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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

WILLIAM ERNEST COULTER

Before: Morgan LCJ, Gillen LJ and Weatherup LJ

MORGAN LCJ (giving the judgment of the court)

[1] The applicant was returned for trial on a single count of murdering Gillian Doherty in the early hours of 30 January 2003. At his arraignment he pleaded not guilty to murder but guilty to manslaughter. The prosecution rejected the applicant's plea to the lesser offence and he stood trial on the murder count at Ballymena Crown Court before Nicholson LJ sitting with a jury. On 20 October 2004 the jury unanimously convicted him of the murder. Nicholson LJ imposed a life sentence on the applicant and, on 18 November 2004, fixed the tariff period at 18 years. The applicant submitted an application for leave to appeal sentence on 14 December 2004 but did not lodge an application for leave to appeal his conviction until 27 January 2006. The application for leave has not progressed as a result of the applicant's difficulty in getting acceptable representation. He represented himself for a long period but medical evidence indicated that he would not be in a position to conduct his appeal on his own behalf. We indicated that we were prepared if necessary to deal with the case on the basis of written submissions but fortunately he secured the services of his present solicitors and counsel. Mr Kelly QC and Mr Barlow, both of whom did not appear in the trial, appeared for the applicant. Mr McMahon QC appeared with Mr Mateer QC for the PPS. We are grateful to all counsel for their helpful oral and written submissions.

The evidence at trial

[2] Gillian Doherty was separated from her husband, had two sons and lived in the former matrimonial home at Mill Road, Portstewart. She had entered into a

relationship with the applicant who subsequently moved into her house. On the evening of Wednesday 29 January 2003 the applicant and Gillian Doherty had a meal in Portrush during which they consumed a bottle of wine between them. They returned home at about 10:00pm. Gillian Doherty's eldest son was in the house with friends awaiting a taxi to go out. Her son gave evidence that she was drinking wine from a glass but she was not drunk. He then left with his friends in a taxi. Gillian Doherty then phoned her father and step-mother in England and spoke to them for about an hour and the phone call ended shortly after 11:00pm.

[3] Her next door neighbour, Sylvia Lesley, was woken by her child at a time she thought was about 3:40am on 30 January 2003. She heard the applicant shouting angrily three times, "Are you happy now, are you fucking happy now?" Shortly afterwards she heard a slight cry or scream which sounded like a female. At 3:34am the applicant telephoned 999 and told ambulance control that he had stabbed his girlfriend. He telephoned 999 again at 3:53am and this time told ambulance control that he thought his girlfriend was dead and that he had stabbed her and killed her. He said that they had had a fight, she had hit him with a glass and he had stabbed her.

[4] The police arrived at the house at 3:54am. The applicant told them, "I killed her, she's upstairs". The police observed that the applicant appeared to have consumed a lot of alcohol. His breath smelt of alcohol and he was swaying on his feet. When arrested for murder at 4:02am and cautioned, the applicant replied, "We fell out, we had a fight". He was further cautioned when the knife was found in the bedroom and this time replied, "Having a drink in the bedroom, fell out, she hit me over the head with a glass, I took a knife and stuck it in her and cut her throat".

[5] The applicant was taken to Coleraine Police Station where he was examined by the forensic medical officer at 5:55am. He told the doctor that Gillian had struck him with a wine glass and that he had grabbed a kitchen knife, lying by the bedside, in a frenzy and stabbed her. Upon examination, the doctor observed a used 'TENS' pad on the applicant's back; small superficial lacerations on the side of his face; a small fresh laceration on his upper right thigh and on his left knee; a small fresh laceration above his wrist and a half inch old laceration on the base of his right thumb. A blood sample indicated a blood alcohol level, at that time, of 159 micrograms of blood in 100 millilitres of blood.

