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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

KAREN WALSH

_____

Before: Morgan LCJ, Gillen LJ and Deeny J

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MORGAN LCJ (giving the judgment of the court)

[1] This is a renewed application for leave to appeal against conviction, leave having been refused by Maguire J acting as the Single Judge, in respect of the applicant's conviction at the Crown Court sitting at Belfast, by the unanimous verdict of a jury, of murdering Maire Rankin, an 81 year old woman. The applicant was convicted on 4 October 2011 but her notice of appeal was not lodged until 22 November 2011 just after her tariff was fixed at 20 years. If we grant leave to appeal we will extend the time for appealing. Mr O'Donoghue QC and Mr McKenna appeared for the applicant and Mr McCollum QC and Mr McAughey appeared for the prosecution. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The deceased was a very independent 81 year old woman who lived on the Dublin Road, Newry. With the assistance of her family she was able to continue a relatively independent existence still living on her own. She was a very modest woman, proud of her appearance, devoutly religious and rarely drank alcohol. However, in terms of her health she was frail. For some considerable time she had significant problems with her chest. She took a wide range of medication and needed to use a nebuliser on occasions. About twice a year she would develop a chest

infection, but this responded to medication. She also needed to use a chair lift to get up and down the stairs to her bedroom. In the days leading up to Christmas 2008 she had been unwell, and various members of her family stayed with her at night. She was having problems breathing and had hurt her back. However, by Christmas Eve she was starting to feel better and, although her daughter had encouraged her to come and stay overnight with the family on Christmas Eve, she decided to stay at home on Christmas Eve and go to the family on Christmas Day. Her other daughter telephoned at 10:38pm on Christmas Eve. Her evidence was that her mother was much better than before, bubbly and looking forward to seeing the family on Christmas Day.

[3] The deceased's daughter said that she attempted to telephone her mother at 9:47am on Christmas Day. She gave evidence that there was no answer from her mother. This caused her to worry so she drove to Newry to check on her mother. The deceased's sister had also tried phoning at about 9:00am on Christmas morning but there was no reply. She tried again about thirty minutes later and again shortly after 10:00am. Her husband drove round to the deceased's house. He arrived at the house at approximately 10:20am. The front door was locked and he let himself in with his own key. He noticed the sitting room light was on and there were six or seven items lying untidily on the floor. He went up the stairs and saw two porcelain ornaments lying on the floor of the landing. When he entered the bedroom he found the deceased. She was lying on the floor with no clothes on and a throw covering the lower half of her body. The large mirror in the room was also lying on the floor.

[4] An inspection of the house showed no signs of forced entry, although the rear door was open. Whilst many items downstairs had been disturbed and the bedroom was in disarray, nothing of any value or significance was missing. A Forensic Medical Officer examined the body at the scene at approximately 12:15pm on Christmas Day. He noted rigor mortis had set in and opined death had occurred at least 3-4 hours previously, which meant, in his opinion, that the deceased had died by 9:15am at the latest.

[5] Upon subsequent examination by Professor Crane, State Pathologist, he found the deceased to have extensive bruising to her head caused by multiple blows requiring considerable force. There were also a total of 16 fractured ribs, 8 on each side of the chest, which were consistent with attempts at resuscitation. Neither family members nor medical staff had attempted resuscitation. Professor Crane also observed very faint bruising on the right labia of the deceased's vagina and recent bleeding in the area and rawness to the right labia. He noted there was no sign of general inflammation or infection and opined that the most likely cause of these injuries was some form of interference with the vagina by the insertion of an object or finger. Professor Crane also found multiple bruising to the arms and hands. The

type of bruising, in his opinion, tended to suggest that they were caused by an object with a sharp corner or sharp edge. They were not "tram line" bruises normally associated with being struck by either a cylindrical or elongated object. Injuries to the deceased's nose and cheek were consistent with the nebuliser mask being pushed or punched against her face. Finally, in relation to bruising on the deceased's chin, Professor Crane opined that this was caused by the crown of thorns on the Crucifix being pushed into the chin. Mr Armstrong, Forensic Scientist, conducted imprint tests of the crucifix and concluded there was "strong support" that the crown of thorns made the marks on the deceased's chin.

