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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND (CRIMINAL DIVISION)

THE QUEEN

-v-

SEAN CHRISTOPHER KING AND HUGH WILLIAM FOSTER

Before: Kerr LCJ, Nicholson LJ and Sheil LJ

NICHOLSON LJ

Introduction

[1] Noel Gerard King (Noel King), Sean Christopher King (Sean King) and Hugh William Foster (Foster) were jointly charged with the murder of Kenneth Paul Karl Oslon (Oslon) in the Malone area of Belfast in August 2001. On 15 May 2003 Noel King pleaded guilty to the charge. At Belfast Crown Court, after a trial before Weatherup J and a jury, Sean King and Foster were convicted of the murder on 13 June 2003. Leave to appeal was granted by the single judge. On the appeal Mr Terence Mooney QC and Mr Murphy appeared for the Crown. Mr Terence McDonald QC and Mr Greene appeared for Sean King and Mr Treacy QC and Mr Duffy appeared for Foster.

[2] Background facts

(A) Civilian witnesses on Malone Road and Eglantine Avenue on Friday 3 August 2001

Various witnesses described a series of incidents which occurred on the Malone Road and Eglantine Avenue, Belfast between 6.00 pm and 8.30 pm on Friday, 3 August 2001. These witnesses gave differing accounts of a man being dragged or pushed into an alleyway at the rear of Eglantine Avenue in which Oslon's body was later found. It is not possible to reconcile the

accounts so as to be sure that Sean King and Foster played an active role in bringing Oslon into the alleyway. Two witnesses who came on the scene some time after those who saw the man stated that they entered the alleyway and saw three men standing over someone lying on the ground.

(B) Finding of body of Oslon on Saturday, 4 August 2001

Other witnesses gave evidence of the finding of the body of Oslon in the alleyway between 9.30 pm and 10.00 pm on Saturday. He was lying face downwards and there was some burning of his clothes and body. Pieces of his skull were on the ground between his head and the yard wall. Pieces of brick and mortar were on the ground between his head and the yard wall, as were pieces of wood. Cigarette butts were found close to the body.

(C) Forensic evidence of Mr John Logan

Mr Logan, a Principal Scientific Officer of the Forensic Science Agency, gave evidence that he went to the alleyway on Sunday, 5 August. He was shown a body, later identified to him as Oslon. The body lay face down. The back of the jacket and the right leg of the tracksuit trousers that the deceased was wearing had been burnt away. He stated that elements of the attack on Oslon occurred at various locations along the alleyway. Most of the assaults were carried out where the body was found and while Oslon was on the ground. He would appear to have been hit with a red brick and a piece of wood. After the assaults his clothing had been set on fire.

His conclusions

Extensive and heavy bloodstaining was found on the walls, ground and recovered items at various locations in the alleyway and waste ground to the rear of houses on Eglantine Avenue. In the alleyway, near the blocked-off end, a pattern of splashed bloodstaining was found on the brick wall at approximately head height. Further drips and splashes of blood were found on the wall and ground between there and where the body of Oslon lay.

At the body there was an extensive pattern of bloodstaining on both walls to either side of the entry. On the wall closest to the head, the blood pattern radiated out from near ground level and up the wall. In this pattern of radiating bloodstains there were strike marks on the wall from red brick and timber. On the opposite wall the pattern of blood splashes covered an area the full height of the wall.

It would appear that part of the attack on Oslon occurred while he was still standing and further up the alleyway towards the blocked-off end. He had then made his way or been brought down the alleyway to where he was

found. The attack would appear to have continued since further areas of splashing and heavy deposits of blood were present between both areas.

He had then fallen or been forced to the ground with his head close to the right hand wall (as one looks up the alleyway). Whilst lying there he had been hit innumerable times about the head with a brick and a piece of wood. Some of the blows had gone astray and struck the wall above their target. One of the bricks and the piece of wood found on the waste ground could be physically linked to this site with fragments of brick and wood left beside the body. These items also showed bloodstaining which on DNA analysis matched that of Oslon and were undoubtedly used as weapons. A further brick recovered from the waste ground also showed traces of blood which on DNA testing was found to match that of Oslon and may have been used in the beating.

The attack had been severe and prolonged as judged by the number of strike marks on the wall and the extensive blood splatter on both opposite walls. It was apparent that anyone taking part in the assault or close to it would have had blood splashed onto their clothing.

The body would appear to have been pulled out from the wall slightly and the clothing over the back and legs set alight. It would appear that his shoes had been taken off at some phase of the assault prior to him being set on fire.

Findings relating to Sean King

Blood was found on his shoes, jacket, jumper and trousers. There was particularly widespread, fine blood splashing over his trousers and shoe. The presence of blood to match that of Oslon and its distribution would strongly support the proposition that Sean King had been close to Oslon during the assault. Traces of blood matching that of Sean King were found on the cuff of his sweatshirt, indicating that he had received an injury at some time.

Findings relating to Foster

Blood was found on Foster's shoe, jacket, jumper and trousers. There was particularly widespread, fine blood splashing over his trousers and shoe. The presence of blood to match that of Oslon and its distribution would strongly support the proposition that Foster had been close to Oslon during the assault.

Findings relating to Noel King

Fibres matching those of a blue fleece jacket belonging to him were present on the tapings from the alleyway walls. This would strongly support the proposition that there had been contact between the wall and Noel King's jacket. Blood was present on his jacket, shoes and jeans. Some of this appeared as small splashes of projected blood, and a sample taken matched the blood of Oslon. The finding would strongly support the proposition that he had been close to Oslon during the assault.

