in its approach to the evidence of Colin Robinson incriminating his co accused. He stressed the need to decide whether he was telling the truth or lying and warned them that they could not take his evidence into account unless they were sure "after

taking particular care to scrutinise" his claims that the co accused did attack the deceased. He reiterated this warning by telling the jury that:-

> "When a person who is involved in a crime gives evidence against others in the way that Colin Russell has done I am required by the law to warn you when you are taking stock of his evidence to pay particular care and to be particularly careful about that kind of evidence because well the term has been used "cut throat defence" its every man and woman for himself in this situation. So you exercise particular care."

The alternative of manslaughter

[21] The fifth ground of appeal was that the trial judge ought to have left the offence of manslaughter to the jury in relation to the case against the applicant Ferguson.

[22] As Mr O'Donoghue correctly pointed out the House of Lords in R v. Coutts [2006] 1 WLR 2154 clearly established that a trial judge should leave to the jury any obvious alternative offence to the offence charged when there is evidence to support the alternative. "Obvious" and "alternative" in this context means such alternatives as suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge.

[23] Before the trial judge could have left the alternative offence of manslaughter to the jury in relation to the count of murder there would needed to be evidence on which the jury could have legitimately concluded that Ferguson did an unlawful act in relation to the deceased which resulted in the deceased's unintended death. If the jury rejected Roger Ferguson's case that he was not at the scene of the killing and concluded that Roger Ferguson did an unlawful act to the deceased which caused or contributed to his death there was no evidence to suggest that the death was or might have been an unintended consequence as far as Ferguson was concerned. The evidence clearly pointed to the deceased having been felled to the ground or knocked on the head by the participants in the crime following which a black bin bag was put over his head and then secured very tightly in position by masking tape. This led to his asphyxiation which was the inevitable and entirely foreseeable consequence of the placing and securing of the bag over his head. The bag would obviously have adhered to the skin of the deceased causing him to suffocate in the presence of those involved in the placing and securing of the bag over the head. There could be only one logical inference to be drawn from that sequence of events, namely that those involved intended the death of the deceased. There was, thus, no evidence to suggest that the death could have been an unintended consequence of deliberate acts. Accordingly there was no evidence that could have led a jury to conclude that, if they rejected Ferguson's

denial of being at the scene, he nevertheless did not intend to kill the deceased if they were satisfied that he participated in the acts which led to his death.

[24] In Coutts a serious question arose as to whether the deceased killed the victim deliberately to satisfy his macabre sexual fantasies or whether her death had been an accident during consensual asphyxial sex. The defendant who was charged with murder did not ask for the alternative of manslaughter to be left to the jury although it was the obvious alternative verdict if the jury accepted his version of events. As Lord Hutton pointed out:-

> "The actions and mental attitude of the defendant at the time of the sexual activity with the deceased were relevant to the issue of manslaughter as they went to the issue of murder and the defendant had given a full account of his actions and mental attitude to the jury."

Leaving the question of manslaughter to the jury in that case would accordingly not have been inconsistent with the accused's case but entirely consistent with it. In the present case the applicant's case was that he had nothing to do with the killing and was not at the scene. He gave no evidence of his actions or mental attitude during the events which led to the deceased's death or in relation to the events in which on the jury's findings he was involved. In the absence of any evidence to the contrary, logical analysis led to the inevitable conclusion that he intended the natural consequences of his actions. To have left to the jury the question of manslaughter in such circumstances would have been wholly inconsistent with the applicant's case.

The application for fresh evidence

[25] This latter ground of appeal was related to an application by Roger Ferguson for leave to admit fresh evidence under Section 25 of the Criminal Appeal (Northern Ireland) Act 1980 that evidence being a report provided by Dr M T Davies, a consultant clinical psychologist, dated 26 February 2009. No psychiatric evidence was presented by the defence at the trial. It was suggested that this evidence would have been relevant to the question of the deceased's intention to kill or cause grievous bodily harm. It is clear from R v. Rafferty [1999] 8 BNIL8 and R v. Walsh [2007] NICA 4 that the court must consider the factors set out in Section 25(2) and address the question what the interests of justice require in relation to possible new evidence.

