Neutral Citation No [2017] NICA 49 | *Ref:* **MOR10395**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **11/09/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

LINDSEY WHITE

Before: Morgan LCJ, Weatherup LJ and McBride J

MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal against the appellant's conviction for murder at Newry Crown Court on 13 February 2012 after a trial before His Honour Judge McFarland and a jury. On 28 October 2015 the appellant lodged an application for an extension of time and leave to appeal. In December 2015 leave to extend time and to appeal was granted on a ground alleging a failure to give an adequate direction on the effect of intoxication on the appellant's intent. The appellant also renewed her application for leave to appeal on the basis of a failure to give a sufficient Makanjoula warning and a misdirection on joint enterprise.

Background

[2] Marek Muszynski was a Polish national who had moved to Northern Ireland in 2007 and settled in the Newry area. The prosecution case was that on the evening of 6 July 2009 he had gone out for a meal with a friend, Mr Begnasiuk, who was also Polish. Afterwards, both had then gone to an off-licence to purchase alcohol. On their return from the off-licence they came across the appellant who was in the company of two other men, Adrian Cunningham and Mark McAleavey.

[3] The appellant allegedly instigated a confrontation with the two Polish men. During this confrontation Mr Begnasiuk became separated from Mr Muszynski and was subjected to an assault by McAleavey. He was, however, able to make good his

escape, leaving Mr Muszynski alone with the appellant, Cunningham and McAleavey. When he returned a short time later with other friends, Mr Muszynski could not be found. This was at around 11pm.

[4] Approximately two hours later Mr. Muszynski's body was discovered by a man, who had been walking along a narrow laneway, known locally as "The Line", which is a relatively short distance from the location of the earlier confrontation. His body was found in a state of partial undress, with his jeans lowered to his ankles, and with a boot and sock removed. He had suffered extensive head, neck and upper body injuries which had resulted in his death. There were extensive areas of abrasion on the scalp and face, with bruising and lacerations to the face, and a fractured nose. He had four fractured ribs. He had also suffered internal injuries with bleeding over the surface of the brain, diffuse injury to the substance of the brain, and bleeding to the air passages with inhalation of blood to the lungs. The examination by Professor Crane concluded that Mr. Muszynski had been subjected to numerous kicks and stamps whilst lying on the ground, and at some stage his body had been dragged along the rough path.

[5] The appellant remained in Newry for two days and then left for Belfast and an onward journey on a coach by ferry through Scotland to London. Police at this stage had become interested in the applicant as a suspect and the Metropolitan Police arrested her as she arrived at Victoria Coach Station in London at 6 am on 9 July 2009. A few hours later in Newry, Cunningham approached the police and indicated that he had punched the deceased. He was arrested and then interviewed by the police.

[6] During his initial interviews he indicated that he had been present at the scene, and had used force against the deceased essentially in self-defence and in defence of the appellant but he said that he had not killed him. Meanwhile the appellant was returned to Northern Ireland and when she was interviewed, she admitted to being present at the time of the assault and said that it had been perpetrated by Cunningham alone, and not in self-defence or in defence of her. When this version was put to Cunningham he confessed to his involvement in the assault, but said that the appellant had also been involved.

[7] At the applicant's trial Cunningham gave evidence for the prosecution, having already pleaded guilty to murder. The jury heard evidence that after Begnasiuk had escaped from the confrontation and the assault upon him by McAleavey, the deceased remained in the company of the appellant, Cunningham and McAleavey. They walked round to the Line. During the journey, the appellant suggested to Cunningham that the deceased should be attacked with the assault to

be precipitated by a cough. Cunningham told McAleavey and in due course both men gave coughs and the appellant punched the deceased.

[8] Although the plan was conceived by the appellant for largely unknown motives, and commenced by her single punch, it was Cunningham who was the main perpetrator, and he accepted that he aimed punches and then kicks and stamps to the deceased's body and head. McAleavey wanting to have nothing to do with the assault immediately left the scene. The appellant, however, joined in and at one stage stood on the deceased's throat bearing her full weight down on his neck.