The Report of the Autopsy performed by Alastair J Bentley, Deputy State Pathologist for Northern Ireland

(D) In his commentary Dr Bentley stated:

> "1. Kenneth Oslon died as a result of his injuries, namely blunt force trauma of the head.
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> 2. On the right side of the head there was extensive bruising of the skin and underlying tissues, a large number of lacerations (cuts due to blunt trauma). The largest of these lacerations measured 18.5 cm (over 7 inches) and extended horizontally over the right side of the scalp. In addition there were extensive lacerations of the right ear, including the cartilage. Underlying these injuries there was extensive fracturing of the right side of the skull with fragmentation into a large number of pieces, exposing the brain. Furthermore a number of fracture lines extended across the base of the skull. Examination of the brain revealed bleeding into one of the membrane bound spaces between the brain and the scalp (subarachnoid haemorrhage) and extensive bruising of both the left and right sides of the brain, together with reactive swelling of the brain.
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> 3. The pattern and severity of these injuries indicated multiple very forceful blows with one or more blunt weapons to the right side of the head.
>
> 4. …
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> 5. On the left side of the head there was extensive bruising, patchy abrasions and a considerable number of superimposed small irregular superficial lacerations. The appearance of these injuries was

highly suggestive that they were sustained as a result of forceful contact against the ground, most likely due to counter-pressure of the ground as at least some of the blows to the right side of the head were delivered with the left side of the head lying on the ground.

6. The front of the face showed patchy bruising, including bruising of the inside of the lips and a broken nose. Much of this bruising could have been a consequence of blood tracking through the tissues under the skin from the sides of the head; however the injuries of the lips, nose and right eye were likely to have been sustained as a consequence of direct blows to these sites, which could have been delivered by punching, kicking, head-butts or a blunt weapon, or forceful contact with an unyielding surface , such as the ground.

7. As a result of the severe head injuries unconsciousness would have been instantaneous and death not long delayed. Detailed neuropathological examination of the brain confirmed that death had occurred shortly after the injuries had been sustained, at the most a few hours.

8. There was extensive bruising of the right side of the back, consistent with forceful contact against an unyielding surface such as the ground.

9. There were a number of bruises of the left arm and these were non-specific in nature. However, it is possible that the bruises of the left upper arm could have been sustained as a consequence of forceful gripping and it is also possible that the sizeable bruise of the left wrist and hand could have been a defensive-type injury, possibly indicating that Kenneth Oslon had made an attempt to defend himself against blows from a blunt weapon.

10. The clothing and body showed patch burns. There was no obvious vital reaction associated with the burns of the skin, strongly suggesting that they occurred after death."

(E) The arrests of Noel King, Sean King and Foster

At approximately 6.30 pm on Sunday 5, August 2001 Constable McCurry spoke to Noel King and Foster at Malone Road, Belfast. He spoke first to Noel King in relation to his movements on Friday, 3 August 2001. Then he spoke to Foster who stated that he and the King brothers were on the Ormeau Road and had bought alcohol from the Hatfield Bar prior to going to Wellesley Avenue. At 6.56 pm Constable Canavan arrested Foster on suspicion of the murder of Oslon and cautioned him. He replied: "No problem". Noel King was then arrested by the Constable on suspicion of the murder of Oslon and cautioned and he made no reply. He was searched. Two cigarette lighters were found on him. A birth certificate, medical card and a cheque all in the name of Sean King were also found on him. He was taken in a police car to the Custody Suite at Musgrave Police Station. Foster was put in a police car on his own. Constable Gillen sat beside him. Constable McCurry drove him to the Custody Suite. Both police officers stated that Foster said in the car: "It's nothing to do with me; Noel King hit him with a brick". At 9.10 pm on Sunday, 5 August Constable Boyd spoke to Sean King on the Lisburn Road and arrested him for the murder of Oslon and cautioned him. He made no reply to the caution. He was also taken to the Custody Suite at Musgrave Police Station.

Interviews of Sean King

[3] Detective Sergeant Strain and Detective Constable McConnell began to interview Sean King in relation to the murder of Oslon in the presence of his solicitor in the afternoon of Monday, 6 August 2001. He was interviewed twice on that day, once on Tuesday, 7 August and on four occasions on Wednesday, 8 August. In view of the decision which we have reached we do not consider it necessary to provide a summary of these interviews.

Interviews of Foster

[4] Foster's interviews also commenced in the afternoon of Monday, 6 August 2001. He was interviewed by Detective Constable Childs and Detective Constable McKendrick. Throughout his interviews he denied being with the Kings or with Oslon. Again in view of the decision which we have reached we do not consider it necessary to provide a summary of these interviews.

The case for the defence of Sean King

[5] Sean King gave evidence in his own defence. At the time of trial in June 2003 he was 29 years of age. He told the court that he was a chronic alcoholic. He said that he did not know Kenneth Oslon in August 2001. He

met him for the first time on Friday, 3 August when Oslon came to Simpsons. He himself arrived at Simpsons' via Eglantine Avenue where he had met his brother, Noel and Foster. He described an incident which occurred outside Simpsons' in the course of which his brother and Foster removed his medical card, birth certificate and a cheque for £1,000 from his clothing and his brother put them in his own pocket, saying to Foster: "That will do you and me."

A fellow came round the corner from the direction of Chlorine Gardens and Fisherwick Church towards Simpsons. He thought it was Noel King who said "This is your man, Kid McAteer." He thought Noel said this to Foster and Foster said "Yeah." The man who came round the corner from Chlorine Gardens was in fact Oslon whom he did not know. Oslon went into Simpsons, came out again, walked towards the phone boxes just facing Simpsons. Noel King pursued him and he and Foster followed behind. Then Oslon walked on. Noel King decided to pursue him and Foster walked behind. They got to Fisherwick Church and decided to sit down to have a drink. Oslon turned the corner into Chlorine Gardens and shortly afterwards came back in their direction. Noel King stopped him again and said to Oslon "Nip over to the Botanic Off-licence and get us some bottles of cider." Foster gave him the money to go and Noel King went over with him and stood outside the off-licence while Oslon went into the off-licence. He was to buy a 2 or 3 litre bottle of cider. He recalled Noel King sitting on the wall outside Fisherwick Church and that he and Foster and Oslon were there. Either Noel King or Foster said that Oslon was a tout and Noel King or Foster jumped up and grabbed Oslon and threw him against the gates of the church. Noel King said that they would take him across the road into Eglantine Avenue and interrogate him. Oslon was then pulled across the road by Noel King and Foster. He (Sean King) went with them to get back his cheque, birth certificate and medical card. He thought he still had a tin of cider and he thought that he carried the bottle of cider which Oslon had bought. It was in a bag. He distanced himself from the others.