[26] The court is generally reluctant to allow defendants on appeal to run a different and inconsistent case on different evidence. Thus in R v. Arnold [1996] 31 BMLR24 the court explained:-

> "Whether the trial be civil or criminal parties must be required as a matter of administration of justice to present their cases at the trial and not to be permitted, one case having failed to run a different and inconsistent case in the appellate court based on different evidence."

The court went on to state that very exceptionally that consideration can be treated as not conclusive. On occasions, for example, a defendant's mental abnormality may itself lead him to make a decision not to run a diminished responsibility case or gather the evidence to make such a case.

[27] We consider in this case that there are no special exceptional circumstances to set aside the normal considerations as stated in R v. Arnold [1996] 31 BMLR 24. The applicant has maintained the case that he was not present during the relevant events. That is a defence quite inconsistent with the case that he did participate but without a murderous intent. The reason why he did not adduce psychiatric evidence at the trial was one dictated by his defence of being elsewhere at the relevant time. The psychiatric evidence would not have been relevant or material to that case. The evidence may have some relevance to the question of the appropriate tariff. It can be relied in that context even though it is probably admissible in this regard without regard to Section 25(2).

The application by Jacqueline Crymble

[28] Jacqueline Crymble's first ground of appeal related to the presentation in the judge's charge of the opposing accounts given by Jacqueline Crymble and Colin Robinson in relation to what occurred at the deceased's house and what happened to the deceased. Mr McCreanor argued that the effect of the charge was to direct the jury towards the acquittal of Colin Robinson on the murder charge and towards a conviction on the assisting offenders' charge only. Counsel argued that it would inevitably have led the jury to convict Jacqueline Crymble on the murder charge.

[29] Where an appellant or applicant alleges that a trial judge has put forward an unfair or unbalanced picture of the facts or has unfairly weighted the matter against a defendant the court must scrutinise the judge's directions to the jury to ascertain whether the judge has summed up to such an unbalanced extent that it led to an unfair trial to the relevant defendant. As Lord Lane stated in R v. Mears [1993] 97 Crim A R 239 the court must ask itself whether in the words of Lord Sumner in Ibrahim v. R, there was:-

> "Something which . . . deprives the accused of the substance of a fair trial and the protection of the law or which in general diverts the due and orderly

> administration of the law into a new course which may be drawn into an evil precedent in the future."

Lord Lane in R v. Mears pointed out:-

> "The judge must of course remain impartial but at the same time the evidence may point strongly to the guilt of the defendant. The judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own use. Whether that is what has happened in any particular case is not likely to be an easy decision."

[30] In R v. Cohen and Bateman [1909] 2 Crim A R 297 the appellant argued that the judge's conduct of the case led to a miscarriage of justice. Counsel was hampered by the judge in the conduct of the case. Channell J stated:-

> "In our view, a judge is not only entitled but ought to give the jury some assistance on questions of fact as well as on questions of law. Of course questions of fact are for the jury and not for the judge, yet the judge has experience in the bearing of the evidence and in dealing with the relevancy of questions of fact and it is therefore right that the jury should have the assistance of the judge. It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can say something of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore of very confident expressions in the summing up does not show that it an improper one. When one is considering the effect of a summing up, one must give credit to the jury for intelligence and for the knowledge that they are not bound by the expressions of the judge upon questions of fact."

[31] We have carefully scrutinised the trial judge's summing up as a whole and conclude that it was not presented in such an unbalanced way as to invite

or press the jury to accept Colin Robinson's evidence as correct and to reject Jacqueline's evidence as false. Reading his directions as a whole we are satisfied that the trial judge correctly laid the evidence before the jury, drew attention to the matters that should be considered, stressed the significance of Colin Robinson's evidence if true, to the case against the co-accused and he properly drew attention to lies and inconsistencies in his evidence. Accordingly, we must reject Jacqueline Crymble's first ground of appeal.