[6] DNA samples were taken from, inter alia, the deceased's chin and breasts and also from the bottom of the crucifix. Miss Woodroffe, Forensic Scientist, gave evidence that out of the 20 markers present in DNA, only 11 were relevant in the specific circumstances of the present case. The analysis revealed that in relation to the sample taken from the chin, all 11 markers matched that of the applicant giving a match probability of 1 in a billion people. In relation to the right breast 10 out of the 11 markers were present but the DNA was at too low a level to give a match probability. In relation to the left breast 9 of the 11 markers were present but, again, the DNA was at too low a level to give a match probability. In relation to the crucifix 10 of the 11 markers were present but, similarly, the DNA was at too low a level to give a match probability.

[7] A neighbour on the same street gave evidence that at approximately 7:25am on Christmas morning he saw a woman sitting on the wall between the deceased's house and the applicant's house. This woman had her back to the neighbour, had shoulder length blonde hair, was wearing a red top and smoking. It was accepted however, that the neighbour did not know the applicant to see and at the relevant time the applicant had waist length blonde hair, although she had been wearing a red top with grey stripes on Christmas Eve.

[8] Phone records indicated that between 7:31am and 7:37am someone used the deceased's home phone to make seven phone calls, all to wrong numbers. The prosecution adduced evidence that those seven attempted phone calls made from the deceased's home phone matched 7 digits in the correct sequence for the applicant's husband's work number in Dublin and then 8 digits in the correct sequence for his mobile number.

[9] Police initially spoke to the applicant at 1:00pm on Christmas Day when they began their enquiries. During this conversation the applicant asked Detective Constable Graham if Mrs Rankin had been beaten. At that time the media were only reporting the death as suspicious and the details of the assault had not been given out. A further neighbour gave evidence that on Christmas Day afternoon

he received a phone call from the applicant asking if he had heard who the last person to see the deceased alive was.

[10] The applicant was initially interviewed as a potential witness by way of ABE recording, being the last known person to have seen the deceased alive. She said she had gone to see the deceased between 11:45pm and midnight on Christmas Eve to give her a card and a bottle of vodka and stayed talking for about two hours. The deceased had been wheezing and in her opinion was very sick. The applicant said that she had been wearing a red and grey fleece but had not been sitting smoking outside on Christmas morning.

[11] The applicant was arrested on 27 December and cautioned by police. Immediately following the caution the applicant repeated what she claimed happened, but on this occasion she said the deceased had invited her to open some of the presents downstairs and that she had sat outside after leaving the deceased's house. During police interviews the applicant was asked, inter alia, if she had kissed the deceased. The applicant declined to answer although she claimed in her evidence at trial that she did not answer the questions on legal advice. Her solicitor also read a statement in the course of an interview in which the applicant said that she had always been completely friendly to the deceased and denied either assaulting her or witnessing any assault on her.

[12] The prosecution's case was that the applicant's version of what happened was bizarre and unbelievable. Why would she give an elderly woman who hardly drank a bottle of vodka as a Christmas present? The deceased was obviously attacked as a result of which she died. At some stage the attacker removed the crucifix from the wall, struck the deceased on the chin with it and removed her clothes. DNA which could have come from the applicant was found on each of the deceased's breasts and also on the crucifix. The applicant must also have had contact with deceased's chin thereby leaving her DNA. At approximately 7:20am on Christmas morning a person matching the applicant's description was seen sitting on the wall between the two houses. Between 7:31am and 7:38am the applicant attempted to phone her husband using the deceased's home phone but, in a panic, kept getting the numbers wrong. The prosecution suggested that the applicant went into a rage after the deceased criticised her for being drunk and not being at home with her baby.

[13] The applicant's case at trial was that some other person must have entered the house after she left and attacked the deceased. In her evidence she said she and her husband had moved in next door to the deceased about a year beforehand. She had only met her on 3 or 4 occasions in total but thought she was a lovely woman. She loaned the deceased a heater on one occasion and on another occasion had alerted

neighbours when she noticed the deceased's door was left open. The deceased had subsequently written a thank you letter to her.