Just as he got to the Abacus Restaurant on the left hand side of Eglantine Avenue he thought Oslon struggled with Noel King and Foster and broke his grip from them. He stumbled backwards and more or less banged into him (Sean King) at that time. He pushed Oslon with his elbow out onto the road. Noel King came back and grabbed him by the arm and walked him up the street again towards Foster and the entry. Oslon was held by Noel King and Foster. Noel would have had the tighter grip on him. When he was being led down into the alleyway he (Sean King) did know that they were going to take him down and question him and give him a kicking. The thing that came into his head was that Oslon might get punched and kicked.

None of them had a weapon. Noel King pulled Oslon further on down the entry. By the time they all got down to the end of the entry just before one turned right he (Sean King) stopped to urinate against a grey door at the

bottom. Noel King, Oslon and Foster walked on up the entry. By the time he had finished urinating he turned and saw Noel King driving his fist into Oslon's face on the side of the jaw. At that point Oslon stumbled against a back entry door and fell against it. He thought that Oslon took a step away from the door and fell face down on the ground. He (Sean King) walked up towards the others and there were bricks lying about in a pile. He saw Noel King lifting one of them above head height and he more or less threw it down on the back of Oslon's head. Oslon had his hands behind his head trying to protect himself and when the first brick struck some blood started to come from the back of his head. He (Sean King) stepped in and said to Noel "Stop". He must have said it 4 or 5 times "Stop, don't be doing this, you're going to kill him." He pushed Noel King a bit away and Noel King turned round and lifted the brick again and said to him "Sean, don't be doing that". He took that as a threat that his brother would probably swing the brick in his direction.

His brother lifted the brick above his head and just continued repeatedly to smash it down on the back of Oslon's head. They were forceful blows. He did that about 3 or 4 or maybe 5 times. He (Sean King) was standing close to Oslon when he was lying on the ground and Noel King was standing beside him. Foster was standing around beside Noel King.

He was shocked by what was happening. After Noel King hit him 4 or 5 times there was a plank of wood that came into sight. He didn't know where Noel King got it from but he grabbed the plank of wood and started to beat Oslon with it about the head. He didn't know how many bricks were used and he didn't know how many times Oslon was struck with the plank. Oslon was lying face down with his legs pointing in the direction where the entry had been blocked off.

The incident happened so quickly that it was hard to say how long it lasted; he thought it could have been as long as 3 to 5 minutes. Noel King threw the plank of wood and the brick over into the bushes. He (Sean King) was shocked and frightened by what had happened. He acknowledged that he had mentioned in police interviews that he had seen Foster with a brick but at the time the incident was happening he wasn't really concentrating on Foster or on what he was doing. Foster might have had a brick or he might not. There was blood all around his own feet and Noel King was standing beside him.

Noel said he was going to burn the body. He was shocked. Noel said "Give us your lighter". Sean King said "You've got a lighter of your own". He stated that Noel King said "But it doesn't work" so he gave him his lighter, thinking that he was going to light a cigarette. He didn't know whether Noel King lit a cigarette but he bent down towards Oslon's coat and he (Sean King) saw that Noel King was trying to burn it. There was

newspaper lying beside Sean King and Noel King said "Give us that paper up." He lifted it and gave it to Noel King who scrunched it up like a flame torch and tried to light it but it only burned for a few seconds and put itself out. After that his brother moved towards Oslon's legs and he took his shoes off and threw them over a wall into the bushes. Then he bent down again and set fire to Oslon's tracksuit bottoms. Noel King and Foster then walked back in the direction from which they had come. At that time Oslon's tracksuit bottoms were in flames. He (Sean King) turned and started stamping on the tracksuit bottoms in an effort to extinguish the flames. He thought Oslon had already suffered enough with the head injury. He just didn't want to see any of his body burning. At this stage Noel King and Foster were down at the bottom end of the entry.

After he (Sean King) stamped the flames out the clothes were smouldering and Noel King shouted up to him "Sean come on, leave it." Noel King came up to Sean King and grabbed him by the arm and pulled him. He didn't know whether to stay with Oslon or to go on with Noel King and Foster but eventually he went on with them and got to the bottom of the entry. They just headed on out onto the street and starting drinking their cider. Noel King said "There is a squat down Wellesley Avenue. Come on Sean". They went on the Malone Road. Foster went into the Botanic Off-licence to see if he could get served and he was ejected. They walked on. Before they left the entry Noel King had previously gone back to the body to check for a pulse before they left the entry but couldn't find a pulse and shouted back "We have killed him."

Sean King said that he and Noel King broke into a house in Wellesley Avenue and went in to the back sitting room of the house. There was a doorway leading out into the kitchen. Noel King and Foster sat down on the settee in the sitting room and drank away at the cider and smoked a couple of cigarettes. Noel King went on down into the kitchen and had a tea cloth in his hand and was wiping his hands. The police came about 20 minutes to half an hour after they went into the house and he (Sean King) was arrested that night with the others and they were taken in separate cars to Musgrave Street Police Station. They were released the following day, the Saturday, in the afternoon, after being questioned and charged with breaking and entering. In the course of this evidence he told the court that he had never been convicted of a serious act of violence against another person.

He was cross-examined by Mr Treacy QC on behalf of Foster. He was also cross-examined by Mr Mooney QC for the Crown.

Again in view of the decision which we have reached we do not propose to summarise the cross-examinations by Mr Treacy QC and by Mr Mooney QC.

The case for the defendant Foster

[6] Foster gave evidence in his own defence. He stated that he was born on 22 January 1965. He described himself as a "down and out" tramp and a chronic alcoholic in August 2001. On Friday, 3 August he had been drinking with the King brothers and was present in the alleyway at the back of Eglantine Avenue with them when Oslon met his death. He accepted that as a result of his presence there he had blood from Oslon on his clothing. He had been drinking from early morning and when he ended up in the alleyway he would have been fairly drunk. He denied being one of the men who pushed and shoved Oslon into the alleyway. The tracksuit bottoms and training shoes that he was wearing when arrested on the Sunday were worn by him on the Friday. On the afternoon of Saturday, 4 August Sean King borrowed the jacket which he had been wearing on Friday, 3 August. He never saw that jacket again.