[9] In the aftermath they both discussed a distortion of the scene, with Cunningham then taking off a shoe and pulling down the jeans, which Cunningham explained as an attempt to disguise the nature of the attack. Cunningham said that the appellant went through the deceased's pockets to take a sum of 70 pence, which was all that he possessed. Both then left the scene, and, after buying more drink and a take-away meal, returned to the appellant's flat.

Intoxication

[10] Murder is a crime of specific intent. The jury must be satisfied that the accused intended to kill the victim or cause him really serious injury. There is often no direct evidence of intention but by virtue of section 4 of the Criminal Justice Act (Northern Ireland) 1966 the jury is entitled to infer the relevant intent although it is not bound to do so.

[11] Whether or not a person has formed the requisite intention can be affected by the voluntary consumption of alcohol. The leading case setting out how the matter should be approached is R v Sheehan and Moore [1974] 60 Cr App R 308. There the principal offender was charged with murder on the basis that he had thrown petrol over the victim and then set him alight. His defence was that he had no real recollection of the material events and was substantially affected by drink. If he had acted as alleged the effect of the drink was that he did not have the intention to found a conviction for murder.

[12] The trial judge directed the jury that drunkenness was only a defence to an act which would otherwise be criminal if a person had drunk so much that he was incapable of forming the intention to do the particular act. The Court of Appeal held that in a case where drunkenness and its possible effect upon the defendant's *mens rea* was in issue the proper direction was first to warn the jury that the mere fact of the defendant's mind being affected by drink so that he acted in the way in which he would not have done had he been sober did not assist him at all provided the necessary intention was there. A drunken intent was nevertheless an intent.

Secondly, the jury should merely be instructed to have regard to all the evidence including that relating to drink and to draw such inferences as they thought proper from the evidence. On that basis they should ask themselves whether they feel sure that at the material time the defendant had the requisite intent.

[13] In this case there were a number of witnesses who gave evidence about the consumption of alcohol by the appellant. Her account was that she met up with Cunningham and a number of others about 5:30 PM on the afternoon of the murder. She said that Cunningham and the others had been drinking all afternoon and when she arrived she went with them to the off-licence. She said that she was not drunk and had only consumed two sips of Buckfast and two cans of Fosters. She said that she did not like Buckfast and that Cunningham had consumed three bottles of Buckfast and was drunk. She accepted that she had probably also drunk a mouthful of cider but said she did not like cider either.

[14] Cunningham indicated that he had been drinking Buckfast since early afternoon. He did not give specific evidence about the appellant's condition but indicated that he, McAleavey and the appellant were intoxicated at the time of the attack. A 14-year-old girl was with the group until 9:30 PM that evening. She said that Cunningham and the appellant were drinking Buckfast but at the start did not seem to be drunk. By the time she left she said that both seemed to be getting drunk and she described them as a wee bit drunk.

[15] Charlene McCartney and Daniel Dundon met Cunningham and the appellant at the Railway Bar shortly after the incident occurred. McCartney knew the appellant from school. Her evidence was that the appellant said:

> "Do you remember me, we have beaten someone up down the line".

She described the people she spoke to as having a blue bag which is consistent with Cunningham and the appellant coming from the off-licence and saying that they were going to drink Buckfast which is what had been purchased in the off-licence. Dundon said that during this exchange the appellant was shouting "You don't know who I am or what I did". He thought that she was shouting because "she was drunk or was on some sort of alcohol or something".

[16] Begnasiuk, who had been with the deceased that evening, stated that when they met Cunningham, McAleavey and the appellant it was the appellant who had been the aggressor and he thought that was because she was drunk. CCTV evidence was also available covering some part of the route which the appellant and Cunningham took after leaving the Railway Bar and going to a Chinese restaurant

where they obtained food before returning to the appellant's flat. The prosecution point out that there was no evidence of unsteadiness of gait or other signs of significant drunkenness.

