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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

RICHARD KIERAN STEVENS

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Before: Carswell LCJ, Campbell LJ, Weatherup J

_____

CARSWELL LCJ

Introduction

[1] The applicant was tried before His Honour Judge Foote QC and a jury at Belfast Crown Court sitting at Antrim on an indictment containing a single count of robbery. On 29 January 2001 he was found guilty by a majority verdict and the judge sentenced him on 23 February 2001 to six years' imprisonment. He sought leave to appeal against conviction but was refused leave by the single judge and has renewed his application before this court.

The Factual Background

[2] On 21 July 1999 about 4.30 pm an armed and masked man entered the premises of the Ulster Bank at the Promenade in Portstewart and robbed the bank of approximately £6500 in cash. The robber wore a dark coloured three quarter length leather (or leather type) jacket and his face was concealed by a light coloured hood with eyeholes. He carried a holdall and two guns, one a handgun and another which resembled a sawn off shotgun. There were two customers in the bank at the time and the robber shouted at them to lie on the floor, threatening to shoot them. He ordered a member of staff to put money into the holdall and then left the bank premises. Neither the staff members nor the customers were able to see his face or describe any distinct identifying features about the robber. Some members of the public saw a man who appears to have been the robber in the promenade, but were unable to give a

detailed description of his appearance, since their attention had been directed towards his hat, which they regarded as comical.

[3] The events in the bank had been recorded by the bank's closed circuit television camera and the videotape so taken was shown in evidence to the jury, who were also furnished with still photographs from that tape. The video was shown on a television programme entitled "Crime Call" on several dates in August 1999.

[4] Evidence was given by Justin Mairs that he had been an associate of the applicant in running a bar known as Rick's Bar and Grill in Coleraine, in which he had invested the sum of £3000. By the end of 1998 the bar was not doing well and Mairs reverted to his regular occupation of operating mobile discos and karaokes. In the early part of 1999 the applicant was making attempts to sell the bar, but without success. The stock was run down and the opening hours were restricted by the applicant, who was in financial difficulties.

[5] On 21 July 1999 some time about 5.30 or 6 pm Mairs went to the bar and found the applicant sitting there drinking on his own. The applicant at once told him to take off the leather jacket which he was wearing and go and throw it into the skip, saying that a jacket identical to his had been worn in the bank robbery in Portstewart that afternoon. He was drinking heavily and appeared to be excited or "hyper" and told Mairs to get himself a drink "courtesy of the Ulster Bank". He said to Mairs that it was very easy to do the Ulster Bank, that all he had to do was to come down the steps and go straight in and he was in and out in a couple of minutes. He was in and out so quickly that the people in the bank did not know what was going on. He said that he just walked into the bank and pulled out the gun and he was only in the place a couple of minutes. When he left he ran back up the steps and jumped on a motor bike and left Portstewart.

[6] Mairs did not take this account seriously. He said in evidence that he thought that the applicant was "winding him up", as he was always doing and that "it was Ricky with drink in him spouting off as usual."

[7] The applicant and Mairs left the bar and went to the applicant's flat. Before they left the applicant took from his car a holdall and a package. In the flat the applicant sat at a coffee table and counted bank notes into bundles. Mairs thought that there was well over £2000. The applicant gave Mairs £100 which he owed him and said of the money that "It's all courtesy of the Ulster Bank again". Mairs said that he still thought that the applicant was "on a wind-up" and that he had really obtained the money from the sale of the bar or a bank loan. The two men went to Kelly's for the evening, and as they left the flat the applicant said "I'm glad I didn't take the Uzi with me because I would have shot someone with it." Mairs stayed overnight in the applicant's

flat and the following morning the applicant said in conversation that it was easy to do the bank, which Mairs again did not take seriously. A few days later Mairs was in the applicant's bar and asked him jokily if he had planned anything else, to which the applicant replied that he had to let things cool down for a while and that if he needed stuff again it was a matter of pulling a rope and he had it. A few days later in the Angler's Rest Mairs asked the applicant about his investment in the bar, to which the applicant replied that he would get his money.