[6] Shortly before 5:00pm the applicant was interviewed by the police. He told them that after Gillian had telephoned her father, he had opened another bottle of wine and the two of them talked. He said he mentioned it was odd that her eldest son had had a party at which there were ten males but only one female. He said Gillian appeared to "take umbridge" at this because she thought he was insinuating something about her son's sexuality. He said they then went to bed and they had another bottle of wine in the bedroom. He claimed that at some point Gillian made a comment about him getting a 'TENS' machine to help with his back pain saying, ""Oh, you've got a new toy now, you'll not need me now".

[7] He said she was annoyed and that he was looking at other women when they had been out that evening. He then claimed that she got into bed and hit him in the face with a clean wine glass causing it to break and cut his face. He picked the broken glass out of the bed and Gillian stormed off and slammed the door. She went up and down the stairs several times and came back into the bedroom with another bottle of wine. She left again and then re-entered with a kitchen knife. The applicant claimed he grabbed the knife, never getting out of bed, became scared because Gillian was becoming violent and worried as she had previously tried to cut her wrists. He then claimed the next thing he could remember was running downstairs to telephone 999. After telephoning he sat on the table with the kitchen door open and had a beer and a smoke. He then telephoned 999 for the second time.

[8] When questioned further he said that Gillian had charged across the bedroom at him with the knife and he knew she was going to stick him with it. He then said that he must have grabbed Gillian and thrown her onto the bed. Later in the interview he said "I must have gone ballistic" and "I must have gone berserk". He claimed that he had only previously hit her on one occasion after which he went out and smashed the windows in the car. When informed that there were over 20 stab wounds, the applicant replied:

> "No, couldn't have been, there's no way, I couldn't, no there's no way I could've done that. How the hell could I do that. There's not, there's no way I could … I honestly dunno what I done but God save us I must've went fucking bonkers or something, there's no way. Is that right? … Well as I said I think I remember stabbing her once or twice on the bed and that's all I can remember. I remember her head turning and seeing the big gash on her throat.
>
> …
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> Oh, Jesus, I don't remember doing it. I honestly don't remember doing it. I remember sticking it in, stabbing her or whatever, once or twice in the stomach, and then saw a cut on the side of her neck and I realised that I'd killed her at that stage more or less, for she just slid off the bed and I ran down the stairs, I ran down those stairs and I dialled 999. But I don't remember doing all that, honestly. I'd never do that to a dog or a cat or anything, I would never have done that to anybody in my life, no way."

The medical evidence

[9] Dr Curtis, Pathologist, carried out a post mortem on Gillian Doherty's body. There were 21 stab wounds and 9 incised cuts from a knife, a number of which

appear to have been inflicted when the deceased was trying to defend herself. Most were caused by moderate force although one went right through her arm. Some of the knife wounds were also consistent with the applicant inflicting them when Gillian fell off the bed. There were also other injuries caused by blunt force trauma such as scratching or the use of fingernails, punching, gripping or possibly kicking. The only innocent explanation for those injuries would have been contact with a rough surface. A sample of Gillian blood showed 197 micrograms of alcohol in 100 millilitres of blood.

[10] Mr Logan, Forensic Scientist, gave evidence that, due to the blood staining, the attack took place at the top of the bed but he could not exclude the possibility that part of the attack continued on the floor. He was unable to say where the applicant was he attacked Gillian. He would have been on the bed or beside the bed. The deceased was either sitting, kneeling or lying on the bed. She could not have been standing on the bed.

The relationship evidence

[11] At trial the applicant's former wife of 19 years gave evidence that there had been a lot of rowing and arguments during the marriage but that he had not been violent towards her.

[12] Elaine Beggs, the deceased's next door neighbour, was too ill to attend court but her statement was admitted into evidence. She described how she had met Gillian on Christmas Eve 1999 in the driveway and that Gillian had explained to her that she had tried to cut her wrists following an argument with the applicant. Elaine Beggs also described a number of violent encounters between the applicant and Gillian. On one occasion the applicant had banged Gillian's head off the wall a number of times. As the applicant was leaving Gillian went to phone the police. The applicant came back into the house, ripped the telephone off the wall and threw it towards the sink. The applicant then grabbed Gillian, threw her towards the sink and began pressing her face into the draining board. Gillian lifted a knife and pointed it at the applicant and ran towards him shouting "leave me alone". The applicant punched her on the side of the head causing her to fall. When the police arrived the applicant had left the house but shouted back to his son, who was also present, derogatory remarks about the deceased.