He had a clear recollection as to how he got into the alleyway. Before that he had been sitting on a low wall. Sean King was on his left and Oslon was on his right and Noel King was standing. A fellow came round from Malone Road and called Sean King who got up and went over to him. The next thing was that Sean King assaulted Oslon, the whole commotion broke out and it ended up in the alleyway.

The commotion was in Eglantine Avenue. When he got into the alleyway he saw Noel King hit Oslon on the head with a brick. He grabbed Noel King by the arm and the shoulder and Oslon broke free. Noel King was ready to lift the brick again and he grabbed Noel King but Noel King broke free and lifted a piece of wood and beat Oslon with it. While he (Foster) was engaged in trying to prevent Noel King from attacking the victim, Sean King was beating Oslon with the brick. Once Noel King lifted the piece of wood Foster decided to leave the entry as he wanted no part in it and left it up to the two brothers. He didn't know what was going to happen in the alleyway. He left the alleyway and went back up to Simpsons' shop and stayed there to drink a bottle of cider and at about 9.50 pm he headed down towards Castle Street when he met the two King brothers again. He reckoned it would have been an hour and a half or maybe two hours since he had left the alleyway. He did not know where they had gone. He was heading to New Lodge to get a carry-out.

Foster denied having used a brick or a stick on Oslon whom he knew as McAteer. He had no animosity towards him. After he left the entry he was begging outside Simpsons for about an hour and a half. He was arrested later on Friday evening at the house in Wellesley Avenue. Sean King was in the kitchen washing his hands. He accepted that he had told the police in the police car on Sunday when was arrested for the murder: "It's nothing to do with me; Noel King hit him with a brick." He had denied to them in his

interviews that he was in the entry. He explained this by saying that he had been confused and scared when he was being interviewed. When Sean King assaulted Oslon at the low wall Sean called him a hood touting bastard and that was when the argument ended up in the alleyway.

He was cross-examined by Mr McDonald QC on behalf of Sean King. In view of the decisions which we have reached we do not consider that any purpose is served by setting out a summary of this cross-examination, apart from the questions asked about the incident in 1996 involving Michael Whelan. He was also cross-examined by Mr Mooney QC for the Crown. Again we do not propose to give a summary of this cross-examination.

[7] During the course of cross-examination by Mr McDonald QC Foster was asked about Michael Whelan whom he had said that he drank with. He agreed that Whelan lost his life through being beaten. He said that Whelan and Jackie Vance had a punch-up and a blood vessel burst in Whelan's brain and he died. Jackie Vance gave himself up to police and was sentenced to 5 years' imprisonment for manslaughter. This incident happened somewhere on the Ormeau Road. Foster had been drinking with Whelan on the day that he was killed. He admitted that he was wearing Whelan's jacket the next morning when he was stopped by the police. He claimed that he was not one hundred percent sure whether there was blood on the jacket. He said that the only reason he was wearing Whelan's jacket was because they had been shoplifting. It was September 1996 and he only had a tee-shirt on and he borrowed the jacket to go in to Harry Corry's in order to steal goods.

Mr McDonald QC applied to cross-examine Foster on the grounds that Foster, by the conduct of his case and by giving evidence in the witness-box against his co-accused, had lost the shield that he would have under the Criminal Evidence Act (NI) 1923 not to be cross-examined about previous convictions or bad character. He submitted that Foster for the very first time in the trial had given evidence which incriminated Sean King in the events of the murder and had done so without Sean King even having had the opportunity to answer the allegations that Foster had made against him; King, who appeared first on the indictment gave evidence before Foster.

In the course of his submissions to the judge Mr MacDonald referred to the following matters which, he claimed, he was entitled to put to Foster from a police file which he had obtained from the prosecution.

On 12 September 1996 a man called Michael Whelan had been killed in premises at 38 Essex Street off Lower Ormeau Road. Foster was charged initially with the murder of Whelan. He was not prosecuted but the file remained open. At interview Foster had initially denied ever having been in the house at 38 Essex Street and persisted in that denial despite compelling evidence to the contrary. At the end of the interview cycle, however, he told

police that he could not remember whether he had been in the house. He also said that he could not remember striking Michael Whelan in the kitchen of the house. The police had been suggesting that he took part in a concerted attack upon Whelan as a result of which he was killed. After the events at 38 Essex Street had taken place, it appeared that a number of taxis were used by him to get to the north of the city. After Foster had left one of these taxis items had been found in it and the taxi driver reported this to the police. As a result it was established that Foster had been wearing a bloodstained jacket containing personal items belonging to Whelan. The blood on the jacket was that of Whelan. There was a suggestion that Whelan had been called a tout. It was suggested that Foster had said at least four times in police interviews with the police that if he had murdered someone he would burn the evidence. He told police that he could not remember what happened, that he suffered from black-outs. He claimed not to be able to remember what had happened; whether he had been in Essex Street at the time that Mr Whelan sustained the injuries that led to his death. Mr McDonald QC argued that there was a striking similarity between Foster's attitude (that he could not remember) at interviews in the case of Whelan and his attitude to the police in interviews in this case and further, that he had volunteered that if he murdered someone he would burn evidence.

[8] Weatherup J ruled that Mr McDonald QC could not cross-examine Foster in relation to the incident in 1996, stating that the subject matter must be relevant to the accused's credibility as a witness. He said that in order to allow the questioning proposed by Mr McDonald a degree of collateral inquiry would be required in order to determine the facts of the incident in 1996 and the defendant might not admit some of the matters that would be put to him. It was not relevant to the credibility of the accused in this case, the judge said, that "something similar" had occurred in 1996.

[9] Mr Treacy QC then applied for the jury to be discharged. Weatherup J ruled that the questions put to Foster by Mr McDonald QC before the ruling had not prejudiced Foster.

He did not believe that the fairness of the proceedings required that the jury be discharged. Any possible prejudice by virtue of the association of Foster with someone convicted of manslaughter in 1996 could be dealt with by the judge in his summing up.

