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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MICHAEL CHRISTOPHER BRADLEY

BEFORE HIGGINS LJ, GIRVAN LJ AND COGHLIN LJ

COGHLIN LJ (delivering the judgment of the court)

[1] Michael Christopher Bradley ("the Applicant") was convicted of a number of offences at Londonderry Crown Court on 3 December 2008 at the conclusion of a trial by jury presided over by His Honour Judge Lynch QC. The convictions included three counts of indecent assault on a female, contrary to section 52 of the offences against the Person Act 1861 ("the 1861 Act"), three counts of gross indecency with or towards a child, contrary to Section 22 of the Children and Young Persons Act (Northern Ireland) 1968, 17 counts of buggery, contrary to Section 61 of the 1861 Act and one count of assault, contrary to Common Law and Section 47 of the 1861 Act. All of these offences are alleged to have been perpetrated by the applicant against his daughter. The sexual offences are alleged to have commenced on 31 August 1999, when the victim was 9 years of age, and continued until 30 June 2003. The Section 47 assault is alleged to have been committed on a date unknown between the 30th of May and the 2nd of June 2005.

[2] The applicant now seeks leave to appeal against both the convictions and his total sentence of 13 years' imprisonment. The applicant was also made the subject of a Sexual Offences Prevention Order ("SOPO") requiring him to have no contact, direct or indirect, with the victim as well as no contact with any child under the age of 18 unless approved by Social Services. The applicant had initially been arraigned on the 1st of April 2008 at Londonderry Crown Court and his trial had commenced at that court on 4 June 2008 before the Recorder of Londonderry. For reasons that are

irrelevant to this appeal that trial was aborted on 11 June 2008. During his trial before His Honour Judge Lynch the applicant was represented by both senior and junior counsel but, subsequently, a change of representation has taken place and this application was conducted upon his behalf by Mr O'Rourke QC and Mr Ian Turkington while Mr McMahon QC and Ms McCormick appeared on behalf of the Public Prosecution Service. The court is grateful to both sets of counsel for their industry and the clarity of both their written and oral submissions.

The Factual Background

[3] The applicant originally resided with his wife and their two daughters. The elder daughter is the alleged victim of the offences. Early in 1999 the applicant separated from his wife and went to live with his mother a short distance away. Both daughters began a series of contact visits with the applicant at his mother's address. The offences against the elder daughter are alleged to have been committed by the applicant during such visits commencing when she was approximately 9 years of age and terminating when she was approximately 13 after the onset of her first period. Most of the offences are alleged to have taken place within the premises at which the applicant was then residing although he was also convicted of two counts of buggery alleged to have taken place in his jeep. It is alleged that the majority of the sexual offences took place after the younger sister had been sent to bed when the applicant would compel her older sister to watch blue movies and ply her with coke laced with vodka.

[4] The Section 47 assault is alleged to have taken place when the victim was approximately 15 years of age after the sexual abuse had terminated. She alleged that she had returned to the premises at a late hour having consumed alcohol and that the applicant, who had also consumed a considerable amount of alcohol, flew into a rage and subjected her to a severe physical assault.

[5] The applicant denied all of the allegations made by his older daughter and the conflict of credibility between him and his alleged victim lies at the heart of the case. That was recognised by the learned trial judge who at the commencement of his directions to the jury relating to the evidence said:

> "As is clear, the evidence against the accused rests upon … the daughter of the accused. There is no other direct evidence."

[6] He went on to warn the jury to take care when considering the evidence of the victim who had voluntarily admitted that she had lied about a medical complaint which had been diagnosed as a form of migraine and that she had also referred to a "flashback" about being abused by other persons in a jeep in respect of which she had subsequently accepted that she was no longer certain as to whether it corresponded to "any reality". However, the judge also reminded the jury that they might conclude that there was some support for the victim's evidence in the

evidence of her younger sister insofar as she agreed that she had slept in a particular bedroom which was consistent with the victim's evidence. He also reminded them that the account given by the applicant to the police, that he had slept with the younger sister for a protracted period between the ages of 4 and 8, was acknowledged by him to have been untrue and that, if they considered that account to have been a deliberate lie, and not simply a mistake in a stressful situation, they might determine that such conduct provided a degree of support for the victim's evidence. The judge gave the jury the standard warning about the need to determine the circumstances and reason for giving the apparently untruthful statement before taking it into account against the interests of the applicant and, consequently, in support of the victim.