[8] A couple of weeks later Mairs was watching television, when his attention was caught by a reference to a bank robbery in Portstewart. A photo still was shown on the screen, which Mairs recognised as being that of the applicant. Mairs resolved to go to the police, in particular because his wife, a bank official, had previously been involved in a bank robbery which caused her great distress. She was then working in the Northern Bank in Portstewart and Mairs was concerned lest that bank would then be raided and she would be further upset. Mairs asked the police to show him again the photograph which he had seen on television and satisfied himself that it showed the applicant.

[9] When the applicant was on remand in Maghaberry prison he telephoned Mairs and asked him to tell his solicitor that on the day of the robbery he was in the bar with the applicant doing alterations to the toilets and that two other people were working there as well. Mairs refused, saying that he could not do that for him.

The Course of the Trial

[10] In an extensive cross-examination Mairs' credit was attacked and it was suggested that he was unstable and unreliable and was not telling the truth. The applicant's defence was a complete denial of Mairs' account and of any complicity in the robbery. He denied in evidence that he had made any of the statements which Mairs had related and claimed that Mairs' evidence was complete fiction. He also averred that he did not owe Mairs any money or promise him any payment. He told the police that he had never had a jacket like that described by the witnesses and claimed that the robber shown in the photograph, although it resembled him, was not himself.

[11] The jury were shown the video film of the incident, which included a passage showing the robber leaving the bank premises with his hood or mask rolled up, leaving his face visible. They were also furnished with several still photographs made from frames of the video film, showing the robber with his face visible from several angles.

[12] In the course of his summing up the judge said to the jury:

> "You, as the jury, are the judges of fact in this case. You are entitled, independently of all the evidence in this case, to look at the video, to look at the video stills, to look at the photographs which were taken of Mr Stevens after he was arrested, to look at Mr Stevens in the dock, and to look at him in the witness box and make up your own mind. But you must consider all of the evidence. In other words, it seems to me that if you are sure on seeing Mr Stevens, his photographs, seeing the video and the video stills, if you are sure of his guilt that really is the end of the matter, but you have to look at the entire evidence in the case. You have to look at the evidence of Mr Mairs, you certainly have to look at the evidence of Mr Stevens, all of the points which have been made on his behalf. So you have to consider all of the evidence in the case before you are entitled to convict him."

He did not give them any fuller warning about identification of the applicant or about any specific risks which might exist. Mr Treacy submitted that a warning of the risks appertaining to identification evidence, in the *Turnbull* wording or approximating thereto, was required in a case of this type and that the conviction could not be regarded as safe in the absence of such a warning.

[13] The jury retired at 2.02 pm to consider their verdict. At 2.10 pm they sent a message asking to see the video again. It was played over to them and they retired again. At 4.30 pm the judge brought the jury back to give them a majority verdict direction. Shortly afterwards they sent a note requesting to see the video again, "specifically as the robber exits the bank". They returned to court at 4.51 pm and requested a viewing of the video, first at ordinary speed and then frame by frame. They retired again at 4.56 pm and at 5.05 pm brought in a majority verdict convicting the applicant.

The Issues on Appeal

[14] The applicant's notice of application for leave to appeal contained a number of grounds of appeal, but when he presented the case before us Mr Treacy QC relied on three matters:

1. The judge should have given the jury a *Turnbull* type warning in respect of their identification of the applicant from the video and the still photographs taken from it.

2. He should also have given them a similar warning in respect of Mairs' recognition of the applicant from the photograph shown on television and the still photographs shown to him.

3. The trial judge intervened in the evidence to such an extent and in such a manner that he may have unduly influenced the jury.

Directions Concerning Identification

[15] The guidelines known as the *Turnbull* directions were developed in the leading case of *R v Turnbull* [1977] 2 QB 224, when concerns had developed that juries were accepting identification evidence too uncritically and without realising the potential for mistakes on the part of honest witnesses who may have had a limited opportunity to see the person who committed the offence in question. The guidelines laid down in the judgment of Lord Widgery CJ were based on the need to warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification. He specified that such a warning must be given and that the jury should be directed to examine closely the circumstances in which the identification by each witness came to be made and remind them of the weaknesses in the identification evidence. Failure to follow these guidelines may result in a conviction being quashed and will do so if in the judgment of the court on all the evidence the verdict is unsafe. These principles have been accepted and applied in this jurisdiction: see, eg, *R v Maguire* [1977] 4 NIJB; *R v Russell* [1982] 6 NIJB.