[13] On another occasion, 16 June 2002, Elaine said Gillian knocked on her door and appeared shaking and very scared. Gillian said "He's coming round to get me". Later Elaine saw the applicant reversing out of Gillian's driveway so she and her partner went to Gillian's house. When they entered they found the kitchen had been trashed and her red coat hanging over the back of a kitchen chair had been slashed numerous times with a kitchen knife lying beside it on the table. The applicant returned later that night and smashed windows in Gillian's car. He was then restrained by Elaine's partner in the front garden during which he shouted to Gillian's son that his mother was a whore and a slag. Elaine's partner suffered two broken ribs in the incident.

[14] A couple of nights later the applicant smashed Gillian's kitchen window with a brick. Elaine also described how there was often shouting and loud banging from the house in Mill Road when Gillian and the applicant were drunk and that, on the morning of 6 January 2003, she had gone to Gillian and the applicant to complain about how she had had no peace since the two of them had got together.

[15] Jacqueline Maxwell gave evidence that she was present in the house when the applicant and Gillian Doherty were having a row. She said the applicant threw Gillian down on the kitchen floor and was going to throttle her. On another occasion, 21 December, she was staying the night and heard the two of them rowing and a smashing noise. When she eventually came down downstairs the applicant had left. She saw the kitchen smashed up and Gillian in the living room petrified. She also described on another occasion when the applicant was hunting for cigarettes he told her "One of these days I'm going to kill her", referring to the deceased.

[16] Gillian Doherty's younger son, who was 13 at the time of her death, gave evidence that his mother and the applicant argued when they had drink taken. He described specific incidents where bricks where thrown through the windows of the house, through the windows of the car, and the kitchen being ransacked. He attributed all of these incidents to the applicant.

The applicant's evidence

[17] In his evidence at trial the applicant claimed he had two glasses of wine when he was out for a meal with Gillian on the evening in question. They then shared a couple of bottles of wine when they got back to the house and he also had a couple of cans of beer. He said that he was intoxicated and cannot remember going to bed but can remember being in bed and Gillian coming up to the bedroom. She had a bottle of wine and a glass with her. She was not happy and made a comment about the TENS machine that, "You'll not be needing me any more, you've got your new toy". She left the room again and he remained there using the TENS machine on his back.

[18] He said he dozed off and Gillian returned to the room at some stage and went to her side of the bed. He claimed she was very agitated over the comments he had made about her son and hit him in the face with a wine glass, causing the glass to shatter over the bed. He said that he was moving back to Annalong and then said he used their 'magic word' (an agreement between them to stop an argument if it had got out of hand). She stormed out of the bedroom. He then sat on the bed and picked up some of the broken glass. He then lay down and dozed off again. He claimed the next thing he remembered was Gillian charging into the bedroom with a knife saying something along the lines of "You're not frigging going anywhere". He claimed that what happened next was still very vague and he had no recollection of what he did. He said he must have grabbed the knife, put Gillian down on the bed, and that he had a vague recollection of stabbing her once. The next thing Gillian was sliding off the bed with a big gash in the side of her neck. He then ran down the

stairs and rang 999. In relation to the number of wounds to Gillian, the applicant replied that he must have gone totally "berserk".

[19] Doctor Bownes examined the applicant and gave evidence for the defence. He said the applicant suffered from alcohol dependency syndrome, a moderate anxiety depressive condition and mild recurrent depressive disorder, something which is very common in crimes of inter-personal violence. He said it was common for memories of killing someone to be suppressed, but he did not have amnesia nor was there was a physical reason why the applicant could not remember. The doctor was also of the opinion that the applicant would have been aware of what he was doing at the time when he was stabbing Gillian Doherty, although alcohol could not be excluded as a factor in what he did.