[10] An application was made by Mr Treacy QC to call Dr McClelland, an educational psychologist, as a result of a question from the jury about educational classes in prison. The question must have arisen at some stage before the summing-up. Weatherup J refused to allow Dr McClelland to be called. The issue was, he said, whether or not Foster could read in prison in December 2000 and Foster had told the court that he could. The question therefore was whether Dr McClelland could give assistance in relation to that

issue. Dr McClelland's evidence would be that in January 2003 he tested Foster. In the light of the scores that Foster had attained he had a reading level of a functioning illiterate adult. Foster had given evidence that he could read in December 2000 but he had told the police that he could not read in August 2000. The judge decided that Dr McClelland could not really contribute to that debate. He proposed to tell the jury that they were not to measure his reading ability in 2000 by reference to his reading level in court which was obviously quite good to all who heard him. Accordingly the judge did tell the jury that Foster had not had educational classes in December 2000 but that he had them later and that accounted for his present reading ability.

[11] Before the judge commenced his summing-up to the jury there was a discussion between counsel and the judge as to the verdicts which were open to the jury. Neither counsel for the defence invited the judge to leave manslaughter to the jury. But apparently counsel for the prosecution invited the judge to consider whether he should do so. The judge decided not to leave this as an alternative verdict. No part of the discussions that took place between the judge and counsel is available on transcript and we are therefore unaware of the basis for the judge's decision.

[12] In the course of his summing-up to the jury the judge referred to the defence statement that defendants are required to submit in which they set out the basis of their defence; that Foster had submitted his defence statement in 2002 and Foster had said that he was present at the murder but that he did not participate in it. In other words, he then gave notice to all parties that it was his case that he was present but that he did not take part in and was not part of any joint enterprise.

After the summing-up had been completed and the jury retired to consider their verdict they sent a question to the judge. In the absence of the jury the judge informed counsel that they jury had asked if they could see Foster's statement of defence.

[13] In his statement of defence (1) Foster stated that he denied the offence alleged against him; (2) he accepted that he had been present; (3) he asserted that he did not inflict any injuries; (4) he asserted that the co-accused each inflicted injuries; (5) he asserted that he was not engaged in any joint enterprise to injure or murder the deceased; (6) he asserted that any evidence which purported to show that he was part of a joint enterprise was erroneous.

[14] It was submitted on behalf of Foster that if the judge felt it appropriate, the portion of the defence statement containing the six points could be supplied to the jury. On behalf of Sean King it was submitted that no part of the document should go to the jury. Counsel for King suggested that the document was not evidence in the case; it was self-serving and implicated the

co-accused. If Foster's statement went to the jury it might be necessary also to inform them that Sean King had also submitted a defence statement.

Counsel for the prosecution expressed strong reservations about the jury seeing the document. It was not in evidence, and it would offend the rule against previous consistent statements. The judge pointed out that it had a status to confirm the absence of recent invention which was, in effect, the contest on this point between the defendants.

Eventually, after further argument, the judge re-called the jury about their request to see Foster's defence statement. He told them that it was a procedural document which was not in evidence in the case. He did not consider it appropriate that he should furnish them with a copy of it but as the issue had been raised by Mr Treacy QC in response to comments made by Mr McDonald QC he thought it would be appropriate to tell them what the document said. It made a number of points. One of them was that Foster accepted having been present at or about the scene at which the deceased died; and further that Foster asserted that he did not inflict any injuries upon the deceased. He did not mention that Foster had asserted that his co-accused inflicted injuries.

Grounds of Appeal of Sean King

[15] The grounds of appeal against conviction (as amended) were:

> "1. The learned trial judge erred in ruling that the cross-examination of the co-defendant Hugh Foster as to his involvement in the murder of Mr Whelan in 1996 was irrelevant to any issues before the jury;
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> 2. The learned trial judge did not put the appellant's defence fairly to the jury and in particular did not distinguish sufficiently or at all between the defendants in the consistency of their evidence;
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> 3. The learned trial judge failed to give a direction to the jury on the issue of manslaughter notwithstanding a reminder by Crown counsel to consider doing so. Such a direction would have been appropriate and its absence deprived the jury of an important issue and alternative account, which should have been before them."

We presume that the word "verdict" should be substituted for "account".

[16] The first ground of appeal of Sean King was that the judge refused permission to fully cross-examine Foster. Leave of the judge had been sought because he had to rule whether Foster had lost the shield afforded to him by the 1923 Act and whether the questions were relevant to an issue in the trial. It was submitted that he had lost the shield because his counsel had cross-examined Sean King to the effect that he had struck Oslon with a brick in the alleyway. The evidence of the pathologist was that Oslon had died as a result of multiple blows from a variety of weapons including a brick. Foster himself had given evidence that Sean King had a brick. Therefore, it was contended, the credibility of Foster as a witness was put in issue in the trial. In his ruling at the trial the judge accepted that Foster had lost his shield and this was conceded by counsel for Foster. The judge also accepted that Foster's credibility as a witness was in issue.

[17] The judge correctly concluded that it was necessary to decide whether the questions were relevant to Foster's credibility as a witness and that, if they were relevant, he had no discretion to disallow them. Counsel for Sean King had not disputed that it was a matter for the judge to determine their relevance. But counsel for Foster had contended that, if relevant, they should be disallowed.

[18] Section 1(f) of the Criminal Evidence Act (Northern Ireland) 1923 provides:

> "1. Every person charged with an offence, […] shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided as follows:
>
> …
>
> (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless
>
> …
>
> (iii) he has given evidence against any other person charged [in the same proceedings]:"

The case-law is clear that, if relevant, the questions could not be disallowed on the grounds that they were more prejudicial than probative. This was stated in the leading case of *Murdock v Taylor* [1965] AC 575 in which the House of Lords held (Lord Pearce dissenting) that once the judge has ruled that the witness has given evidence against his co-accused, he has no discretion to restrain relevant cross-examination by a co-accused about previous offences or the bad character of the witness.

We accept that this principle is supported by all the leading text-books, such as Archbold 2005 at 8-209, Blackstone 2005 at F12-76, Phipson on Evidence, 15th ed. at 18-71 and Cross and Tapper, 9th ed. at pp 415-416. The judge has a discretion to exclude evidence that the prosecution seeks to adduce on the ground that its probative value is outweighed by its prejudicial effect but no such discretion exists in relation to cross-examination of one defendant who has given evidence against another.

