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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

HENRY CHRISTOPHER MICHAEL MARLEY

Before Kerr LCJ, Nicholson LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an application by Henry Marley for leave to appeal against his conviction of three offences of causing death by dangerous driving; dangerous driving; and driving whilst disqualified. The applicant was convicted by majority verdict of 10 to 2 on 6 March 2003 after a trial before His Honour Judge Foote QC and a jury at Dungannon Crown Court. He was sentenced to nine years' detention in respect of the first offence; to a concurrent term of two years' detention on the second count; and to one year's detention on the third count, again to run concurrently. He was disqualified from driving for life. The applicant also appeals, with leave of the single judge, against the sentences imposed.

[2] Apart from the offences referred to above, the applicant was charged with a number of other offences. He pleaded guilty to two offences of having no insurance. He was fined £1000 in respect of each of those offences. He also pleaded guilty to four further charges which were preferred jointly against him and Neil Francis Blaney. These were three charges of theft and one charge of taking and driving away a motor vehicle without the owner's consent. The learned trial judge imposed concurrent sentences of three years' detention for theft and a concurrent sentence of nine months' imprisonment for taking and driving away. He ordered that the three years' detention on

the theft charges should be consecutive to the sentences in respect of the driving offences so that a total effective sentence of twelve years' detention was imposed.

Background facts and summary of relevant evidence

[3] On 1 March 2002 at about 1.10pm clothing was stolen from a shop at 58 Mill Street, Newry, County Down. Marley admitted involvement in this theft. Subsequently, a Vauxhall Corsa car, RDZ 2695, was stolen by Marley and Blaney from Upper Edward Street, Newry, County Down. This theft occurred some time before 4.55pm when the car's owner noticed that it was missing. Again, Marley admitted that he was involved in the theft of the car. At 5.15pm the stolen vehicle was observed being driven by a male person. There did not appear to be anyone else in the car. At 5.45pm two men entered Brennan's off-licence in Seaforde and stole a quantity of beer. They were both in the stolen Corsa and Marley again admitted that he was one of the men.

[4] At 8.50pm on the same day a Vauxhall Astra motor car was stolen by Marley and Blaney from the car park at the Abbey Centre, Newtownabbey, County Antrim. At 9.35pm two males travelled in the Vauxhall Corsa, RDZ 2695, to Stockman's Lane Belfast and there robbed an off-licence of a 24 pack of Smirnoff Ice. Marley has admitted that it was he and Blaney who carried out that offence. The call reporting this robbery to the police was logged at 9.37pm.

[5] At about 10pm on the same evening Constable Hilary Beggs was driving a police landrover in a citywards direction on the Springfield Road, Belfast. A Vauxhall Corsa motor car was driven from Monagh Road into the path of the landrover. According to Constable Beggs, the car was driven in a manner that caused other vehicles to swerve; the driver then executed a handbrake turn and travelled towards the landrover. The landrover swerved to the left and the Corsa swerved in the same direction and the vehicles collided, with the nearside front of the landrover striking the rear nearside of the car. After the collision the Corsa was observed to travel countrywards and turn into Monagh Road. Other police witnesses who were in the landrover also gave evidence about the course that the Corsa took.

[6] A witness, John Paul McAllister, who knew Marley, gave evidence that he was at a filling station on Springfield Road at about 8.30/8.45pm on 1 March 2002 when he noticed Marley in a maroon Corsa in the garage forecourt. He saw Marley and a friend whom he knew only as 'Brains' drive from the garage and perform a number of handbrake turns on the Springfield Road. Mr McAllister then left the garage and went to a friend's house in New Barnsley. The friend was not in and McAllister then went to the Turf Lodge area (off the Springfield Road) where he stayed for about half an hour. Shortly after 9pm he saw the maroon Corsa motor car being driven in a

countrywards direction on the Springfield Road by Marley who was alone in the car. He saw the collision between the landrover and the Corsa.

[7] At approximately 10.15pm or perhaps slightly before that time a Vauxhall Corsa motor car was driven into and collided with Deborah Dorothy McComb, a young woman who was sixteen years old. She was fatally injured. The collision occurred on the Springfield Road near its junction with Divismore Crescent. It is not in dispute that this was the car that Marley and Blaney had stolen earlier on that day in Newry and in which they had been seen at Stockman's Lane at 9.35pm. It was the opinion of the pathologist who conducted the autopsy on Miss McComb's body that loss of consciousness would have been instantaneous and that death would not have been long delayed.