The issues in the appeal

Provocation

[20] In his Defence Statement the applicant admitted that the deceased had died as a result of his acts but denied that he was guilty of murder. He denied that he had the mens rea necessary for murder, denied having the necessary intent for murder and relied on the defence of provocation by reason of the conduct of the deceased. Mr Kelly correctly submitted that the Defence Statement left open the possibility of involuntary manslaughter as well as the issue of voluntary manslaughter by reason of provocation.

[21] At his arraignment the defendant pleaded not guilty to murder but guilty of manslaughter. The basis of the manslaughter plea was not disclosed. The plea was not accepted by the Crown and the case proceeded. In the course of his re-examination senior counsel then acting for the applicant introduced in evidence the fact that the applicant had pleaded guilty to manslaughter although the basis of the plea was not discussed.

[22] In the course of his police interviews the applicant made a number of very damaging admissions. Although the applicant explained that he felt pressurised during his interviews none of these were challenged in the course of the trial. In particular at one point in his interviews he said:

> "I had a couple of beers when I was in the bed and she came there. I don't know she came into the room. And I grabbed her, threw her on the bed, or I was in bed like, threw her on the bed whenever I done. I remember vaguely pinning her down and stabbing, stabbing her on the stomach on the bed… I don't know what way I pinned her down or how I pinned her down, but I held her down some way. I must have, if I had a knife in one hand and must have held her with my other hand."

[23] In the course of his cross-examination crown counsel put to him that he clearly intended to kill the deceased. The applicant responded, "I would never harm that girl, I wouldn't harm a hair of her head. To be quite honest with you I don't know what happened. I don't know what happened. I just must have totally lost it that night." During the subsequent lunch interval the learned trial judge asked senior counsel then acting for the applicant whether he wished unlawful act manslaughter not involving an intention to kill to be left open. Senior counsel responded:

> "On my reading of the authorities, my Lord, I would have thought that any admission to having used the knife as a weapon in the circumstances described by the accused could only lead to the conclusion that very serious harm was intended."

In his closing speech to the jury, although he mentioned the issue of intent, the applicant's senior counsel addressed the jury on the basis that the only issue in the case was that of voluntary manslaughter by reason of provocation.

[24] During the discussion during the lunch interval mentioned at paragraph 23 above the learned trial judge identified the first three questions that he proposed to ask the jury:

> "Question 1
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> Are you satisfied beyond reasonable doubt that William Coulter killed Gillian Doherty?
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> Question 2
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> Are you satisfied beyond reasonable doubt that William Calder intended to kill Gillian Doherty?
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> (If the answer to Question 2 is Yes you do not have to answer Question 3)
>
> Question 3
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> Are you satisfied beyond reasonable doubt that William Coulter intended to cause grievous bodily harm?"

[25] After the submission by senior counsel set out at paragraph 23 above the learned trial judge indicated that it would probably be perverse of the jury not to find an answer to what he was proposing as a question and he indicated that he intended to direct them that they must answer either the second question or the third question yes. At the end of this exchange he also asked senior counsel whether he was inviting the jury to take into account something said other than on the 29th/30th January as provocation. Senior counsel indicated that it would not be

justifiable to do so. Later, in the course of his cross-examination, the applicant indicated in his evidence that his over-reaction was a culmination. He said he was like a big sponge, he soaked it up for four years and thought that he could deal with it but obviously it "just got to the stage where he couldn't deal with it any more".

[26] He said that he had been attacked on numerous occasions. In particular he claimed that he had got a jab with a knife from the deceased a couple of years ago when he tried to prevent her cutting her wrists one night at his own house. He accepted, however, that the deceased was not trying to cut his hand at that time. The other occasion on which the deceased confronted the applicant with a knife was that described by Elaine Beggs when the deceased pointed a knife at the applicant and ran towards him after he had attacked her at the draining board. This was relied upon by Mr Kelly as evidence tending to show a disposition by the deceased towards the use of serious violence. It is by no means clear that this incident was advantageous to the applicant. The applicant had allegedly been responsible for considerable violence on the deceased leading to her taking up the knife. The evidence was consistent with the deceased needing to protect herself against him. Senior counsel in the trial did not rely on this incident and whether exposing this incident to the jury was likely to be beneficial to the applicant was a matter of judgment for those involved. We do not accept Mr Kelly's submission that it must have been to the applicant's advantage to pursue this.