The grounds of Appeal

[7] The original grounds of appeal have been amended and, before this court, the application for leave to appeal against conviction focused upon a number of respects in which it is alleged that the applicant's former legal representatives had been incompetent in the conduct of his defence. In that respect the primary complaint made on behalf of the applicant is that his former representatives failed to put before the judge a submission that he should give the jury a good character direction on behalf of the applicant.

[8] The applicant agreed to waive privilege and, accordingly, senior and junior counsel, together with their instructing solicitor, who had represented the applicant during the course of his trial before His Honour Judge Lynch and the jury were contacted and provided with an opportunity to respond to the case now being made on behalf of the applicant. Counsel previously instructed on behalf of the applicant replied confirming that they had neither discussed with prosecuting counsel the possibility of seeking a good character direction nor had they specifically raised such a possibility with the judge. They provided a number of reasons for the omission to do so which included:

(i) On 26 February 2008 the applicant had pleaded guilty to breach of a non-molestation order granted in February 2007 in favour of his wife and their children including the complainant Ciara.

(ii) The defendant had a criminal record, comprising motoring convictions, which included three drink driving convictions, two of which had been committed within the space of a single month in 1985 and the third on 10 January 2004.

(iii) Between the aborted trial and the trial before His Honour Judge Lynch the applicant had allegedly breached bail on 8 August 2008 by "stalking" his daughter who was working in a part-time job in Newry.

(iv) In her statement dated 8 August 2007 the applicant's wife had provided a history of physical and emotional violence associated with alcohol during the

course of her marriage which included an assault, particulars of which were similar to the physical assault alleged to have been carried out on the complainant by the applicant.

Counsel were aware that the prosecution had not made any application to admit evidence of bad character in accordance with the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") but, having regard to the material in the applicant's background, they formed the view that it was unlikely that the trial judge could be persuaded to give a full or even a partial good character direction to the jury on behalf of the applicant. Even if the judge could have been persuaded to give a partial direction they believed that any benefit resulting therefrom would have been outweighed by the admission of prejudicial evidence.

[9] By way of response, Mr O'Rourke submitted that the suggestion that there was a risk that the prosecution might apply to admit bad character was unsustainable. The prosecution had not attempted to do so either prior to or at the commencement of the trial and there was no realistic prospect of success of such evidence being admitted to correct a false impression in accordance with Article 6(1)(f) of the 2004 Order. He further submitted that any allegation of domestic violence in respect of the applicant's wife would have ceased when the marriage ended in 1999 and, in any event, would only have been relevant, in terms of propensity, in relation to a single count. Any attempt to admit the evidence on such a basis could have been met with an objection grounded upon Article 6(3) of the 2004 Order, namely, that its admission would have had such an adverse effect on the fairness of the proceedings that it should not be admitted. Mr O'Rourke also rejected the suggestion that the evidence might have been admissible in order to correct a false impression upon the ground that the evidence was too general and Article 6(1)(f) was specifically limited by Article 10(6) to evidence that:

> "… goes no further than is necessary to correct the false impression."

He argued that the construction contended for by previous counsel would enable all sorts of allegations and accusations, contested or otherwise, by defendants to become admissible.

The relevant Legal Principles

The incompetence of Counsel

[10] This subject was recently considered in this court by Hart J in the case of R v Boyd [2011] NICA 22 who, in the course of delivering the judgment of the court, said as follows:

> "(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] 1WLR 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 WIR 491 at paragraph 30 their Lordships stated, citing R v Clinton [1993] 1WLR 1181 and R v Kamar [The Times 14 May 1999]:

'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 …'

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 Crim App Reports 103, para 39; Balson v The State [2005] UKPC 2; and CF Anderson v HM Advocate [1996] JC 29. 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 therefore has 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.'