[8] Just before the collision between the police landrover and the Corsa Patrick Mervyn was driving in a countrywards direction on the Springfield Road. He pulled into a filling station near Kelly's Corner (which is a large junction on the Springfield Road) and saw the collision between the car and the landrover. The car appeared to go into Turf Lodge. Some time later Mr Mervyn left a Chinese restaurant on the Springfield Road and got into his car when he saw the same car as had been involved in the collision with the landrover earlier. It was travelling in a countrywards direction. He saw the car being driven into a crowd of young girls who were crossing the road and strike one of them, (later identified as Debbie McComb, the deceased). The car did not stop after the accident but travelled on into New Barnsley Drive (a road off the Springfield Road). He did not see it thereafter.

[9] Roisin Curley gave evidence that she alighted from a taxi at the bus depot on the Springfield Road and noticed a crowd standing nearby. She later discovered that this crowd surrounded the body of the deceased. Ms Curley moved towards the crowd and heard a screeching of brakes coming from the direction of New Barnsley Drive. The car that was making this noise approached the crowd and pulled up. She looked into the car and thought at first that there were three people in it but then was absolutely sure that there were two persons, one of whom she knew as Harry Marley. He was the driver of the car. When she saw him the car began to move again and travelled towards Turf Lodge. Under cross examination this witness accepted that she did not tell the police at the scene what she had seen and did not contact them until September 2002.

[10] A number of witnesses saw the car strike the deceased girl but were unable to identify the driver. Many of these witnesses were asked about the car returning from the New Barnsley Drive direction after the collision and a number of these either said that they did not see it travel in that direction or that it did not do so.

[11] Tracey Hanna had been Marley's girlfriend. She gave evidence that he came to her home at 14 Springmadden Court in the Ballymurphy district of Belfast on 1 March 2002. She had gone to bed before he arrived. She had been watching a television programme known as the 'John Daly show'. This programme had ended at 10pm and she had then gone to bed and was dozing when her young cousin came to her bedroom to tell her that Marley had arrived at the house. When it was put to her that it was 'very close to 10 o'clock' that he came to her house she disagreed and said that it was well after ten that he arrived. She agreed, however, that it was not as late as a quarter to eleven. She also agreed that when she first made a statement to the police she had said that Marley had arrived during the John Daly show but she put that down to confusion on her part.

[12] Aine Brennan, who lived at 52 Norfolk Drive, saw a car that she later discovered was a Vauxhall Corsa travelling at speed past her house at about 10.15pm on 1 March 2002. The car had a flat tyre. It was brought to a halt two doors beyond her home and the single occupant alighted from the driver's side. He disappeared into the adjacent Falls Park. An engineer, Brian Murphy, gave evidence that it was 1.1 miles from Norfolk Drive to Springmadden Court.

[13] Paul May gave evidence that he was in his mother's home in New Barnsley Park at about 1am on 2 March 2002 when Neil Blaney came to the house. He arrived in a Vauxhall Astra car and brought a few bottles of alcohol into the house. Shortly after he arrived, Blaney got a telephone call from Marley. Blaney then went and collected Marley and they returned to the May home. They remained there for a half hour or an hour. Mr May saw Marley again that evening at about 6.30 or 7pm. He sounded the horn of the car that he was driving and Mr May went out to speak to him. Marley asked Mr May to say to police if they called that he had been with Mr May all day in Crumlin the previous day.

[14] The applicant was interviewed by police about this incident after he attended Grosvenor Road police station. He did not give evidence on trial but the records of his interviews were read to the jury. At the first interview on 3 March 2002 he gave an account of stealing the Vauxhall Corsa with Blaney. He also admitted stealing alcohol from the off-licence at Seaforde and taking and driving away the car from the Abbey Centre. He also confirmed that he and Blaney had stolen the pack of Smirnoff Ice from the off-licence in Stockman's Lane. He claimed that after the theft of the Smirnoff Ice, Blaney drove the Corsa to the bottom of the Whiterock Road where he alighted and went to the house of his girlfriend, Tracey Hanna. In a second interview he said that he could remember watching the John Daly show on television in Ms Hanna's house. During the fourth interview he stated that he could not remember asking Paul May to say that he had been drinking with Marley on 1 March 2002.