[27] The learned trial judge in his charge addressed the jury on the questions set out at paragraph 23 above in the following terms:

> "And the fact that he has pleaded guilty to manslaughter…. merely indicates that when you are asked the question… Did he kill Gillian Doherty [the answer] is, of course, "yes". And it would be perverse of you to…. find any other answer than that. And the answer to the question did he intend to kill her or did he intend to cause grievous bodily harm is "yes". But there are two separate questions and I want two separate answers to them. .. Now those are the ingredients of murder, killing, an intention to kill or to cause grievous bodily harm. And because he pleaded guilty to manslaughter the answer to the first question, of course, is "yes". The answer to the second and third questions did he intend to kill or did he intend to cause serious bodily harm… grievous bodily harm, the answer to one or other of those questions must be "yes" as well."

Shortly afterwards he said:

> "And he has, having pleaded guilty to manslaughter, accepts that he had, at least, the intention of causing

> grievous bodily harm… So again it would be perverse if you were to have answered either of those questions or both of those questions "no".

[28] Mr Kelly submitted that the learned trial judge was in error in concluding that the applicant's plea to manslaughter was an admission that he had an intent to kill or cause grievous bodily harm. It is accepted that his evidence was vague but that the passage quoted at paragraph 23 above was sufficient to raise the issue. It was further submitted that the learned trial judge was led into error by the concession made by senior counsel set out in the same paragraph. There is no authority to suggest that the use of a knife as a weapon could only lead to a conclusion that very serious harm was intended.

[29] Mr Kelly also placed some emphasis on the evidence of the applicant that his overreaction on the night was the product of a culmination of aggression towards him by the deceased. It was submitted that the incident in which the applicant received a minor knife wound and the pointing of a knife towards the applicant were particular examples of this. For the reasons given we do not accept that the evidence in relation to the knife wound supported the submission. The account given by the applicant was that he intervened to remove a knife from the deceased when she was attempting to cut her wrists. In the course of that struggle he got a minor wound. He accepted that the deceased was not attempting to harm him at any stage of this incident. The other incident was a response to aggressive conduct by the applicant. We are also satisfied that the evidence of the applicant in relation to other aggressive conduct on the part of the deceased consisted of generalised assertions without any particularity.

[30] It was submitted on behalf of the applicant that the learned trial judge ought to have left the issue of "slow burn" provocation to the jury. That would have required a direction that earlier specific conduct on the part of the deceased had been responsible for a sudden loss of control on the night in question and that a reasonable man could have been so provoked. Whether or not such a direction was required depended upon the assessment by the learned trial judge of whether the evidence was sufficiently specific to leave the matter to the jury (R v Acott [1997] 1 WLR 306). Senior counsel for the applicant submitted that the provocative conduct related only to conduct on 29th/30th January. We accept that the learned trial judge was not bound by that submission. In light of the generalised allegations made in the applicant's evidence, however, we consider that the learned trial judge was entitled to take the view that there was insufficient specific conduct upon which the jury could base any finding of a loss of control and we do not accept, therefore, that there was any error in not leaving the "slow burn" issue to the jury. In any event the jury answered the question on subjective loss of control in the applicant's favour.

[31] The next issue arising from this aspect of the provocation appeal is the extent to which the learned trial judge was entitled to rely upon the submission of counsel at paragraph 23 above in coming to the conclusion that he should direct the jury that they had to answer Questions 2 or 3 "yes". A barrister acting on behalf of the accused

is prima facie acting under instructions when making any admission on behalf of the accused. In those circumstances any admission authorised by the client is admissible against him (R v BJ Turner and others (1975) 61 Cr App R 67) It does not seem to us, however, that the submission made by senior counsel amounted to an admission. He expressed the view that there was some authority which led to the conclusion that the applicant had the relevant intent because of his use of the knife. All parties agreed that there is no such authority. The submission did not contain any statement that the applicant accepted that he had the relevant intent.