[32] The second ground of appeal related to the introduction in her cross-examination by the Crown of references to evidence which had not been relied on. The prosecution informed the defence during the trial that it would not be relying on covert recording material which purported to record conversations between Jacqueline Crymble and Roger Ferguson after the death of the deceased. Mr McCreanor referred to the questions put by prosecution counsel to the applicant, Crymble, at pages 272 to 273 of the transcript. The questions to which particular objection was taken being

> "Q. You know that a bugging device was placed in your house, don't you?
>
> A. Yes.
>
> Q. Because the police told you?
>
> A. No, that is incorrect.
>
> Q. The police drew it to your attention during the course of the interviews that they had a listening device in your car?
>
> A. That is incorrect My Lord.
>
> Q. And they produced to you in interview the product of the listening advice?"

At that point there was an intervention from senior defence counsel and the matter was considered in the absence of the jury.

[33] We conclude that there was considerable force in Mr McCreanor's objection to that line of questioning. The questions should not have been posed in the manner in which they were. The trial judge however in clear and robust terms stated to the jury:-

> "There is one matter I want to mention to because Mr Mooney in cross examining Mrs Crymble suggested there was or may be some evidence about this

> because the house had been bugged. Now, I want to direct you members of the jury . . . You have to ignore that because we heard no evidence of that whatsoever. There was talk about Mrs Crymble saying to someone that she thought the house was bugged and so on. So there is an example of rumour and speculation that should be left out of account altogether. The only evidence of what happened after Mr Crymble's death is the evidence of Jacqueline Crymble and the evidence of Roger Ferguson and one or other is right and the other is wrong about that."

The judge returned to the point later in his summing up and again made it clear that the jury should disregard this matter:-

> "It was put to her by Mr Mooney that she continued seeing him after Paul's death and there was a full sexual relationship continued. She denied that. But in the course of that Mr Mooney suggested something about a recording and Jacqueline Crymble had talked about the house being bugged and so on. Members of the jury there was no evidence of that whatsoever. I am directing you to completely ignore that suggestion and the only evidence about whether there was a sexual relationship or not between Jacqueline Crymble and Roger Ferguson after Paul Crymble's death comes from two people Jacqueline Crymble who said no there was no such relationship and Roger Ferguson who as you will hear shortly who said yes there was."

[34] Directed as it was in such unequivocal terms by the judge, the jury cannot have been in any doubt that the question of bugging was wholly irrelevant to their consideration of the case. They were told in clear terms not to speculate on matters which were not in evidence. Mr McCreanor argued that the risk that the jury might not have wholly discounted the bugging material and might have speculated that there was other unproven evidence available to the Crown which proved the guilt of the accused. The jury system however proceeds on the sensible basis that juries listen carefully to the trial judge's clear directions of law and follow them. The judge in this case left the jury in no doubt as to their duty to leave out of account any speculation in relation to bugged material. Accordingly we are satisfied that the applicant has not made out her second ground of appeal.

The directions in relation to lies

[35] The third ground of appeal put forward by both Roger Ferguson and Jacqueline Crymble was that the judge's directions to the jury as to the significance and relevance of lies told by them failed to accord with the requirements of the directions set out in R v. Lucas [1981] QB 720. It was contended that the judge's direction was liable to confuse the jury and create the risk that the jury might believe that lies told by all or any of the defendants could be supportive of the guilt of the other defendants. They took issue with the comments made by the judge which they suggested indicated to the jury that he thought there were so many lies told that it was difficult to know where to begin and that very often defendants who plead not guilty to murder are lying. Mr O'Donoghue on behalf of Roger Ferguson argued that in particular the judge's directions in relation to his alibi case were wholly inadequate.