[16] In *R v Dodson and Williams* (1984) 79 Cr App R 220 the Court of Appeal had to consider the applicability of the guidelines to a case where the jury had before them evidence of still photographs reproduced from a videotape from security cameras on which an incident involving a robbery was filmed. In the course of his summing up the recorder who tried the case referred to the fact that photographs can give a mistaken impression of a subject and can in some cases look quite unlike the persons appearing in them, whereas in others they may catch a characteristic, an attitude, a gesture, an expression absolutely right. He also reminded them that they can give different impressions to different people.

[17] Defence counsel submitted that the photographs should not have been admitted in evidence, but the court held such evidence admissible. The court went on to hold, however, at pages 228-9:

> "It is, however, imperative that a jury is warned by a judge in summing-up of the perils of deciding whether by this means alone or with some form of supporting evidence a defendant has committed the crime alleged. According to the quality of

> photographs, change of appearance in a defendant and other considerations which may arise in a trial, the jury's task may be rendered difficult or simple in bringing about a decision either in favour or against a defendant. So long as the jury having been brought face to face with these perils are firmly directed that to convict they must be sure that the man in the dock is the man in the photograph, we envisage no injustice arising from this manner of evaluating evidence with the aid of what the jurors' eyes tell them is a fact which they are sure exists.
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> What are the perils which the jury should be told to beware of? The recorder we think in the admirable passage of his summing-up we have quoted explained them more than adequately for the purpose of the present case. We do not think the provision by us of a formula or series of guidelines upon which a direction by a judge upon this matter should always be based would be helpful. Evidence of this kind is relatively novel. What is of the utmost importance with regard to it, it seems to us, is that the quality of the photographs, the extent of the exposure of the facial features of the person photographed, evidence, or the absence of it, of a change in a defendant's appearance and the opportunity a jury has to look at a defendant in the dock and over what period of time are factors, among other matters of relevance in this context in a particular case, which the jury must receive guidance upon from the judge when he directs them as to how they should approach the task of resolving this crucial issue.
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> In the present case we do not doubt that the jury was made well aware of the need to exercise particular caution in this respect."

[18] *R v Dodson and Williams* was followed in *Taylor v Chief Constable of Cheshire* [1987] 1 All ER 225, where the videotape had been mistakenly erased before trial, but a police officer was able to give evidence that he had seen it and recognised the appellant, who was charged with theft of an item from a shop. The evidence was held admissible, and McNeill J added in his judgment at page 232:

> "Where the identification of an offender depends wholly or in major part on the evidence of a witness describing what he saw on a visual display unit, contemporaneously with the events which he describes, or which a tribunal of fact sees from the recorded copy of that display, or what a witness says he saw on a recorded copy of that display, whether or not that copy is available to be seen by the tribunal of fact, and any combination of one or more of those circumstances, that evidence is necessarily subject to the directions as to identification evidence laid down in *R v Turnbull* [1976] 3 All ER 549, [1977] QB 224 and juries will be directed, and justices must direct themselves, to approach the evidence in accordance with that authority.
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> The matter is more complicated because the tribunal of fact has to apply the *R v Turnbull* direction first of all to the camera itself, that is to say, as to its position, its opportunity for viewing that which it depicts, to the visual display unit or recorded copy, and to the witness. In other words, each of the three had to be subjected to the *R v Turnbull* test.
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> It is more important that that test should be complied with strictly where, as here, in the absence of a copy which the justices could see, there is conflicting evidence on the one side and the other as to what actually appeared on the copy, and as to the certainty of identification of the offender."

[19] These cases were also followed and the principles applied in this court in *R v Murphy and Maguire* [1990] NI 306, where the admissibility was in issue of a "heli-tele" video film taken from a helicopter hovering at a height. The court held that the film had been properly admitted, then went on at page 326:

> "We consider that the *Turnbull* guidelines should be applied and adopted as far as appropriate by a judge in a Diplock court to his assessment of the weight to be given to visual identification made from a video film, whether that identification

> purports to be made by a witness or witnesses, or by the judge himself. We see nothing in principle to justify a distinction between the consideration of the identification evidence of a bystander and that of a witness or judge who identifies from a video film screen. The imperfections of human observation, the dangers of suggestibility and the possibilities of honest mistake even by a plurality of witnesses still arise and justify the need for special caution before convicting."