[32] A judge is entitled to express his opinion strongly in a proper case on the issues of fact for the jury. In this case there were substantial admissions made by the applicant and Dr Bownes indicated that the applicant would have been aware of what he was doing when he stabbed the deceased. This was, therefore, a proper case in which to express a strong opinion. We accept, however, that issues of fact must be left to the jury to decide and the judge must not usurp their function.

[33] In this case the learned trial judge directed the jury that they must answer Question 2 or 3 "yes". It appears that the learned trial judge proceeded on the basis that the applicant's admission that he pleaded to manslaughter amounted to evidence of an intention to kill or cause grievous bodily harm. In the evidence there was no indication of the basis upon which that plea was entered. Manslaughter can take many forms. The Defence Statement had raised the issue of lack of intent. In our view the learned trial judge should not have given such a direction to the jury in the absence of a clear admission.

[34] The other aspect of the appellant's submission on the question of provocation concerned the manner of the judge's charge which it was submitted lack clarity and failed to focus the jury on how they should approach the issues. Questions 4 and 5 dealt with the issue provocation:

> "Question 4
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> Are you satisfied beyond reasonable doubt so as to be sure that he did not lose his self-control and do as he did, namely kill Gillian Doherty, by reason of thing said or done or said and done by her on the evening and night of Wednesday, 29th January 2003 and early morning of 30th January 2003?
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> If the answer to that question is yes you do not answer the next question. You will find him guilty of murder.
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> If you have answered that question in his favour by the answer no because you have at the best a reasonable doubt you go on to the objective test.

Question 5

Are you satisfied beyond reasonable doubt so as to be sure that the defendant's conduct was not sufficiently excusable to reduce the offence from murder to the lesser crime of manslaughter?

If your answer is yes, your verdict will be murder, otherwise you will find him not guilty of murder but guilty of manslaughter by reason of provocation."

[35] The jury answered the fourth question "No" and the fifth question "Yes". The submission was that the learned trial judge had invited the jury to enter into considerations of law rather than deal with issues of fact and that the question posed did not direct them to whether a reasonable person with the characteristics of the applicant would have been provoked to lose their self-control. It was accepted, however, that in explaining how the jury should approach the question posed the learned trial judge correctly directed them on the factors that they should take into account in addressing both questions. The judge then went on to examine the evidence in relation to the infliction of the knife wounds and at one stage invited the jury to consider through that evidence what they thought of the attacker as an aid to the determination of provocation. We accept that this was very loose use of language on the objective test but consider that the learned trial judge had carefully ensured that the jury understood through his directions how they should approach that test.

Good character

[36] In his evidence in chief the applicant was asked if he had any criminal record. He said that he had been fined for disorderly behaviour as result of an incident at the airport when the deceased had been refused permission to board a flight because she had been drinking. The applicant said that he kicked up a row about it. In fact it turned out that the applicant was mistaken and he had not in fact been convicted of disorderly behaviour but that was not finally clarified until the appeal.

[37] In the course of the applicant's evidence senior counsel had indicated that he was not putting the applicant's character in issue. During a break in the summing up by the judge junior counsel raised the issue of whether the applicant was entitled to a good character direction. There was then a discussion about how to deal with the bad character evidence at the end of which junior counsel expressed the view that it would at best be neutral to raise the character issue and in those circumstances he did not pursue the matter further.

[38] One of the difficulties was that the applicant only accepted two of the background incidents. In some cases he denied that the events had occurred and on others said that he could not recall. In respect of some incidents he said that the witnesses were not telling the truth. He did accept that he had slapped the deceased on one occasion when she was hysterical and had also be responsible for smashing

two of her car windows in the course of the dispute between them and on another occasion her house windows.