[36] Lies told by a defendant do not make a positive case of any crime but in appropriate circumstances may be relied on by the prosecution as evidence supportive of guilt. Whenever a lie told by an accused is relied on by the Crown or may be used by the jury to support evidence of guilt as opposed to merely reflecting on his credibility a Lucas direction should generally be given by the judge that is to say:-

(a) that the lie must be deliberate and must relate to a material issue;

(b) the jury must be satisfied there was no innocent motive for the lie, the jury being reminded that people sometimes lie, for example, to bolster up a just cause or out of shame or to conceal a disgraceful behaviour; and

(c) the lie must be established by evidence other than that of a witness who is to be corroborated.

Such a direction in particular is usually required when inter alia the defendant relies on an alibi (Burge [1996] 1 Criminal Appeal Reports 163).

[37] It is clear that the Crown was relying on lies by the appellants in support of the prosecution case and in any event it is clear that the jury might have used the evidence of lying to support evidence of guilt. Accordingly the judge was bound to give a Lucas direction. While the JSB Bench Book suggests the form of appropriate direction, provided the judge deals adequately with the points which should be covered the law is not prescriptive of the precise formulation of the direction.

[38] The judge stated at page 11 of his direction on 15 May 2004:-

> "Now I think it is accepted by all, you've heard plenty of the lies from different people. The defendants have

> all admitted lying but that is one thing. You have to consider why the individual lied. The mere fact that a person tells lies is not of itself evidence of guilt because the defendant may lie for many reasons, and you have been given examples and there are text book examples, so I will go over them again. For example, to bolster a true defence. Someone may or may not have been there but they maybe lied through their teeth about an alibi which is shown to be lies. They didn't have an alibi but they are innocent so they try to make things better for themselves by telling lies, maybe just making it worse. But there is an example of a reason why a person might lie.
>
> It might be to protect someone else, it could be to conceal disgraceful conduct and it may be out of panic or confusion. If you think there is or may be some innocent explanation for lies told by any of the defendants you should take no notice of them. But if you are satisfied beyond reasonable doubt that one or other or more of the defendants did not lie or for some such reason … innocent reason, then the lies of that person can be evidence going to prove his or her guilt by supporting the prosecution case. So you must be satisfied beyond a reasonable doubt that there is not some possible explanation for the lies which destroys their effect."

[39] The judge went on to say in the context of lying denials of a sexual relationship between Jacqueline Crymble and Roger Ferguson:-

> "And so if these and other matters are lies and you are satisfied beyond reasonable doubt that they were not told for an innocent purpose but to conceal guilt then you can take them into account as supporting the prosecution case. They have become another piece of the evidence. You have got to weigh it. What weight do you give to it? It is like another piece of jigsaw and you put that into the scales when you are weighing up what the effect of all this is. Some evidence is good strong evidence. Perhaps some evidence is not very strong at all and some evidence you think I am going to ignore . . ."

[40] Having read the whole summing up carefully we are unpersuaded by the argument that the judge misdirected the jury on how they should approach the question of lies when examining the evidence against the accused. He

pointed clearly to the need for the Crown to establish beyond reasonable doubt that lies had been shown to be deliberately told and that there was no innocent motive for the lies. He reminded them that defendants can lie for a number of reasons such as bolstering a just cause and he made specific reference to the case of alibi which was relevant in the case of Roger Ferguson's defence. We consider that the judge made it sufficiently clear that it was the relevant lies of an individual defendant which could be evidence which points towards the guilt of *that* defendant. It was not fatal to the overall balance of the direction not to state that lies by one defendant could not be evidence against another defendant since it was clear from the overall direction that a proven lie by one defendant without an innocent motive could only be evidence of guilt against that defendant.

[41] Nor are we persuaded that the judge's comment "it is difficult to know where to start with the lies that have been admitted" posed a risk to the safety of the conviction. Even if this ambiguous comment were construed by the jury as indicating an adverse view taken by the trial judge to the number of lies which in fact had been told by the defendants he made it abundantly clear that it was for the jury and not the judge to decide all questions of fact.