[15] An application was made to the trial judge that the jury should be allowed to visit the scene of the accident. It was submitted that it would be impossible for the jury to fully appreciate the difficulties in making accurate observations without their seeing the actual location. This application was refused by the judge. An application was also made that the case against the applicant in respect of the charges of dangerous driving and dangerous driving causing death should be withdrawn from the jury. This application was also rejected.

The application for leave to appeal

[16] For the applicant Mr Dermot Fee QC made three principal submissions. He argued firstly that the judge should have acceded to the application of no case to answer. He claimed that the critical evidence (from Mr McAllister and Ms Curley) was so much in conflict with other evidence that it could not safely be relied upon. Indeed he submitted that Mr McAllister's evidence was not credible not only because it diverged from the evidence of others as to how the collision between the landrover and the Corsa occurred but also because it was inconsistent with other accounts that McAllister had given of the collision. Mr Fee submitted that Ms Curley's evidence was inherently incredible because it was so unlikely that anyone who had been involved in the collision would have driven back up Springfield Road. Apart from that no other witness saw the car return to pass the scene of the accident and several of the witnesses said that this did not happen. Furthermore the circumstances of the purported identification were such that no reliance could be placed on it. Finally, Mr Fee suggested that the fact that Ms Curley did not come forward with her account for several months after the accident raised substantial questions about its veracity.

[17] The second principal submission made by Mr Fee was that the judge was wrong to have refused the application to visit the locus of the accident. This would have allowed the jury to obtain a true appreciation of the difficulties attendant on the purported identification especially by Mr McAllister.

[18] The third submission was that the verdict was unsafe. Mr Fee canvassed two aspects to this claim. Firstly, he suggested that the verdict was against the weight of the evidence; secondly, he claimed that the judge's charge contained a number of irregularities that either put pressure on the jury to reach a verdict or misled them in a number of material particulars. We shall deal with these below.

Refusal of a direction of no case

[19] Mr Fee relied on the well known passage from *R v Galbraith* [1981] 1 WLR 1039 in which Lord Lane CJ described the principle that a judge should

withdraw the case from the jury where he comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it. Lord Lane said: -

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

[20] The learned trial judge concluded that the evidence taken at its height was sufficient to allow this case to proceed. We emphatically agree. Mr Fee spent much time expertly analysing the different accounts that Mr McAllister had given of his identification of Marley and he painstakingly examined the differences between his version of the collision with the police landrover and that given by the police officers in that vehicle. He also strongly argued that the evidence that Mr McAllister gave as to his position on the Springfield Road made it impossible for him to have seen, much less to have identified, the driver of the Corsa.

[21] While this analysis was perfectly legitimate as a forensic exercise it should not be elevated to a position of pre-eminence in assessing the reliability of Mr McAllister's evidence. It is clear that he was a young man of limited education. He gave evidence that he could not read. On Fridays, Saturdays and Sundays he and his friends were wont to congregate near the garage on the Springfield Road and they seemed to occupy themselves in rather aimless activity there. This was not a setting in which careful noting of precise details of an incident was likely to occur. From a reading of Mr McAllister's evidence as a whole, it is clear that he had little concept of time

and the driving of Harry Marley of the Corsa up and down Springfield Road, executing handbrake turns was for him by no means an unusual event. But it would be unrealistic to assume that, because Mr McAllister could not be regarded as a particularly observant chronicler of events, the essential core of his evidence was unworthy of belief or intrinsically unreliable. That essential core was, of course, that he recognised Marley driving the Corsa when it was in collision with the police landrover. Despite extensive and skilful cross-examination by Mr Fee, Mr McAllister was not shaken from that central part of his account. We consider, therefore, that the trial judge was right to recognise this as a case which was *par excellence* one in which the jury should be the arbiter of the reliability of Mr McAllister's evidence.

[22] The same result is arrived at from an examination of the submission of no case in relation to the evidence of Ms Curley. The major attack on her evidence was based on the fact that no other witness saw the Corsa return to the scene of the accident and that a number said that it had not done so. Two matters stand out in any review of the evidence about the car's course after it had struck Miss McComb. The first is that there is a wide divergence in the accounts given by various witnesses as to where the car travelled after the collision. Virtually none of the versions given tally with each other. The fact that Ms Curley is not supported by any other witness's account is therefore unsurprising. Those who saw Miss McComb struck by the car and flung into the air must have been horrified by that sight. That they should have failed to register accurately the course of the car afterwards is entirely to be expected. Secondly, Ms Curley had not witnessed the collision. Her presence of mind and ability to absorb the fact that the Corsa had returned to the scene is readily explicable on that account.