[39] Mr Kelly submitted that he was entitled to a good character direction. He accepted that there might be an issue about whether the propensity element of the character direction should be given having regard to the background evidence but submitted that in any event the credibility direction should be given. He recognised that by their verdict the jury accepted the applicant's evidence that he had lost control on the evening in question. He submitted, however, that the applicant's credibility was material to those factors about his personality which the jury had to take into account in their objective analysis. Although we accept that the submission is correct the learned trial judge explored with the parties what those characteristics were and there did not appear to be any substantial disagreement on that issue.

[40] In this case the applicant admitted in evidence that he had a conviction for disorderly behaviour. In addition he agreed that he had smashed the deceased's car windows and broken windows in her house on another occasions. The prosecution case sought to establish various other examples of bad behaviour on his part. His senior counsel had expressly indicated that he was not putting the applicant's character in issue and although junior counsel raised the character issue midway through the learned trial judge's charge he subsequently accepted that it would not be in the applicant's interests to have the issue of character raised.

[41] We have been considerably assisted by the decision of the Court of Appeal in R v Hunter and others [2015] EWCA Crim 631. Having regard to the matters set out at paragraph 39 above the learned trial judge had a broad discretion as to whether or not to direct the jury on either aspect of the applicant's good character. In substance the submissions made by counsel on behalf of the applicant in the trial were that reference to issues of character was at best likely to be neutral. A propensity direction would almost certainly have been meaningless having regard to the other issues in the case. We agree that the learned trial judge could have given the credibility direction but in light of all the circumstances he was entitled not to do so.

Bad character

[42] This ground of appeal concerns the relationship evidence commencing at paragraph 11 above. In his charge to the jury the learned trial judge rehearsed the evidence given by the witnesses and that given by the applicant in rebuttal. Having done so the learned trial judge directed the jury that the background events were helpful only in so far as they threw any light on what happened on the evening of 29/30th January 2003.

[43] The following morning the learned trial judge continued his charge and during a break, before he had completed his direction, junior counsel for the applicant raised his concerns that it may be perceived by the jury that they were being invited to consider the background incidents as indicative or supportive of the applicant's propensity for violence. He indicated that the defence had acquiesced in

the material going before the jury as background material but that it was not evidence admissible as proof of the commission of the offence. He submitted that the evidence was introduced not to demonstrate that the applicant was a violent man but that the applicant and the deceased had a violent relationship.

[44] As a result of this discussion the learned trial judge then directed the jury about this evidence in the following terms:

> "And you will recall the various witnesses to give evidence about that and you will recall that Mr Coulter denied, in different ways, quite a number of those incidents as having occurred. Now the important thing for you to concentrate on is what happened on the night of the 29th January and morning of the 30th in deciding whether or not he is guilty of murder. That's the important thing. And you exclude, in deciding that, you will exclude those incidents that indicated that there was a, if you believe that they took place, indicate that there was a violent relationship or a relationship that at times was violent between the accused and Ms Doherty. But the fact that there may have been incidents of violence does not decide whether or not he was guilty of murder on the night of 29/30th of January 2003. And it's the evidence about that that is relevant…. But don't take into account the other incidents of violence, if you believe that they took place, as proving that he was guilty of murder on the night, and the early hours, really, of 30th January 2003."

[45] Mr Kelly made a number of criticisms of the manner in which the learned trial judge dealt with the background evidence. First, it does not appear that there was any discussion about the basis for the admissibility of the evidence and the purpose for which it could be admitted. Secondly, when first directing on this evidence the learned trial judge gave no assistance to the jury as to how this evidence might help them in relation to the events on the evening of 29/30 January. Thirdly, having admitted the evidence the learned trial judge then told the jury that they should exclude it in deciding the applicant's guilt if they concluded that it indicated a violent relationship between the applicant and the deceased. The end result was that the jury were advised that the evidence, which was highly prejudicial to the applicant, was irrelevant.