[14] On Christmas Eve night the applicant and her husband were at home. They each had a glass of Baileys and then the applicant went to deliver a present, a bottle of vodka, to a neighbour but they were not in. She returned home and decided to deliver a Christmas card to the deceased and ask after her daughter whom she knew was sick. She decided to take the bottle of vodka as a present for the deceased. She did not know the time but thought it was about 11:30pm. She buzzed the door and the deceased let her in. She left her handbag at the living room door and went upstairs to see her. The deceased was sitting in a recliner in her bedroom wearing a blue dressing gown with the duvet over her. She said she hugged her and kissed her on the chin. The deceased hugged and kissed her back. She and the deceased talked for a while and then the applicant asked if she could open the Vodka she had brought. She said that the deceased was happy for her to do so, so she opened the bottle and sipped it straight from the bottle, despite there being glasses on the bedside table, for about an hour or an hour and a half while the two talked. The deceased did not have anything to drink.

[15] The applicant said the deceased became very wheezy so she helped her over to the bed where the nebuliser was. The applicant said she became worried as the deceased remained wheezy so she went downstairs to look for the inhaler which she had seen her use in the past. She said she did not see that the inhaler was actually sitting on the bedside table. The applicant looked in the living room and dining room for the inhaler but could not find it. She could not remember if she looked in the kitchen but denied going out the back door and onto the patio. While in the living room she took a mince pie out of a bag, sat on the sofa and ate it.

[16] The applicant said she left the house at about 2:00am, slammed the front door behind her and climbed over the wall between the two houses. She went into her house, had a glass of water and then went up to bed where her husband already was. She told her husband she thought that the deceased was not well, but he said she would be fine. The applicant then claims she went to sleep and did not get up until about 11:00am on Christmas morning. She said she saw a report on teletext that the death was suspicious and, after the police initially spoke to her, she phoned a neighbour who told her the house had been ransacked. The applicant denied she had been sitting on the wall at about 7:20am or that she had attempted to phone her husband using the deceased's home phone.

[17] The causes of the injuries to the deceased were disputed by the defence experts. Dr Gilsenan, who performed his own examination of the body, concluded that the bruising to head and face was caused by very vigorous and very forceful

pulling of clumps of hair out of the deceased's scalp. He further opined that the bruising to the vagina was caused by the deceased falling against a piece of furniture. He hypothesised that perhaps the deceased had climbed upon the bed in an attempt to take down the crucifix and fell against the sharp edge of the cheval mirror.

[18] Professor Farnan also disputed the cause of the vaginal injuries. His opinion was that they were caused by a condition known as senile atropic vaginitis. Although he did not examine the body personally, he said this was the most common non-malignant cause of post-menopausal vaginal bleeding. He described the condition as one which, without infection, can cause intense itching, vaginal discharge and mucosal ulceration. However, neither Professor Crane nor Dr Gilsenan found any evidence of mucosal ulceration or inflammation. In relation to the bruising on the arms and hands, Professor Farnan was of the opinion that blows from the crucifix would have caused "tram line" bruising. He concluded that those injuries were likely caused by either furniture or a mirror falling on top of the deceased. In relation to the marks on the chin, Professor Farnan considered that these could only be caused by the crucifix if the crown of thorns had been pushed into the skin and then twisted. They could not have been caused by merely pushing the crucifix straight into the skin.

[19] There was no DNA evidence to suggest the applicant had damaged or disturbed anything in the deceased's house, opened the rear door or had attempted to use the telephone. Furthermore the interpretation of the DNA evidence found on the deceased's body was disputed by the defence expert Professor Krane. He gave evidence that where the DNA is at too low level to give a probability match an expert should give a finding of "inconclusive" and refrain from stating how many markers matched because it is the probability match which is the conclusion rather than the number of matching markers.

The issues in the appeal

DNA

[20] DNA was recovered from the chin of the deceased containing all 11 markers matching those of the applicant and giving rise to a match probability of less than one in a billion people. There was an application to exclude the remainder of the DNA evidence on the basis that in each case the DNA was at too low a level to give a match probability. The learned trial judge noted that there was no issue as to the scientific basis for the tests nor as to the accuracy of the results. The disagreement between the experts related to the significance of the findings. The learned trial judge admitted the DNA evidence in relation to the left and right breast and the

crucifix where 9 or 10 of the markers were present but excluded samples taken from the right hand and arm, the left-hand, the inner thighs and the hair shafts on the basis that because of the lower number of matching markers the prejudicial effect outweighed the probative value of those specific samples.