It should, however, be borne in mind that the heli-tele film shown in *R v Murphy and Maguire,* being taken from a height, did not show the faces of the persons photographed with any clarity and the trial judge, who was sitting without a jury, had to make his identification from other features (enumerated at page 330 of the judgment of Kelly LJ in the Court of Appeal), also linking those pictures with colour television films and photographs taken on the ground. In these circumstances it was plainly desirable that the judge should, as he did, take scrupulous care over the identification, and if it had been a jury trial specific directions would clearly have been required.

[20] It falls then to be considered how the *Turnbull* guidelines should be applied in a case such as the present, which contains no special features such as a change in the defendant's appearance since the incident. In principle we consider that the guidelines, like all principles of the common law, should be applied with common sense and discrimination. Directions to juries should not be formulaic mantras, nor should they introduce instructions or qualifications which are unnecessary for their consideration of the particular case before them. Rather they should be adapted to the facts and issues of each case, to give the jury the most effective guidance. When considering the sufficiency of directions an appellate court has to concern itself with their substance, bearing in mind that the paramount issue is the safety of the conviction. On this approach we consider that where the evidence comprises a video film or one or more photographs, which may be seen and studied by the jury, and from which they are asked to make an identification of a defendant, the type of direction to be given depends on the circumstances. The trial judge should ordinarily give a general warning that mistakes in identification are always possible, even with photographs available, because they are capable of giving a misleading impression. The better the photographs and the more opportunity the jury may have to view the perpetrator on a film, the less detailed and emphatic such a warning need be. If there are factors such as a change in appearance or the need to pick out a person from some feature other than facial appearance, as in the heli-tele pictures in *R v Murphy and Maguire,* a more detailed warning on *Turnbull* lines would ordinarily be required. In the absence of such factors, we consider that in principle such a direction would be superfluous.

[21] We are fortified in these conclusions by two decisions of the English Court of Appeal. In the first, *R v Downey* [1995] 1 Cr App R 547, decided in March 1994, a robbery was filmed by a security camera and the jury was shown the video film and a still photograph taken from the film. It was held that the omission of a specific direction such as that stipulated in *R v Dodson and Williams* did not constitute a misdirection or vitiate the conviction. Evans LJ said at pages 555-6:

> "In our judgment, nothing in *Dodson and Williams* was intended to go so far as this. A mandatory direction is justified in cases of identification by a witness, whose evidence is based on his recognition of the defendant as the person whom he saw at the relevant time, because the jury is told that the experience of the Courts has shown that honest and even convincing witnesses are fallible on matters of this sort, hence the need for a special warning. Similarly, the direction given in sexual cases on the need for corroboration of the complainant's evidence is based on the past experience of the Courts. In both kinds of situations, the jury is cautioned against accepting too readily the evidence of a witness whom they have heard. Inviting the jury to consider whether the person shown in a photograph is the defendant who has appeared before them is a different process. To some extent, the difficulties are obvious to any layman. They arise, in the words of Watkins LJ, for 'the average person in domestic, social or other situations … from time to time.' The quality of the photograph is self-evident, as is the extent to which the photograph is a close-up representation of the person's face, which is likely to be the identifying factor most relied upon.
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> Apart from general matters of this sort, it is always possible that special considerations will arise. For example, if there is a question as to whether the defendant had the same appearance at the time when the offence was committed as he does when he appears in Court, then, as Watkins LJ pointed out, that is a matter to which careful attention should be given. No such consideration arises in the present case. Rather, for the reasons indicated above, it was common ground that no relevant

> changes had occurred. Similarly, if the video recording alone had been relied upon, then it might have been necessary, or desirable, to remind the jury that they had only seen a moving representation which they had no opportunity to compare directly with the defendant who appeared before them. The very purpose of producing a still photograph was to remove this difficulty from their task. In short, there was no scope in the present case for any direction which would not have been a statement of the obvious to any "average person" who was asked whether he was sure that the person shown in the photograph was the defendant whom he saw in Court.
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> In these circumstances we do not consider that any specific direction was called for and we reject the submission that the judgment in *Dodson and Williams* was intended to lay down an invariable rule that something must be said in every case, however obvious and even banal it might be. We are impressed also by the consideration that if such a direction is mandatory, then strictly it ought to be given in respect of any video recording that is shown in evidence, and presumably before the recording is shown to the jury in the course of the trial. We cannot believe that any such procedure was intended to be compulsory. Rather, the appropriate direction will depend upon the circumstances of each case, and when no special factor arises, the absence of a specific direction cannot of itself amount to a misdirection."