The Good Character Direction

[11] In R v Vye and Others [1993] 97 Criminal Appeal Reports 134 the Court of Appeal in England and Wales confirmed that in cases in which the essential issue was the credibility of the defendant on one hand and that of the complainant on the other it was of fundamental importance that a defendant of good character should receive the benefit of a good character direction in relation to both credibility and propensity. The Court confirmed that, in cases in which the defendant has given evidence, such a direction was necessary in relation to credibility even when, on his own admission, the defendant had told lies in interview with the police – see R v Kabariti [1991] 92 Criminal Appeal Reports 362. However the factual matrix of each case is of great importance and we note that the appellants in Vye and Kabariti both enjoyed previously good characters.

[12] It is clear that, in a case in which it is likely to be to the defendant's advantage, it is the duty of counsel to raise the issue of his client's good character whether by direct evidence from him or by eliciting it in cross-examination of prosecution witnesses and that, subject to the observations of Lord Woolf at paragraph 17 of the judgement in Gilbert v R (Practice Note) [2006] 1WLR 2108, the duty of raising the defendant's good character is to be discharged by the defence, not by the judge – see the judgement of Lord Kerr in the Privy Council decision of Brown (Nigel) v State of Trinidad and Tobago [2012] 2 Criminal Appeals Reports 21 at paragraph [30].

[13] Since the decision in Vye there has been considerable judicial debate as to the circumstances in which a defendant might be entitled to a 'modified' good character direction. In R v Gray [2004] 2 Criminal Appeal Reports 498 Rix LJ, giving the judgment of the court, dealt with the question of character at paragraph 57. After reviewing the relevant authorities he said:

> "In our judgement the authorities discussed above entitle us to state the following principles as applicable in this context:
>
> (1) The primary rule is that a person of previous good character must be given a full direction covering both credibility and propensity. Where there are no further facts to complicate the position, such a direction is mandatory and should be unqualified …;

(2) if a defendant has a previous conviction which, either because of its age or its nature, may entitle him to be treated as of effective good character, the trial judge has a discretion so to treat him, and if he does so the defendant is entitled to a Vye direction …;

(3) where the previous conviction can only be regarded as irrelevant or of no significance in relation to the offence charged, that discretion ought to be exercised in favour of treating the defendant as of good character (*H*, *Durbin*, and, to the extent that it cited *H* with apparent approval, as *Aziz*). In such a case the defendant is again entitled to a Vye direction. It would seem to be consistent with principle 4 below that, where there is room for uncertainty as to how a defendant of effective good character should be treated, a judge would be entitled to give an appropriately modified Vye direction;

(4) where a defendant of previous good character, whether absolute or we would suggest, effective, has been shown at trial, whether by admission or otherwise, to be guilty of criminal conduct, the prima facie rule of practice is to deal with this by qualifying a Vye direction rather than by withholding it …; but

(5) in such a case, there remains a narrowly circumscribed residual discretion to withhold a good character direction in whole, or presumably in part, where it would make no sense, or would be meaningless or absurd or an insult to common sense, to do otherwise (*Zoppola-Barrazza* and dicta in *Durbin* and *Aziz*)."

[14] Ultimately, much will depend upon the specific circumstances of the case and the extent to which counsel exercised a professional degree of judgement. In the Privy Council case of Nyron Smith v The Queen [2008] WL244 3251 Lord Carswell, who had given the judgment in Teeluck, observed at paragraph 30:

"30. The law has become clearer since the time of this trial and it hardly needs repetition now that the defendant is entitled to have a good character