[21] At the hearing it was correctly accepted by Mr O'Donoghue that evaluative opinion evidence of the interpretation of DNA for which a statistical probability was not available was admissible in light of the decision of this court in R v Martin [2012] NICA 7 and the decision of the English Court of Appeal in R v Dlugosz [2013] EWCA Crim 2. Each court recognised, however, the importance of adequate directions to the jury set out in particular at paragraph 24 of Dlugosz:

> "We consider that on the materials with which we have been provided, there may be a sufficiently reliable scientific basis on which an evaluative opinion can be expressed in cases, provided the expert has sufficient experience (which must be set out in full detail in the report) and the profile has sufficient features for such an opinion to be given. If the admissibility is challenged, the judge must, in the present state of this science, scrutinise the experience of the expert and the features of the profile so as to be satisfied as to the reliability of the basis on which the evaluative opinion is being given. If the judge is satisfied and the evidence is admissible, it must then be made very clear to the jury that the evaluation has no statistical basis. It must be emphasised that the opinion expressed is quite different from the usual DNA evidence based on statistical match probability. It must be spelt out that the evaluative opinion is no more than an opinion based upon (the expert's) experience which should then be explained. It must be stressed that, in contrast to the usual type of DNA evidence, it is of more limited assistance."

[22] It was submitted on behalf of the appellant that the direction set out above was entirely missing in this case. In order to examine that submission it is necessary to look at the manner in which the learned trial judge approached the direction. No issue was taken with the expertise of the witnesses for the prosecution or defence. The judge explained the prosecution expert's evidence that there were 11 markers present in the DNA of the applicant but not that of the deceased. He contrasted the three samples which he admitted containing 9 or 10 markers and that containing all 11 markers. He noted in particular that a match probability could be obtained in relation to the latter sample but not in relation to the other three samples. He reminded the jury that although the expert indicated that the latter three samples could have come from the applicant the expert accepted that they may not have been generated by her. The judge reminded the jury that the defence expert concluded

that in the absence of a match probability the test results should be regarded as inconclusive although that expert accepted that there were components consistent with the DNA of the applicant. He also accepted the prosecution expert's statement that generally the more components which are found that matched the components of the person under examination the more likely it was that the sample related to that person.

[23] In our view the judge was not required to use paragraph 24 of Dlugosz in a formulaic way and, of course, could not have done so since that decision post-dated his charge. The judge was careful to contrast the assistance which the jury could get from the incomplete samples with that which gave rise to a match probability. The evaluative opinion went no further than to say that the DNA on the breast and crucifix could have come from the applicant. The experts agreed on that. They also agreed that the higher the number of components found the stronger the inference that the applicant was a contributor. We consider, however, that this treatment of the DNA evidence was balanced and ensured that the jury were alerted to the limited basis upon which they could rely upon it.

[24] It is important to remember that the DNA evidence needed to be evaluated by the jury in the context of the case a whole. It was, therefore, entirely appropriate for the learned trial judge to advise the jury to examine the relationship between the full profile on the deceased's chin and the partial profiles on her left and right breasts and on the foot of the crucifix. The jury had to evaluate this evidence as part of the prosecution case that the applicant had been in physical contact with the deceased's breasts and the bottom of the crucifix as well as her chin as part of the attack upon the deceased. We do not accept that any criticism can be made of the approach to the DNA evidence taken by the trial judge.

Intoxication

[25] The applicant's account was that she had consumed a glass of Baileys with her husband at home that evening. After attempting to visit a neighbour who was not in she returned home and decided to deliver a Christmas card and a bottle of vodka as a present for the deceased. She said that the deceased agreed that she could open the bottle and she sipped directly from it on a number of occasions. The bottle of vodka was found at the scene by police and at least two thirds of the bottle remained.