[22] The second case was *R v Blenkinsop* [1995] 1 Cr App R 7, decided in July 1994. A video film and still photographs were taken at the scene of an incident in which the defendant was alleged to have taken part. The offender was shown as wearing a green waxed jacket similar to that worn by the defendant when arrested a few days later. His appearance had changed between the date of his arrest and the time of trial. The judge gave the jury a warning of the risks of identification, but not a full *Turnbull* type warning. In giving the judgment of the court Evans LJ said at pages 11-12:

> "One factor which the jury must take into account is the question whether the appearance of the defendant has changed, or not, since the visual

> recording was made, and in general terms this is something which should be brought to their attention. In other respects, the *Turnbull* direction is inappropriate or unnecessary; for example, the jury does not need to be told that the photograph is of good quality or poor; nor whether the person alleged to have been the defendant is shown in close-up or was distant from the camera, or was lone or part of a crowd. Some things are obvious from the photograph itself, and *Dodson and Williams* laid down guidelines which do not have to be applied rigidly in every case: *Downey, The Times,* April 5, 1994.
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> Moreover, one reason why the full *Turnbull* direction is obligatory in a witness identification case is because practical experience has shown that a witness, apparently correct and definite, can well be mistaken. This knowledge cannot be assumed to be part of the juryman's stock in trade. But the process of identifying a person from a photographic image is a commonplace and everyday event – as Watkins LJ said, it is done on innumerable social and domestic occasions. There is no special factor, drawn from the experience of the Court, which has to be drawn to their attention before they embark upon that exercise.
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> Nevertheless, the need for a careful and thorough direction whenever there is an identification issue is clearly established. The underlying requirement in our judgment is that the direction shall conform with *Turnbull* in a witness identification case and with the same principle as exemplified in *Dodson and Williams* in a case where the jury is invited to conclude that the person shown in a photograph or video recording was the defendant whom they have seen. There is also a general and invariable requirement that the jury shall be warned of the risk of mistaken identification, and of the need to exercise particular care in any identification which they make for themselves."

[23] In the passage which we have quoted from his summing up the judge in the present case told the jury that they were entitled to look at the video and the stills and other photographs, to look at the applicant in the dock and

when giving evidence and make up their own minds. He did not give them any general warning of the risks involved in identification or the more specific matters discussed in *R v Dodson and Williams.* Counsel for the applicant contended that such directions were mandatory and that their absence made the conviction unsafe. The Crown case, as set out in their skeleton argument, was that this was a straightforward matter of deciding whether the person seen in the video film and the stills was the applicant. There were no special features on which the jury required guidance and comparison of the pictures with the applicant was one which required no more than ordinary common sense and judgment. The jury had clearly taken considerable trouble to peruse the film in order to determine whether the applicant was the person shown on it and required no further directions to come to a safe conclusion.

[24] We are unable to accept the argument advanced on behalf of the applicant. Comparison of the still photographs with the applicant was in our view a straightforward matter, on which more detailed directions were not required, and no special factors were relied on as taking the case out of that category. The applicant's counsel did not ask us to view the video film, but he did not suggest that its perusal and comparison with the applicant presented any particular difficulty by reason of any special factors. The judge did not give the jury any warning on the dangers of identification from photographic evidence, which we consider should be given in most, if not all, such cases. Even though such a direction is almost invariably required, a conviction may still be safe notwithstanding its absence, depending on the facts and the nature of the case. The jury clearly took their task of comparison seriously and devoted time and trouble to it, and we consider that on the facts of the case the conviction was safe in this respect.