Questions put that are relevant to the character of a co-accused and, therefore, relevant to his credibility must therefore be allowed, particularly where one accused person has chosen to attack his co-accused on issues relevant to guilt on the charges which they face. Intimation of the desire to put these questions to the witness should be given to the court and to counsel for the witness in the absence of the jury: see Lord Morris of Borth-y-Gest in *Murdoch* at pp. 584-586. One of the reasons for allowing cross-examination in these circumstances is that if one co-defendant gives evidence against another he should be treated, as far as the latter is concerned, as a witness for the prosecution and, therefore, liable to cross-examination as to his character: see *R v Stannard* [1964] 48 Cr.App.R.81 at 85, per Winn J.

In the present case we consider that counsel for Sean King should have given such intimation before he mentioned the case of Whelan, not least because Foster was not convicted of any offence in Whelan's case. Moreover, we consider that he should have made available to the judge and to counsel for Foster the material on which he proposed to rely. In order to make submissions as to the relevance of the material, an opportunity ought to have been afforded to Foster's counsel to see the file. The material had been made available by the prosecution to the lawyers for Sean King because it supported the case for Sean King when Foster dropped his shield but did not support the case for Foster.

Counsel for Sean King submitted that he was entitled to use this material as "similar fact" evidence against Foster which the prosecution, if it had intended to do so, would have presented as part of the case for the prosecution. It was also submitted that he was entitled to rely on it as tending to establish that Sean King's account of his involvement in the murder was more probably true than that advanced by Foster. (On this point we draw attention to *R v Randall* [2004] 1 Cr.App.R.26). Counsel also submitted that he

was entitled to cross-examine as to admissions previously made by Foster in interviews with the police that if he were to commit a murder, he would burn the evidence.

[19] We accept, of course, that apart from previous offences in respect of which Foster could be cross-examined, his bad character was also put in issue and that this was not confined to reputation, but included past misconduct or misdeeds: see *Stirland v DPP* [1994] AC 315 at 325 per Lord Simon and *R v Bracewell* [1978] 68 Cr.App.R.44. In *R v Dunkley* [1927] I KB 323 at 329 Lord Hewart CJ said that it was then too late to consider whether character in the statute meant only general reputation. Similarities between previous offences or misconduct do not debar a co-accused from cross-examining his accuser: see *R v Reid* [1989] Cr.L.R.719, referred to by the judge and *Randall's* case cited at para.[18].

We are satisfied that the Whelan case was not *shown* to be a "similar fact" case tending to establish the guilt of Foster in the present case. Foster was not convicted of any crime in relation to the "Whelan" case. No material was presented to the judge or to this court in order to show that it was a similar fact case. Neither the judge nor this court was provided with material which showed what caused his death. Neither the judge nor this court was provided with material with tended to show that Foster was present when blows were struck, if they were the cause of death. Neither the judge nor this court was provided with material which showed when the blows were struck or that blood was on the jacket worn by Foster at 6.00 am the next morning or that the blood was Whelan's blood or that Whelan had been wearing the jacket on the previous evening or what items were found in the taxi or how they were linked with 39 Essex Street or their relevance to the death of Whelan. It may well be that Foster took items from 39 Essex Street which he was not entitled to remove or that he took away the jacket of Whelan in order to interfere with the investigation of his death. This would, prima facie, be evidence of his involvement in offences or misconduct and would tend to establish bad character. It may also be that he made statements at interview which were damaging admissions but neither the judge nor this court were shown notes or transcripts of interviews.

We can understand why the judge held on the arguments which have been transcribed that the cross-examination on which Mr McDonald was about to embark was not relevant to Foster's credibility as a witness since he had sought to justify it on the basis of "similar fact."

At the same time we recognise that there was material which was, prima facie, relevant to the contention that Foster committed offences or misconduct at the time of the attack on Whelan or after it. Counsel was wrong to concentrate on avowed similarities between that case and this case and this may have led the judge into error. What was important was to show

that the questions which were to be put to Foster were relevant to offences or his bad character in 1996.

[20] However, the questions which were asked by Mr MacDonnell QC about the Whelan incident in 1996 and others which, as he indicated to the judge, he intended to ask, were relevant to Foster's bad character. In consequence the judge's ruling was incorrect. The admissions allegedly made by Foster that if he killed he would burn the evidence were also relevant to bad character. As we shall explain below, we have decided that there must be a re-trial in this case. It will be a matter for the trial judge on that re-trial to determine whether, in view of the questions by Mr McDonald QC and answers by Foster, counsel is entitled to put to Foster that he was charged with the murder of Whelan.

[21] In view of our decision that there should be a re-trial we do not propose to say anything further about the relevance of questions to be asked. We consider that any questions that counsel proposes to ask and the material on which those questions are based should be made available to the trial judge and to counsel for the co-accused if and when the conditions of Section 1(f) (iii) have been met and leave to cross-examine has been granted. It will be a matter for the trial judge to rule as to whether the file in the Whelan case should be shown to counsel for Foster. If he concludes that it should be shown to counsel for Foster, it is clear that counsel should be allowed to consult with Foster as to its contents. We have been given a sketchy outline of the questions and none of the material on which they are based. We are, therefore, in any event unable to assist the new trial judge, save to say that on the basis of what we have been told, Weatherup J was wrong to rule as he did, that all of Mr McDonald's questions were irrelevant.

Ground 2 was not argued and we deal with Ground 3 at para.[33].

[22] No argument was addressed to us about Article 6 of the Convention and we do not propose to embark on a discussion of it. Different considerations arise when one is examining the rights of an accused against whom a co-accused has given evidence than arise as between prosecution and defence. Article 6 was not discussed by their Lordships in *Randall's* case.

Grounds of Appeal of Foster

[23] The grounds of appeal against the conviction of Foster were:

1. The trial judge did not permit the jury to have sight of the Foster's defence statement despite a request from the jury at an important stage of its deliberations. The judge gave some information orally in respect of the statement but may have left the jury under the impression that the defence Statement may not have been entirely consistent with the case being made by the defendant at trial, namely that the defendant asserted a role to the other

two defendants as having inflicted injuries on the deceased and in the denial of any joint enterprise. The failure to properly detail the nature of the accused's defence as set out in the statement may have resulted in the jury being misled as to an important issue in the case.