[23] One must recall that both Mr McAllister and Ms Curley knew Marley well. No motive for their giving false testimony against him emerged, apart from a somewhat veiled suggestion that this might have been prompted by their association with the relatives of the deceased. The lack of any obvious reason for them to concoct a story must weigh in the balance as to the honesty of the accounts that they gave. While, of course, honesty is not in this context a substitute for reliability, it is relevant that much of the challenge to their evidence was on the basis that they had fabricated the account that Marley was driving the car.

[24] It must also be borne in mind that Marley, on his own account, had been associated with that car for a number of hours earlier that day and indeed had been in it at 9.35pm, no more than 40 minutes before the fatal collision. This, of course, would not alone be sufficient to create a *prima facie* case against him because, as Mr Fee pointed out, the pattern is for these stolen cars to be used by a number of drivers. It is nevertheless a factor that could properly be taken into account in deciding whether Marley was indeed the driver at the fateful time. Taken in conjunction with the other matters discussed above, we

are satisfied that the judge was entirely correct in his decision to allow this case to go to the jury.

Refusal of the application that the jury visit the scene

[25] As is suggested in an article by David Ormerod in [2000] Crim LR 452 common sense dictates that a view of the locus should only be undertaken when it will be of assistance to the trier of fact. But, as Ormerod also points out, the fact that the demonstration will be relevant and of assistance is not the only criterion governing admissibility. The true test is that the view/demonstration is necessary and proper. On these issues Ormerod says:

> "The requirement of necessity relates to the degree to which the view/demonstration will assist the trier of fact. This requires an assessment of the potential probative worth of the exercise when balanced against the upheaval, delay, cost, danger and potential distraction involved. In conducting this balancing exercise the judge will have regard to the availability and sufficiency of other forms of evidence - photographs, videos, models etc. and the degree to which an image of the scene is critical to an understanding of the events. The requirement of propriety, on the other hand, concerns the broader issues of fairness and prejudicial effect. Put simply, is taking a view in the interests of justice? This involves the judge considering a series of issues: Will the evidence be more probative than prejudicial? Will it be fair to the accused? Will a view infringe other fundamental principles, e.g. will it cause such delay as to deny the accused a speedy trial etc? How will the 'public' nature of the criminal trial be affected by the receipt of evidence away from the courtroom in this way?"

[26] The learned trial judge concluded that a view of the scene of the fatal collision was not required in order that the jury have the necessary understanding of the circumstances of the accident and the identification of Marley. Maps and photographs had been provided which, in our view, amply illustrated the scene and the conditions in which an identification could be made and the difficulties attendant on that. The jury had also been shown a video which had been prepared by Mr Murphy. We have some misgivings about the value of the video evidence since, as Mr Murphy acknowledged, it cannot replicate in any true sense what the eye sees and the senses observe. Be that as it may, we are satisfied that the judge was correct to conclude that a visit to the scene was unnecessary for the jury to be able to

fully appreciate and evaluate the circumstances in which the witnesses purported to identify Marley.

Safety of the verdict

[27] We can deal with Mr Fee's first argument on this issue (*viz* that the verdict was against the weight of the evidence) shortly. There was, in our opinion, ample evidence to permit this case to go to the jury. It follows that there was sufficient material available to a properly directed jury to safely convict. Apart from the evidence discussed above, the jury was entitled, in our judgment, to draw an adverse inference from the failure of the applicant to give evidence. This issue featured in Mr Fee's attack on the judge's charge and we shall consider it more extensively later in this judgment. Stated shortly, Marley had been identified as the driver of the vehicle at two critical points in the evening of 1 March 2002. Those identifications were made by people who knew him well. This was crucial evidence. If he failed to enter the witness box to answer that evidence the jury were entitled to consider that failure of importance in their assessment as to whether he was guilty.

[28] On the question of the overall safety of the verdict and the sufficiency of the evidence to support it, we should also mention the matter of the 'alibi' that the applicant was alleged to have attempted to obtain. Again, this is a matter that we will require to deal with in our consideration of the arguments about the judge's charge but for present purposes it is sufficient to say that there was, in our opinion, evidence on which the jury could conclude that Marley had attempted to create a false alibi. This must also be placed in the reckoning when considering if the verdict of the jury could be said to be unsafe.