[25] The applicant's second ground was that no *Turnbull* direction had been given by the judge in respect of Mairs' identification of the applicant as the man appearing in the picture shown on television. There is a stronger case for requiring such a direction to be given, since there may be issues of the length of time that the witness had to see the picture and the fact that it was a single picture, as distinct from a whole video film sequence or a series of photographs taken from different angles, which would give a more complete picture of the subject. Mr Hunter QC for the Crown originally submitted that Mairs' purported identification was not material to the case, since it was not opened or relied on by the prosecution as a piece of relevant evidence supporting the case against the applicant, nor did the judge refer to it in his summing up. When we received further submissions on this point, he drew to our attention the fact that in the course of his evidence Mairs was asked if he recognised the person shown on television and stated twice that the minute he saw it he recognised it as the applicant. He affirmed this twice when asked about his identification in cross-examination. The jury may have paid some heed to these pieces of evidence, even if they were not reminded

about them in the closing speeches or the summing up, and we are unable to say now if they placed any reliance on them. In our opinion the judge should correctly have either directed them to disregard this or given them a *Turnbull* type direction related to it. It has then to be considered whether the absence of such a direction made the conviction unsafe. Bearing in mind the small part which it played in the trial and the absence of focus upon it, the fact that the jury devoted time and attention to the video film and the evidence before them of the applicant's admissions to Mairs (which was controverted but which they were entitled to accept if they chose), we are satisfied that no reasonable jury would have reached a different conclusion if such a direction had been given. We accordingly consider that the conviction was not rendered unsafe by the absence of a *Turnbull* direction, nor was the fairness of the trial affected by its omission.

Interventions by the Judge

[26] The final ground relied upon by counsel for the applicant was that the judge had intervened to such an extent that the jury were likely to have been influenced against the applicant, and that in consequence the trial was unfair. We have set out the applicable principles in some detail in our judgments in *R v Close* (1997) [2000] NIJB 333n and *R v Roulston* [2000] NIJB 327, and need not repeat them in this judgment. It should be said at the outset that counsel did not suggest any bias or partiality on the judge's part, nor did he criticise the content or tone of his summing up to the jury, which was fair and balanced. Nor was it claimed that the judge took the conduct of the case out of counsel's hands by taking over the examination in chief of his witnesses and preventing him from obtaining a coherent narrative from them. The gravamen of the complaint was that his interventions were such as to be capable of influencing the jury against the defendant, that he asked questions in the manner more of a prosecutor than a judge and made comments adverse to the applicant and his case.

[27] The applicant's counsel produced to us an elaborate schedule of the judge's interventions during the evidence of Mairs and the applicant, with figures showing the number of times he asked questions during each portion of their examination in chief and cross-examination. While we appreciate their industry, we consider that the effect of interventions can only effectively be considered by a critical reading of the evidence as a whole, in order to gauge the tone of the judge's questions and the way in which they may be judged to have affected defence counsel's running of the case or the jury's assessment of the evidence.

[28] We have carried out this exercise carefully, assessing the evidence in the light of the submissions made on behalf of the applicant. Our conclusion is clear, that the judge's interventions, taken as a whole, fell well within the limits of permissible judicial participation in the evidence given at the trial.

For substantial stretches of time during the critical evidence, that of Mairs and the applicant, he asked no questions at all. Many of the questions which he did ask were either neutral or sought necessary clarification of answers given. At times he pursued the witness to obtain a proper answer to a significant question, a legitimate act if done sparingly and with care. At others he allowed himself to express some impatience with defending counsel about a line of questioning which seemed to him irrelevant, about which the same comment might be made. On one occasion he asked a pointed question of the applicant which might be construed as hostile in its tone and phrasing, but this was an isolated instance which did not in our view have a significant effect on the course of the evidence. There can scarcely be a trial in which minute examination of the evidence could not give ground for some element of criticism of the judge's questions, and we would deprecate attempts to found appeals on such a ground without reasonable cause. The paramount issue is whether any of the judge's questions or comments caused unfairness to the defendant. If one might legitimately regard a few of the judge's questions in this case as being rather vigorous or sceptical, their effect in our judgment fell far short of making the trial unfair or the conviction unsafe. We therefore do not regard this complaint as having been substantiated.

[29] For the reasons which we have given we do not consider that any of the grounds of appeal advanced on behalf of the applicant has been made out and we accordingly dismiss the application for leave to appeal.