[46] We accept that the position in relation to the admissibility of this evidence was unsatisfactory. We have made it clear that in cases where the prosecution intend by agreement to introduce bad character evidence under the Criminal Justice (Evidence) (Northern Ireland) Order 2004 a discussion between counsel and the trial judge should ensure that the purpose for which the evidence is being introduced is

clear. If such a discussion had taken place in this case the learned trial judge would have had to consider under the principle in R v Pettman (unreported 2 May 1985) whether the evidence would have been admissible to show the use of violence by the applicant or alternatively to demonstrate that the applicant and the deceased had a violent relationship.

[47] We also accept that the direction in relation to the use which the jury could make of the evidence was unsatisfactory. When the evidence was initially reviewed by the learned trial judge he left it to the jury to decide what assistance it might provide in relation to the events at issue. Having then reviewed the matter he effectively told the jury to ignore this substantial body of evidence except on the issue of credibility. In fact the jury, by accepting the subjective case made by the applicant that he had lost control and stabbed the deceased, found him credible at least in part.

Other matters

[48] One of the issues in the case was whether the deceased had threatened the applicant with a knife prior to his attack upon her. In an interview with the forensic medical officer the applicant was recorded as saying that he grabbed the knife from a bedside table. The applicant said that he was unable to remember what he said to the forensic medical officer. He denied, however, that there had been a knife in the bedroom. The jury were invited by the learned trial judge to consider whether his account about the knife was an afterthought. Mr Kelly submitted that a Lucas direction was required.

[49] A Lucas direction is not required in every case where a defendant gives evidence and the jury may conclude in relation to some matters that he has been telling lies. It is only where there is a danger that the jury may regard the lies as probative of his guilt of the offence that such a direction is required. The circumstances in which that may arise have been considered in R v Purge and Pegg [1996] 1 Cr App R 163. Those circumstances did not arise in this case. We do not consider that a Lucas direction was required.

[50] The other matter raised by the applicant concerned the issue of whether the jury should have been invited to consider self defence. We do not accept the self defence arose in this case. On his account he was able to disarm the deceased and take possession of a knife. She was lying pinned down to the bed before he stabbed her. Those representing the applicant at the trial did not raise the issue and in our view that the right not to do so.

Consideration

[51] We have concluded that the applicant has made out two deficiencies in the charge to the jury in this case. The issue for us, however, is whether the conviction safe. In order to determine that question it is necessary to examine each of those issues to ascertain their impact upon the safety of the conviction.

[52] The first relates to the direction by the learned trial judge that the jury must answer question 2 or question 3 in the affirmative. We have already indicated that the learned trial judge would have been entitled to give a strong direction to the jury on this issue. Taking into account the applicant's admissions and the evidence of Dr Bownes there was an overwhelming case that one or other of the questions was satisfied. The jury answered question 2 in the affirmative and, therefore, did not need to proceed to question 3. The direction did not, therefore, remove the issue entirely from the jury and they formed their own view about the appropriate answer. We do not consider that this misdirection affected the safety of the conviction.

[53] The second issue concerns the direction in relation to the background evidence. It is important to recognise at the outset that this evidence was introduced by agreement. It was advantageous to the applicant for his frailties in relation to alcohol and the violent nature of the relationship to be exposed to the jury. The evidence supported his case that there was a loss of control on his part on the night in question. Insofar as the evidence raised an issue of credibility adverse to the applicant it is of importance that the jury accepted his evidence in relation to the issue of loss of control.

[54] The real question, therefore, is the extent to which this evidence and the direction on it could have adversely affected the jury's conclusion in relation to the objective part of the provocation test. There was, in our view, no material controversy about the applicant's history of problem drinking and his mild depression being factors which had to be taken into account in determining the answer to the objective question. Those were drawn to the attention of the jury by the learned trial judge. The background evidence, if anything, tended to emphasise those features. It did not, however, bear upon the jury's assessment of whether his loss of self-control was objectively justified so as to reduce the offence from murder to manslaughter. We do not consider, therefore, that the uncertain and at times contradictory direction in relation to the evidence affected the safety of the verdict.

Conclusion

[55] In light of the difficulties which the applicant had in securing representation to pursue his appeal and the arguments advanced on his behalf we consider it proper to extend time for appeal and to give leave but for the reasons given the appeal is dismissed.