[26] The learned trial judge dealt with the issue of intoxication in the following passage from his charge:

> "Secondly, in this context, she brings an elderly lady who she doesn't know well as a present a litre bottle of vodka. Then the Defendant

> drinks from the bottle whilst lying across the bottom of Mrs Rankin's bed. She said that she drank three or four times out of the bottle, to such an extent, that she said at one stage – "under normal circumstances I'd say I would be fairly drunk but I was very concerned for her so that kind of kept the sober side too". That seems, you may think, to be an admission by the Defendant that she was affected by alcohol by some degree although perhaps not as much as the quantity might otherwise indicate because of her concern for Mrs Rankin. Now I should say one thing to you at this point about the amount of alcohol which the accused appears to have taken and you will see the bottle in the photographs … and if you look at that, you will see how much appears to have been consumed. So the Defendant appears to be implying that she was affected by drink at least to some extent. If she was and if she behaved in a way that she would not have done if she had been sober, in other words, if it was she who attacked Mrs Rankin that she did so or may have done so because of drink does not give the Defendant any defence. If it was she who attacked Mrs Rankin and if she intended to kill her or intended to cause Mrs Rankin really serious injuries or ought to have realised that she would cause her some injury, the fact that the Defendant may have been affected by drink is irrelevant because a drunken intent in law is still an intent. In other words, if the Defendant was the attacker the fact that she may have been affected by drink doesn't give her any defence."

[27] There is no dispute about the fact that murder is a crime of specific intent and that the jury must be satisfied that the accused had the necessary intent to kill or cause grievous bodily harm. Where there is evidence of intoxication such as to call into question whether the accused formed the necessary intent the jury should be instructed to draw such inferences as they think proper from the evidence (see R v Sheehan and Moore [1974] 60 Cr App R 308).

[28] In this case the evidence indicated that the applicant had consumed alcohol but at its height the evidence indicated that the applicant stayed on the sober side of fairly drunk. The issue of intoxication affecting the applicant's intent was not raised by the defence and in our view the evidence taken at its height does not raise any case that the applicant was so intoxicated that it affected the issue of whether she did, in fact, form an intent. We do not accept, therefore, that a direction to that effect was required. We note that in the direction the learned trial judge included a reference to whether the applicant ought to have realised that she would cause the deceased some injury. This direction was plainly in contemplation of a possible

manslaughter conviction. We do not consider that it gave rise to any question affecting the safety of the conviction.

The absence of a Lucas direction

[29] In closing its case to the jury the prosecution maintained that the evidence given by the applicant was unbelievable and that she lied when she denied any involvement in the murder. The prosecution maintained that she did not tell the truth in a number of respects:

(i) how it was she came to visit the deceased,

(ii) that her account suggesting the deceased could barely speak was inconsistent with other evidence about the detailed conversation they had,

(iii) that her account about going to get the Ventolin inhaler was inconsistent with her actions in going into the living room, eating a mince pie and opening some of the Christmas presents, and

(iv) that her account that she learnt that the death was suspicious from the teletext was untrue.

[30] The learned trial judge discussed with counsel whether to give a Lucas ([1981] QB 720) direction at the close of the evidence. He suggested that the prosecution case was that part of her account was true in that she went up into the bedroom to see the deceased but that she was lying in relation to a number of other matters. The learned trial judge suggested that a Lucas direction about relevant but peripheral issues was not going to really advance anything. Senior counsel for the defence agreed.

[31] It was submitted on behalf of the applicant that the learned trial judge's approach suggested that the lies upon which the prosecution relied simply went to the issue of the applicant's credibility. Mr O'Donoghue contended that the import of the prosecution case went much further which was why an obligation fell upon the learned trial judge to give the Lucas direction.

[32] Mr McCollum submitted that the Lucas direction was likely to be unhelpful to the applicant. To be acquitted the jury needed to conclude that there was a reasonable possibility that she was telling the truth and had nothing to do with the death. In this case if the jury concluded that she was lying she was inevitably going to be found responsible for the deceased's death. That was clearly the assessment made by defence counsel appearing for her and was an entirely appropriate tactical decision to make in the trial.

[33] Where a lie told by an accused is relied on by the prosecution or may be used by the jury to support evidence of guilt as opposed merely to reflecting on the accused's credibility a threefold Lucas direction should generally be given to the jury:

(a) The lie must be deliberate and must relate to a material issue.

(b) They must be satisfied that there was no innocent motive for the lie, reminding them that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or a wish to conceal disgraceful behaviour.