2. The trial judge failed to discharge the jury in circumstances where counsel for the co-defendant had asked questions in respect of an incident in 1996. At that time, this defendant had been arrested on suspicion of murder and was questioned, however the charge was later withdrawn. Whilst no specific reference was made to the arrest of the defendant, sufficient material was placed before the jury in connection with this matter, to have an adverse effect upon the jury, prejudicing the defendant and rendering the verdict unsafe. This is a particularly salient point since the learned trial judge subsequently ruled against an application to admit further questioning in respect of this past event as being irrelevant and the terms of the ruling were such that had it been made at an earlier time, then the questions posed by counsel for the co-accused would clearly have been in breach of the subsequent ruling.

3. The trial judge specifically drew the attention of the jury to the events of 1996 and whilst this was in the form of a direction to them not to consider any reference to these events as they were irrelevant, the mere reference had the effect of focusing the minds of the jury on that portion of the cross-examination of the accused. This was the last matter to which the jury were directed before retiring to deliberate and this reference would have made it difficult for the jury to disregard the matter, in turn rendering the conviction unsafe.

4. The learned trial judge failed to give a direction to the jury on the issue of manslaughter, notwithstanding an application by Crown Counsel to do so. Such a direction would have been appropriate and its absence deprived the jury of an important issue and alternative verdict, which should have been before them.

5. The learned trial judge refused to allow evidence to be heard from Dr Colin McClelland, Educational Psychologist. This evidence was both relevant and admissible and should have been admitted by the trial judge. This evidence was to assist in determining an issue of whether or not the defendant lied to police when he told them that he could not read. An explanation in support of the accused was available from this witness and the refusal to allow the evidence had such a significant effect upon the progress of the trial and the credibility of the accused in the eyes of the jury, that the subsequent conviction is unsafe.

6. The learned trial judge refused to admit the defence statement of the accused Foster. His defence sought to introduce this document as evidence of a previous consistent statement to counter an allegation of recent fabrication.

This document ought to have been admitted and a subsequent partial reference to the document by the learned trial judge in his directions to the jury was insufficient to deal properly with the suggestion of recent fabrication.

On the morning of the hearing before the Court of Appeal leave was granted to add a seventh ground as follows:

7. In the course of the trial, the prosecution disclosed to representatives of the co-accused, material relating to the investigation into the death of Michael Whelan. This material was not disclosed to legal representatives of this appellant. The material in question was then used by representatives of the co-accused to question this appellant in the matter set out at pages 411 and 412 of the transcript and as referred to in the particulars of paragraph 2 of the Grounds of Appeal. The disclosure of the material by the prosecution in this fashion constituted a breach of the provisions of the Criminal Procedure and Investigation Act 1996, amounted to an abuse of the process of the court and resulted in unfairness to the appellant. Had the matter properly been disclosed to representatives of the appellant, the line of questioning could have been anticipated and objection raised so as to prevent its emergence before the jury in the trial. The material may further have allowed the appellant, through his counsel, to assert that there was no foundation to the suggestion of the appellant being involved in the death of Whelan.

Grounds 1 and 6

[24] Foster's defence statement was not in evidence and, as the judge said, it would have been inappropriate (and irregular) to permit the jury to have sight of it. We consider that the jury may have wished to see it in order to discover whether Foster made the case before trial that Sean and Noel King inflicted injures on the deceased. The judge, when he was discussing the answer which he would give to the jury's question, indicated that Mr McDonald QC had alleged that much of Foster's evidence was "recent invention". Counsel for Sean King was entitled to contend that it was. But it is clear from Foster's defence statement that Foster was proposing to run the defence that the Kings had inflicted injuries on the deceased before the trial commenced. By reading paragraphs 1 and 2 of the defence statement to the jury and by omitting paragraph 4, which made that assertion and which he had originally stated that he would read out, the judge may have led the jury to believe that it was only during the course of the trial that Foster decided to make this case against the Kings.

In so far as a number of allegations made by Foster were not put by his counsel because Foster did not inform his counsel of them, the defence statement could not have protected Foster from all the assertions of "recent

fabrication". The judge would have had a duty to draw attention to the fact that the defence statement did not cover them. However he did not give this as his reason for omitting paragraph 4: see also Ground 6. Accordingly there was a material irregularity in dealing with this question from the jury, as they may have formed the view that all of Foster's allegations about Sean King were recent.

Grounds 2 and 3

[25] As we have held that counsel for Sean King was entitled to cross-examine Foster about aspects of the incident involving the death of Whelan in 1996 we do not accept that the jury should have been discharged on that ground. It is, therefore, unnecessary for us to deal with the principles governing the discharge of the jury.

[26] We propose to leave Ground (4) to the end of this judgment.

Ground 5

[27] The judge, it was submitted, should have allowed evidence to be given by Dr Colin McClelland, consultant psychologist. This would have assisted in determining an issue as to whether Foster had lied to police when he told them that he could not read, it was claimed.

According to Dr McClelland the appellant was functionally illiterate as at 25 January 2003 in that his level of literacy fell below that of adult competence. The appellant's statement to the police in August 2000 that he could not read was in the context of the interviews indicating that the detective would draw a map of the area.

For the reasons given by the judge in his ruling we do not consider that Dr McClelland was in a position to assist the jury. It was for them to decide what Foster meant when he told the police that he could not read. They would have been aware that he made the statement in the context of interviews indicating that the detective would draw a map of the area. It was not for Dr McClelland to interpret for them what Foster meant. It was a matter for comment by counsel, if they chose to make it. We respectfully agree with the judge's ruling which we have set out at para [11].

Ground 7

[28] It was submitted that the disclosure of the material relating to the investigation into the death of Michael Whelan constituted a breach of the provisions of the Criminal Procedure and Investigation Act 1996 and

amounted to an abuse of process of the court and resulted in unfairness to Foster.