[29] In *R v Pollock* [2004] NICA 34 this court outlined the approach to be taken by an appellate court to the question whether a verdict was unsafe in the following passage from paragraph [32] of its judgment: -

> "[32] The following principles [should be applied]:
>
> 1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of 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."

[30] Subject to the criticisms of the judge's charge, to which we shall now turn, the application of the above principles to the present case leads us assuredly to the conclusion that the verdict was safe.

The judge's charge

[31] The first criticism of the judge's charge was that he opened by saying to the jury "Now members of the jury, as I explained to you earlier on today, it is very important that this case finishes tomorrow". Mr Fee suggested that this remark put the jury under undue pressure to reach a verdict. Neither he nor Mr McMahon QC for the prosecution was able to explain how the judge came to make the statement nor was either able to throw any light on the allusion by the judge to some earlier instruction. The statement clearly did not register with counsel for the defence at the time because it was not the subject of any requisition nor was any objection taken to it. Mr McMahon stated, without contradiction by Mr Fee, that none of the counsel involved in the case was able to recall any sense of urgency about the conduct of the case.

[32] As it happens, the jury returned their verdict (as best can be ascertained) the following afternoon, 6 March 2003. The judge finished his charge at 11.38am on 6 March and, as Mr McMahon pointed out, just before ending, the judge intimated to the jury that they could return a unanimous verdict "after 5 minutes … [or] … 5 hours" which does not suggest that they were being rushed to reach a verdict.

[33] It is a cardinal principle of our law that a jury should not feel under pressure to reach a verdict. As Lord Lane CJ said in *R. v. Watson* [1988] Q.B. 690, 700: -

> ". . . a jury must be free to deliberate without any form of pressure being imposed upon them, whether by way of promise or of threat or otherwise."

[34] In the present case, apart from the somewhat mysterious opening words of the judge's charge, there is nothing to suggest that the jury was subject to any pressure or encouragement to reach a verdict speedily. It is regrettable

that the judge started his charge as he did but in the absence of other evidence, we do not consider that it has been shown that they were placed under any pressure to reach their verdict. We therefore reject the argument founded on this submission.

[35] Mr Fee's next criticism of the charge was that the judge had failed to give the jury a sufficient warning about the dangers of identification evidence. Mr Fee suggested that the 'identification direction' was superficial and failed to deal with significant deficiencies in the evidence of Mr McAllister and Ms Curley. What the judge said about identification appears at page 40 of the transcript as follows: -

> "… as you have heard from all sides, this is an identification case, as we lawyers call it, and, as Mr Fee has just told you – and I endorse entirely – identification evidence is dangerous. This is a trial where the case against the defendant depends wholly or to a large extent on the correctness of one or more identifications of him which the defence allege to be mistaken. I therefore warn you of the special need for caution before convicting the defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes and an apparently convincing witness can be mistaken; so can a number of apparently convincing witnesses.
>
> Examine carefully the circumstances in which the identification by each witness was made. How long did he have the person he says or she says under observation? At what distance? In what light? Did anything interfere with that observation? Had the witness ever seen the person he or she claims to have observed before? In this case the answer is clearly 'yes'. Both Mr McAllister and Ms Curley claim to have known Mr Marley for a number of years. These are matters that you have to take into consideration."

[36] In our judgment this was an entirely apposite way in which to deal with the identification issues in the case. The case of *R v Turnbull* [1976] 63 Cr App R 132 remains the *locus classicus* for directions that should be given in an identification case. At page 137 the Court of Appeal gave this guidance: -

> "… whenever the case against an accused depends wholly or substantially on the correctness of one or

> more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often?"

[37] The learned trial judge gave all the relevant directions to be obtained from this passage. He gave the appropriate warning about the dangers of identification evidence generally; he invited the jury to focus on the conditions in which the identifications were made; and he quite legitimately reminded the jury that both witnesses claimed, without contradiction, to have known Marley for some years. In our view this was all that was required in the circumstances of this case. It is true that he did not give a specific warning (such as is recommended in *Archbold Criminal Pleading and Practice* at paragraph 14.17) that friends and acquaintances can be mistaken in their purported recognition of an individual but we consider that this was sufficiently implicit from the general tenor of the passage quoted at paragraph [35] above.

[38] Mr Fee drew our attention to a section of the judge's charge in which he dealt with the differing accounts that can be given by witnesses to a particular event. The judge said this: -

> "Our experience in courts is that if three or four or more people see the same incident and give a description of it afterwards they will not be the same. I will give you a simple example. If a man with a false red nose walked in the door, turned a somersault and went out again and I asked the twelve of you to retire to your room and write out what you saw we would not get one version only. It would be hard to estimate or guess how many there are (*sic*)."