(c) The lie must be established by independent evidence.

[34] In Middleton [2001] Crim LR 251 the court said that the point of a Lucas direction was to warn the jury against adopting the forbidden reasoning that a defendant's lies necessarily demonstrated his guilt. Where there was no risk of the jury doing so, which would generally be the case in relation to lies told by a defendant in evidence because the position would be covered by the general directions on the burden and standard of proof, a Lucas direction was unnecessary. In Nyanteh [2005] EWCA Crim 686 the issue was identification and the lie concerned whether the defendant's hoodie had drawstrings as alleged by the identifying witness. The court recognised that the judge could have given some modified form of Lucas direction but considered that a full-blown direction would have done more harm than good.

[35] This was a case in which the lies were given in evidence and touched on the central issue of whether the applicant was the person who inflicted the injuries upon the deceased which led to her death. We accept that a Lucas direction could have been given but had it had been given it seems highly likely that it would have been to the disadvantage of the applicant since it is difficult to see any explanation for the various lies which was not connected to her involvement in the murder. Defence counsel on her behalf clearly took that view and Burge [1996] 1 Cr App R 163 is authority for the proposition that the attitude of defence counsel can be taken into account in considering whether the absence of a Lucas direction affects the safety of the conviction. In all the circumstances we do consider that a Lucas direction in this case would have been likely to be very damaging to the applicant and its absence did not give rise to any issue affecting the safety of the conviction.

Telephone evidence

[36] The evidence from the telephone records of the calls between 7:31am and 7:37am set out at paragraph 8 above was an important part of the prosecution case.

The sequence of numbers matching the applicant's husband's work telephone number and mobile number were relied upon to demonstrate that the applicant was the person who made the calls and therefore was on the premises at the time the calls were made. That was significant since the time of death was estimated at any time up to 9:15am. On the applicant's account she had left the premises in the early hours of the morning and had not returned.

[37] The telephone records available at the trial indicated that there had been calls from a 272 number at 9:47am and 10:00am which both appeared to have a duration. The 272 number was that of the deceased's daughter. She made a statement indicating that she had made calls at the relevant time which had not been answered. It was also established that she had not been billed for those calls. A further call had a duration established to it at approximately 10:03am on the same morning from a 262 number. That corresponded to a call from the deceased's sister about which she also had made a statement.

[38] At the trial, once it was established that the 272 calls had not been billed, the case proceeded on the basis that the calls therefore had not been answered. In preparation for this appeal, further billing records were obtained and advice sought from John Tarpey, a cell site analysis engineer employed by Forensic Telecommunication Services Ltd. He noted that dialled calls from the deceased's phone had an 8132 prefix. That was because the deceased was using a cheaper internet phone provider, Gaelic Telecom. In his evidence Mr Tarpey indicated that he believed that the prefix was automatically dialled and we do not have to consider it further.

[39] Having considered the calls at 9:47am, 10:00am and 10:03am, Mr Tarpey's opinion was that in light of his experience the telephone records showed calls which had been actually answered. He accepted that this was a subjective unqualified opinion formed as a result of only one source of information and based on the fact that other calls during which the phone rang did not have any duration attached to them. In light of that opinion we decided to hear evidence from Mr Tarpey.

[40] By the time he gave evidence Mr Tarpey had had an opportunity to consider the billing records in relation to the 272 phone. He also had access to the billing records in relation to the 170 telephone which also appeared to have had a call of some duration at 11:11am. In both cases the billing records showed that there had been no charge to either phone. Mr Tarpey indicated that the billing records which he had not had an opportunity to examine when he swore his affidavit were generally much more quality controlled than the underlying records which had initially been made available to him. In light of those records his opinion was that on

the balance of probabilities the calls were not answered. He indicated that this was a probability or strong probability that the calls were not answered.

[41] In taking that view Mr Tarpey did not rely upon the statement of the deceased's daughter that she had made the calls at 9:47am and 10:00am nor did he rely upon an undisclosed statement about the call at about 10:03am. Those statements, therefore, further enhanced the evidence that the calls were not answered. In all the circumstances, therefore, there was no evidential base after Mr Tarpey had given evidence for the suggestion that the calls had been answered thereby indicating that someone else had entered the house after the applicant had left but before the deceased's brother-in-law or the police arrived. We are satisfied, therefore, that the telephone evidence in relation to the calls subsequent to 7:37am was of no assistance to the applicant.