In reply Mr Mooney QC for the prosecution took us through the relevant provisions of the Act. Disclosure of unused material is governed by Part 1 of the 1996 Act. The test for disclosure is set out in *R v H and C* [2004] 2 Cr.App.R. 179. Only material that weakens the prosecution case or strengthens the defence case is subject to disclosure. Material affecting the credibility of defence witnesses, including the defendant, is not subject to a duty of disclosure, see *R v Brown (Winston)* [1998] 1 Cr.App.R. 66 at p 74 et seq.

It was necessary for counsel for Sean King to obtain the leave of the court to cross-examine Foster on the issue of the death of Whelan in order to show that he had committed offences or was of bad character and thereby attack his credibility as a witness in this case. This only arose if Foster gave evidence against Sean King. At that stage it was clear that counsel for Sean King had the file in his possession. It had been given to his legal advisers because they were seeking to argue that Whelan's case involved "similar fact" evidence against Foster and went to his credibility. It had the potential to strengthen the position of Sean King in so far as it tended to damage the credibility of Foster. At the stage when the application was made, counsel for Foster was entitled to ask the judge for leave to inspect the file. It was then a matter for the judge to rule whether in fairness he should be shown the file. An application for disclosure of the file could have been made to the judge.

There was a difference of recollection between Mr Mooney QC and Mr Treacy QC as to whether the former had invited the latter to read the file at that stage. But this is irrelevant. The judge refused the application to cross-examine Foster on the issue of the Whelan case, so that in any event the matter of disclosure did not arise.

We are satisfied that there was no breach of the Criminal Procedure and Investigation Act 1996 by the prosecution and counsel for Foster was unable to point to any such breach. The prosecution did not intend to use the material given to the legal advisers of Sean King and none of it weakened the prosecution case or strengthened the defence of Foster. As we have stated neutral material or material damaging to the appellant need not be disclosed. Whilst the decision in *R v Brown (Winston)* was concerned with the duty to disclose material relevant only to the credibility of defence witnesses, not the defendant, Lord Hope referred in his speech to the words of Lord Diplock in *Dallison v Caffrey* [1965] 1 QB 348 at 375 that the duty of the prosecutor is to prosecute, not to defend. At p 76 of his speech he said:

> "No witness enters the witness-box with a certificate which guarantees his credibility. Every witness can expect to be cross-examined upon the veracity or

> reliability of his evidence. Cross-examination which is directed only to credibility may lose much of its force if the line is disclosed in advance. This weakens the opportunity for the assessment of credibility by the jury… To insist on such disclosure would, sooner or later, undermine the process of trial itself. It would protect from challenge those who were disposed to give false evidence in support of a defence which had been fabricated. That would be to tip the scales too far. Justice would not have been done."

In our view fairness demanded that on an application for leave to cross-examine Foster, which, as we have indicated, should have been made earlier by Mr McDonald, the prosecution should have made available to Foster's lawyers the material which they had provided to the lawyers for Sean King. There is a difference of recollection as to whether this was done. As it transpired, the judge ruled in favour of Foster. So there is nothing in this ground of appeal helpful to Foster.

The issue as to whether manslaughter should have been left to the jury

[29] This was Ground 3 of the Grounds of Appeal of Sean King and Ground 4 of Foster's Grounds of Appeal.

A judge in summing-up is not obliged to direct the jury about the option of finding the accused guilty of an alternative offence, even if that option is available to them as a matter of law. If, however, the possibility that the accused is guilty only of a lesser offence has fairly arisen on the evidence and if directing the jury about it will not unnecessarily complicate the case, then the judge should – in the interests of justice – leave the alternative to them: see *R v Fairbanks* [1986] 93 Cr.App.R. 251.

Since justice serves the interests of the public as well as those of the accused, there will be cases where, on the evidence, the accused ought to be convicted of at least the lesser offence and it would be wrong for the jury to acquit him entirely merely because they cannot be sure that he is guilty as charged. In *R v Maxwell* [1990] 91 Cr.App.R. 61 it was held by the House of Lords that where the judge fails to leave an alternative verdict to the jury, the Court of Appeal, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct. If they are so satisfied then the conviction cannot be safe or satisfactory: see Blackstone 2005 at D.17.30.

It is most unfortunate that we do not know the judge's reasons for not allowing manslaughter to go to the jury, particularly since the Crown had indicated to the judge that he had the option of giving such a direction if he

felt that it was appropriate. The forensic evidence against both accused was powerful. He may have considered that such a direction would unnecessarily complicate the case. It would be speculation on our part to determine what the reasons were.

Both appellants made the case that the other one assisted Noel King to bring the deceased to the alleyway. Both made the case that they thought that the deceased would be assaulted but not seriously. Foster claimed that he left the alleyway after attempting to restrain Noel King. Sean King claimed that he attempted to restrain Noel King. It is obvious that the jury disbelieved both of them. But we consider that the jury might have taken the view that one or other or even both of them may have had an intent to cause actual bodily harm to the deceased rather than grievous bodily harm and that their conduct contributed to the death of the deceased. That is to say, Noel King intended to kill or cause grievous bodily harm and used a brick or bricks and a piece of wood to do so but did not go so far as to break the causal connection between their conduct and the death of the deceased. We acknowledge that on the evidence of those who gave "snapshots" of the scene, as the judge described them, the jury were entirely justified in reaching the verdict which they did. They were also fully entitled to do so in view of the forensic evidence.

But, in the absence of the judge's reasons for not leaving manslaughter to the jury, and notwithstanding the care with which he directed the jury, there is a possibility which we cannot hold to be fanciful or unreasonable that the jury convicted one or other or both of the appellants of murder out of a reluctance to see them "get clean away with what, on any view, was disgraceful conduct".

[30] We wish to re-iterate that we are aware of the considerable difficulties which confronted the judge on a number of occasions during the trial and of the skilful and painstaking way in which he charged the jury. It was in many respects a model summing-up. We are aware that some of our rulings are based on the material available to us and that parts of the transcript, especially the reasons why he did not leave manslaughter to the jury, are missing.

[31] We will therefore allow the appeal on this ground and quash the verdicts of guilty on the charge of murder. It is clear, however, that there must be a retrial at which the possible verdict of manslaughter should be left to the jury by the trial judge.