> direction from the judge when the facts warrant it and that its absence may be a ground for setting aside a verdict of guilty. It is the duty of defence counsel to ensure that the defendant's good character is brought before the court, and failure to do so and obtain the appropriate direction may make a guilty verdict unsafe: Sealey and Headley v The State [2002] UKPC 52, [2002] 61 WIR 491; Teeluck and John v The State [2005] UKPC 14 [2005] 1 WLR 2421. It has, however, been emphasised by the Board in recent cases that the critical factor is whether it would have made a difference to the result if the direction had been given: see eg Bhola v The State [2006] UKPC 9, [2006] 68 WIR 449, para 17, per Lord Brown of Eaton-under-Heywood. In the present case the appellant did not give evidence and merely made an unsworn statement from the dock, so that the credibility limb of the direction would have been of lesser consequence. The propensity limb might have been of some relevance, but their Lordships do not consider that, looking at trial as a whole, it would have made any difference to the verdict."

[15] In R v P D [2012] EWCA Crim 19 the appellant was charged with four counts of violent assault upon his wife, together with seven counts of anal rape. At the conclusion of the evidence, in the absence of the jury, the judge had acceded to an application from counsel acting for the appellant to give a qualified good character direction in favour of the appellant based purely on propensity reminding them that the appellant had no previous convictions for sexual offences. However, in the event, the trial judge omitted to give any such direction and was not reminded by counsel of the omission to do so. During the course of the evidence the appellant admitted using some physical violence towards his wife, although he denied that it was to the degree alleged by the prosecution, and he also agreed that he had published on the internet an account of a husband being anally raped which he had described as "the ultimate punishment for somebody". Such an article was of considerable significance in the context of the allegation by his wife that he had perpetrated the anal rapes upon her as punishment for an affair. In giving the judgment of the court Moses LJ said at paragraph 14:

> "But the fact that the effect of a good character direction might be undermined by the facts of a particular case provides no warrant for declining to give any such direction. There will be many cases where a defendant is entitled to a good character direction but the weight to be given to it is diminished by the facts or circumstances of

> the particular case. There is no principle that a judge is justified in declining to give a good character direction merely because he foresees that the prosecution may be able to diminish its fact. It was for the jury, not the judge, to decide what weight to give to the absence of previous convictions."

However, in that case it is clear that the Court of Appeal in England and Wales placed particular emphasis on the fact that the learned trial judge had taken the view that the appellant was entitled to and intended to give a modified character direction without any objection on the part of the prosecution. At paragraph 18 Moses LJ confirmed the view of the Court of Appeal that it had been "a strong case". However, he went on to observe that:

> "But we are quite unable to say that the verdicts are safe despite the omission of the judge. He thought that a character direction could be given without absurdity and without indulging in a charade. This court from time to time has emphasised the importance of a trial judge's own assessment of what fairness in a trial demands. It would be inconsistent with the importance attached to a trial judge's 'feel for a case' to take the view that a modified character direction was unnecessary and would have made no difference in the light of the judge's own view that he ought to have given such assistance to the jury. For those reasons, we take the view, reluctantly, that the verdicts of anal rape in this case were unsafe."

[16] Finally, in Brown (Nigel) v State of Trinidad and Tobago [2012] 2 Criminal Appeal Reports 21 the Privy Council reviewed the authorities relating to the omission to give a good character direction. Lord Kerr, delivering the judgment of the Board, confirmed that it was the duty of counsel to raise the issue of his client's good character where it was likely to be to the defendant's advantage and failure to do so could bring about an unsafe verdict. However, he cautioned that it should not be automatically assumed that the omission to put a defendant's character in issue represented a failure of duty on the part of counsel pointing out that there might well be reasons that defence counsel had decided against such a course of action. At paragraph 35 Lord Kerr went on to say:

> "35. The Board considers that the approach in Bhola, if and so far as it differs from that in Teeluck, is to be preferred. There will, of course, be cases where it is simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. Singh and Teeluck are obvious examples. But there will

> also be cases where the sheer force of the evidence against the defendant is overwhelming. In those cases it should not prove unduly difficult for an Appellate Court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case comes within one category or the other will depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issue and evidence. It is therefore difficult to forecast whether it will be rarely or frequently possible to conclude that a good character direction would not have affected the outcome of a trial. As Lord Bingham observed in Singh at [25], hard, inflexible rules are best avoided in this area" – see also the views of Lord Kerr in France and Vassell v R [2012] UKPC 28 at paragraphs 42-49.