Other matters

[42] There were a number of other matters advanced on behalf of the applicant which did not require us to call upon the prosecution. The evidence from the forensic medical officer who attended the scene at 12:15pm on Christmas Day was that death occurred more than 3 to 4 hours before his examination. On that basis death occurred sometime before 9:15am. In his charge to the jury the learned trial judge invited the jury to reflect on all the evidence to consider whether it was really a feasible proposition that the deceased was alive up to that time. It was accepted that he did so in fairly robust language but a judge is entitled to take that approach if that is where the evidence points and should remind the jury to examine the scientific evidence in the light of all the other evidence. This issue was related to the suggestion that someone else must have arrived at the premises on Christmas morning and answered the phone at 9:47am. For the reasons given that submission no longer has any substance. We consider that the learned trial judge was entitled to direct the jury in the way that he did and that in any event this issue was not material to the safety of the conviction.

[43] There was no DNA found which could be attributed to the applicant on the telephone which was used to make the calls between 7:31am and 7:37am from the deceased's phone. That issue was highlighted to the jury as part of the defence case. It was submitted that it would have been open to the judge to contrast the fact that DNA attributable to the deceased was present on the phone with the fact that there was no DNA found which could be attributable to the applicant. We consider that this was a matter of judgement for the trial judge. No doubt these matters had been covered in the speeches of counsel. We note that there was no requisition in relation to the charge on this point. It is not in our view a matter of substance.

[44] The final point raised on behalf of the applicant concerned the judge's charge on the issue of intention. The judge dealt with this by looking first at the prosecution evidence about the deceased's injuries. Professor Crane said that the bruising to the deceased was so extensive that it required significant force to bring it about. Secondly, the deceased was subject to a multiplicity of blows and in the absence of evidence that anyone attempted to resuscitate her, his opinion was that someone sat or knelt on her. Lastly there were marks on the chin, arms and vagina. The learned trial judge directed the jury that if they accepted that the deceased was struck a multiplicity of blows to the head with significant force her attacker certainly intended to inflict really serious bodily injury on an elderly lady who was obviously in a vulnerable condition because of age and impaired health.

[45] We accept that there are certain circumstances in which such a direction would divert a jury from looking at all of the evidence dealing with intention. That would particularly be so if there was intoxication evidence which called into question whether the attacker did in fact form the intention. That, however, was not this case. In the absence of other evidence touching on the question of intention we consider that the learned trial judge was entitled to direct the jury as he did.

[46] Having looked at the position on the prosecution case the learned trial judge then examined the defence case. He advised the jury that the injuries to the ribs were typical of injuries which occur when someone is subjected to cardiopulmonary resuscitation ("CPR"). The evidence suggested that the rib injuries were inflicted after death. Although there was no direct evidence that anyone attempted CPR the learned trial judge properly raised that issue before the jury. He then went on to examine the defence case that there was a very vigorous and very forceful pulling out of several lumps of hair. It was described by Dr Guseman as a severe assault, a serious and sustained assault. He invited the jury to consider whether, even on that case, they were satisfied beyond reasonable doubt that the attacker, at the very least, intended to inflict really serious bodily injury. We consider that this direction on that issue was entirely appropriate.

Conclusion

[47] In our view this was a very strong circumstantial case. The applicant admitted that she had visited the deceased on the night of the murder but claimed that she had left the premises and made them secure approximately 2 hours afterwards. There was, however, no sign of forced entry. The DNA evidence linked the applicant to the attack upon the deceased and the telephone evidence between 7:31am and 7:37am was overwhelming evidence that the applicant was using the deceased's phone at that time. Her presence at the deceased's house just prior to those phone calls was corroborated by the description of a person seen by a neighbour. The

applicant had no answer to that case. We have no sense of unease about the safety of this conviction.

[48] In light of the fact that we called upon the prosecution on the issues of DNA, the Lucas direction, intoxication and the telephone evidence we grant leave on those grounds but dismiss the appeal. We refuse leave on the other grounds.