[42] Mr O'Donoghue was critical of the judge's comment at page 14 of the summing up when he said:-

> "There can also be members of the jury be another reason for telling lies about these matters and it might be because you are guilty and you are trying to divert attention away from the reality. Now sometimes people stand up and say guilty when they are asked how do they plead to a charge of murder but very often and indeed in the vast majority of cases they don't and therefore lies and denials can be part and parcel of a person's way of diverting attention away from themselves."

Counsel argued that this could have misled the jury into thinking that in the vast majority of cases when pleading not guilty to murder the individuals concerned are lying. We do not accept that this is a fair interpretation of what the judge said or one which the jury at the conclusion of the whole summing up could have put upon the comment. It is clear that what the judge was trying to convey was that if a guilty person denies a charge of murder lies and denials can be part of the way of diverting attention away from his guilt. This is an observation based on the reality of the experience.

[43] In relation to the question of Roger Ferguson's alibi the judge made clear to the jury that it was Ferguson's case that he was not at the scene of the crime and was at home during the relevant time. The judge informed the jury in clear

terms that it was not for Ferguson to prove his alibi. It was for the Crown to satisfy the jury beyond reasonable doubt that the defendant was at the scene of the crime and that he was knowingly involved in the killing of the deceased. Thus at page 159 of the summing up on 15 May he said:-

> "It is a relatively straightforward case (for Roger Ferguson) because he says he wasn't there and you have to decide if that is right or not. And you have to decide the standard I have just told you. Are you satisfied beyond a reasonable doubt that he was there? Taking account of all that evidence and what you have made of Colin Robinson's evidence you have to decide that members of the jury as I have said beyond a reasonable doubt. To put it another way if there is any reasonable possibility that Roger Ferguson was not there and not taking part in the common plan to kill Mr Crymble then if there is any reasonable doubt about that he is entitled to an acquittal. That's what the law says."

[44] As noted earlier in his summing up in the context of lies the trial judge warned the jury that an innocent person may bolster his case by lying about an alibi. The judge's direction accordingly focused attention on the correct questions to be addressed by the jury and it contained the relevant matters as referred to in the Judicial Studies Board standard direction.

[45] The judge correctly pointed out that a defendant may lie in claiming an alibi even if he is innocent in order to give greater strength to the defence. He did not in terms point out that even if the jury concluded that Dawn Ferguson had lied in giving evidence supporting Roger Ferguson's claimed alibi that did not of itself show that his alibi was false because a witness may also lie to bolster a defendant's case even if the defendant is innocent. It might be said that there was a risk that if the jury found Dawn Ferguson was lying they might have concluded that that evidence showed that Roger Ferguson was lying in claiming to be at home at the relevant time. It was in theory possible that Roger Ferguson was at home at the relevant time, that his mother did not in fact see him in bed but that she lied in order to bolster his case. The judge's direction in relation to Dawn Ferguson's case did point out that the jury should ask the question whether she gave her evidence to protect her son. The jury would have thus have been alive to the possibility that the mother lied in order to bolster her son's case in his defence. If she did so in the context of the rest of the evidence against Roger Ferguson such a lie by her might be of some relevance in supporting the Crown case though it would not of itself show that Roger Ferguson's alibi claim was inevitably false. If the jury were satisfied beyond reasonable doubt, as they would have been entitled to be of the guilt of Roger Ferguson, that would show that Dawn Ferguson was deliberately lying

in relation to her claim to have seen him at the relevant time. There was sufficient evidence for the jury to reach their conclusion on that basis. While it would have been preferable for the judge to have directed the jury in terms that a lie by Dawn Ferguson in relation to the alibi claim did not of itself show that Raymond Ferguson was not where he claimed to be at the relevant time, we are satisfied that the jury's verdict was in the circumstances safe.

[46] For these reasons the appeals are dismissed.