Discussion

[17] In applying the above legal principles to the facts of the instant appeal the following matters are of particular significance:

(i) It is common case that the respective credibility of the victim and the applicant lay at the heart of this case. In such circumstances his counsel were under a duty to consider whether to apply to the learned trial judge to give the appropriate form of good character direction to the jury.

(ii) However, this was not a case in which counsel had simply mistakenly omitted or forgotten to draw the attention of the judge to the question of whether he should give an appropriate good character direction. Nor is it a case in which counsel originally instructed have failed to provide a satisfactory explanation for the omission to do so. It is clear from their written submissions that counsel had considered whether the risks were forensically acceptable and having done so, reached a professional conclusion. This court must bear in mind the give and take of a criminal trial and the obligation upon counsel to make both tactical and strategic decisions "in the heat of battle." Such decisions will be taken in the context of an assessment of the developing facts of the case, the impact of written and oral evidence already given and the predicted impact of evidence still to come. This court does not have the advantages of trial counsel and must have regard to professional decisions made in good faith as to how the interests of their client would best be served even if another course might have been validly adopted or the

chosen course of action, upon more mature reflection, subsequently turns out to have been erroneous – see R v MH [2008] EWCA Crim 2644.

(iii) In this case counsel have provided a detailed explanation in support of their decision not to raise the issue of a good character direction with the learned trial judge relying, in particular, upon the risk that any such application might result in the admission in evidence of the applicant's previous convictions for drink driving, his plea of guilty to breach of the non-molestation order, the allegation that he had "stalked" his daughter in breach of his bail conditions and the allegations of his former wife relating to physical and emotional domestic violence throughout the marriage. Counsel expressed their concerns that the ground work for a good character direction might have elicited an application on behalf of the prosecution to admit such evidence in order to correct a false impression in accordance with Article 6(1)(f) of the 2004 Order. Even if an application for an "effective" or "qualified" good character direction had succeeded, counsel formed the professional view that any such limited direction would have been likely to make a more prejudicial than beneficial impact upon the jury.

[18] By way of response Mr O'Rourke rejected the argument that raising the possibility of a good character direction with the judge would have elicited a bad character application on behalf of the Crown pointing out that no such application had been made at any stage of the proceedings prior to the close of the evidence. He also rejected any suggestion that the prosecution would have been likely to succeed in an application to adduce evidence of misconduct of the applicant in order to correct a false impression. Mr O'Rourke reminded the court that, apart from the drink driving convictions, the allegations of domestic violence, stalking and breach of the non-molestation order were emphatically denied by the applicant and he submitted that, in such circumstances, such evidence would have been rejected by the learned trial judge as constituting mere allegations likely to give rise to unnecessary satellite litigation. Mr O'Rourke also referred to Article 10(6) of the 2004 Order restricting the admission of evidence to correct a false impression and further submitted that neither the allegations of domestic violence nor the previous convictions of motoring offences would have been admissible to correct a denial that the applicant had a propensity to commit sexual offences.

[19] As the recent authorities confirm it is important to consider the significance of the relevant evidence within the context of the facts of each particular case. The trial judge was bound to direct the jury with regard to the applicant's admitted lies to the police. The applicant's previous convictions related to driving offences rather than to sexual misconduct but the evidence of the victim was that the sexual offences to which she was subjected were committed by the applicant after he had been drinking and that he was virtually an alcoholic. She described how he had routinely purchased a "carry out" and also alleged that he had deliberately induced her to consume alcohol by covertly introducing alcohol into her Coca Cola prior to the