[39] Mr Fee suggested that this passage was objectionable firstly because it conveyed to the jury a claimed general experience when in fact that could well be the subject of some controversy and secondly because it tended to diminish the importance of the defence case that significant differences existed between the two identifying witnesses and others who gave evidence of the events to which they had testified.

[40] We consider that it is not normally appropriate for a judge to tell a jury what the general experience of courts is in relation to types of evidence unless that matter has arisen in the trial itself or it is entirely uncontroversial. We believe, however, that the trial judge in this instance was doing no more than illustrating in a somewhat colourful way an experience that is regularly encountered *viz* that it is in the nature of the human condition that different people will register different things in different ways when they witness a particular incident, especially if that incident occurs in fraught circumstances. While this is not a method that we would commend to other judges, we are satisfied that it did not mislead the jury in this instance.

[41] The next matter to be considered is the reference by the trial judge to the applicant having arrived at Tracey Hanna's house, sweating. In fact no such evidence had been given. But it is clear that Marley had been running before he got to the house. He told Detective Sergeant Brown that he had run from the bottom of the Whiterock Road. And the judge was careful to remind the jury that the applicant's appearance was normal on his arrival at the house and that he did not appear to be out of breath. We do not consider that there is any danger of the jury having been misled by this inadvertent error by the judge. The fact remains that the applicant had run to the house. The critical issue was the time that he arrived there. On the basis of the evidence given by Tracey Hanna, it was open to the jury to find that he had ample time to drive to the point in Norfolk Drive where the car was abandoned and then run to the house. Moreover we consider that that the jury could quite properly have concluded that Marley had attempted to create an alibi by asserting that he had arrived at the Hanna house while the John Daly show was still on television.

[42] Mr Fee submitted that the judge misrepresented the effect of Mr May's evidence to the jury by suggesting that this could be taken as having been an attempt to provide a false alibi for the offences of dangerous driving. The request made of Mr May that he tell police that he had been with Marley all day related to the desire to avoid detection for the offences committed in Newry, Seaforde and Newtownabbey, Mr Fee claimed. It is true that if Mr May had given the account to police that Marley had asked him to say that he had been with him all day, this would have covered the earlier offences but that does not exclude the possibility that he was trying to obtain an alibi for the driving offences on Springfield Road. This was a matter for the jury to

consider and reach conclusions on; we are of the view that there was nothing exceptionable about the judge's charge on this issue.

[43] The next point of criticism of the judge's charge was that he failed to give a proper direction on the inference to be drawn against the applicant on account of his failure to give evidence. Mr Fee submitted that the judge ought to have directed the jury that they should not draw an adverse inference against the applicant unless they considered that the case against him (apart from his failure to give evidence) was sufficiently strong to justify that course.

[44] In *R v Cowan and others* [1996] 1 Cr App R 1 the Court of Appeal in England and Wales gave guidance as to the content of a judge's charge about the drawing of adverse inferences under section 35 of the Criminal Justice and Public Order Act 1994 (which is in broadly similar terms to Article 4 of the Criminal Evidence (Northern Ireland) Order 1988) where a defendant has failed to give evidence. The court in *Cowan* identified certain indispensable directions in the following passage: -

> "… there are certain essentials which we would highlight:
>
> 1. The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is. 2. It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains. 3. An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act. 4. Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence."

[45] The judge in the present case mentioned each of these requirements in his charge – see pages 61-63 of the transcript of his charge. In particular, at page 63 he said that the jury could draw an inference "if – and only if – you conclude that there is a case against him". But Mr Fee argued that the judge should have gone further and said that the case against Marley was not strong and that they should therefore be less ready to draw an inference against him. We do not accept that submission. This would involve the judge making as assessment of the strength of the prosecution case which would be at least pre-emptive, if not usurping, of the jury's role. We can find nothing to fault in the judge's charge on this point.

[46] Mr Fee raised a number of further minor, discrete challenges to the judge's charge. We have considered each of these carefully. We do not

consider that either individually or taken together they are of any substance. We have examined the charge as a whole and are satisfied that it put the case for the defendant fairly and fully.

Conclusions

[47] None of the arguments advanced on behalf of the applicant has been made out. The application for leave to appeal must therefore be dismissed.