commission of the sexual offences. She also alleged that he had been extremely drunk on the occasion of the alleged assault. When being asked about the break-up of her parents' marriage the complainant referred to the applicant as being "always drunk". Transcripts available to this court indicate that the victim was firm in her evidence under lengthy and searching cross examination. During her cross-examination it was put to her that the applicant denied ever inducing her to consume alcohol or that he was an alcoholic and that she was exaggerating the amount of alcohol consumed by the applicant to "deliberately sway the jury". At the conclusion of his own direct evidence the applicant was questioned by the Learned Trial Judge about the allegations that he was frequently drunk and that the offences were associated with his consumption of alcohol. The applicant denied that he had been frequently drunk in the company of the complainant or her sister although he conceded that he would have regularly obtained a carry out comprising a half bottle of Powers Whiskey which he would have consumed, with Coca Cola, when the sisters came to visit. The applicant accepted the characterisation of himself as a "drinking man" and that is the image that the learned trial judge appears to have left with the jury. A similar image was created in the interview for the pre-sentence report in which the applicant claimed that he had only begun to drink heavily when the sexual allegations were reported to the police in 2006. The witnesses called on behalf of the applicant also minimised his drinking. In such circumstances, we have little difficulty in understanding the apprehension of counsel about the admission in evidence before the jury that, in 1985, the applicant had driven with excess alcohol in his system in July and that, apparently despite detection, within a period of approximately 4 weeks he had been driving under the influence of alcohol. In November 2004 he was convicted of a further offence of driving when unfit through drink or drugs. In our view the combination of significant alcohol consumption on these dates combined with serious social irresponsibility was likely to have been clearly prejudicial in the circumstances of this particular case.

[20] While he agreed that the termination of his marriage had involved many acrimonious arguments, the applicant denied that he had ever subjected his wife to physical violence. Counsel previously representing the applicant had referred to the non-molestation order in the course of cross-examination but that appears to have been simply by way of background. While the order had been obtained ex parte and was modified to a non-occupation order within a relatively short period of time, no further detail of the allegations upon which the order was based seem to have been opened before the jury. It appears that the applicant was convicted of a breach of the non-molestation order in February 2007 when he subjected his former wife to a prolonged harangue by way of telephone. It also seems that the applicant was prosecuted for harassing the complainant by driving up and down outside the shop in which she worked in Newry, that prosecution being terminated by the convictions from which he seeks leave to appeal. During the course of his submissions Mr McMahon accepted that the prosecution would not have sought to introduce such material by way of a bad character application and it is clear from the examination and cross examination of the victim's mother that great care was taken by counsel on both sides to avoid eliciting any reference to domestic violence. However he also

emphasised that such material would have been drawn to the attention of the learned trial judge if there had been an application for a good character direction. While concerns as to the dangers of "satellite litigation" would have to be borne in mind with regard to any historical allegations of physical violence committed against the applicant's former wife, as opposed to convictions, the admissibility and management of such evidence would ultimately be a matter for consideration by the learned trial judge asked to consider a good character direction. It is of fundamental importance to remember that, while he had a discretion as to whether to give and, if so, how to tailor any good character direction to the circumstances of the case, ultimately, in reaching a determination the learned trial judge would have been subject to an overriding obligation to ensure that the jury were not misled (R v Cuff [2012] EWCA Crim 2980).

[21] This case involved allegations not of a "one off" offence or offences but of a prolonged period of planned and organised sexual exploitation of the child victim. We accept that counsel could have made an application to the trial judge in the absence of the jury and, with hindsight, it might have been wise to explain the reasons for their decision to the applicant. However, in either event, had he been persuaded to do so, the judge would still have had to fashion a modified direction which would not have misled the jury. We consider that it was a tenable view for counsel to hold that any such character direction could only have related to the absence of a propensity to commit sexual offences and would have required to have been given in the context of other material so prejudicial as to negative any real benefit to the applicant. Standing back and taking an overview of all the circumstances of this particular case we have not been persuaded that the omission of counsel to apply for a good character direction has rendered this conviction unsafe and, accordingly, we reject this ground of appeal.