[17] The appellant submitted that in light of the evidence asserting that the appellant was drunk at the material time it was necessary for the learned trial judge to give a direction in accordance with R v Sheehan and Moore on the issue of intention. It is common case that although the learned trial judge indicated to the jury that they should take into account all the relevant evidence and circumstances in determining what the appellant intended. It is also common case that there was no specific direction inviting the jury to take into account the consumption of alcohol as part of their consideration of the appellant's intent.

[18] The circumstances in which it is necessary to give such a direction were considered by the Privy Council in Narine Sooklal and another v The State [1999] 1 WLR 2011. Both appellants were accused of the murder of a housemaid at the home of the first appellant's father-in-law. The co-accused maintained that he had been drinking on the day of the incident. He said that he could not remember what happened because he was under the influence of alcohol. His only defence was that he lacked the intention which was necessary for murder. In addition to this evidence the prosecution also introduced his statement which said that he and Sooklal had taken two drinks each of puncheon rum and that he did not know what got into his head thereafter. It was submitted that so long as there was some evidence that the defendant was drunk at the time that the offence was committed the judge must leave it to the jury to consider whether he was guilty of manslaughter.

[19] The relevant portion of the judgment dealing with this issue was set out by Lord Hope:

> "Whenever reduction of a charge of murder on the ground of self-induced intoxication is in issue, the ultimate question is whether the defendant formed the mens rea for the crime charged: *Smith & Hogan, Criminal Law*, 8th ed. (1996), p. 225. What is required is evidence that the defendant was so intoxicated that he lacked the specific intent which is essential for murder: that is the intent to kill or to inflict grievous bodily harm upon the victim: Reg. v. Doherty (1887) 16 Cox C.C. 306, 308, *per* Stephen J.; Director of Public Prosecutions v. Beard [1920] A.C. 479, 499, *per* Lord Birkenhead L.C. and Reg. v. Majewski [1977] A.C. 443, 498–499, *per* Lord Russell of Killowen.

> This test is not satisfied by evidence that the defendant had consumed so much alcohol that he was intoxicated. Nor is it satisfied by evidence that he could not remember what he was doing because he was drunk. The essence of the defence is that the defendant did not have the guilty intent because his mind was so affected by drink that he did not know what he was doing at the time when he did the act with which he has been charged. The intoxication must have been of such a degree that it prevented him from foreseeing or knowing what he would have foreseen or known had he been sober. This was made clear by Lord Denning in Bratty v Attorney-General for Northern Ireland [1963] A.C. 386, 410, in a passage which was quoted by Widgery L.J. in Reg. v. Lipman [1970] 1 Q.B. 152, 156:
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> "If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary, see Beard's case."

In Attorney-General for Northern Ireland v. Gallagher [1963] A.C. 349, 381 Lord Denning gave some helpful examples of the application of this principle:

> "If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intention, is an answer: see Beard's case [1920] A.C. 479, 501, 504. This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing (see Reg. v. Moore (1852) 3 C. & K. 319), as where, at a christening, a drunken nurse put the baby behind a large fire, taking it for a log of wood (Gentleman's Magazine (1748), p. 570); and where a drunken man thought his friend (lying in his bed) was a theatrical dummy placed there and stabbed him to death (The Times, 13 January 1951). In each of those cases it would not be murder. But it would be manslaughter.""

[20] The issue for the jury was the actual intent of the defendant but it is apparent that there was a relatively significant threshold which must be crossed before the court was obliged to give the Sheehan and Moore direction. The evidence of the appellant herself provided no support for such a direction. The evidence of Cunningham suggested that the appellant was intoxicated but his account of their conversation both beforehand when he alleged that she was the aggressor who suggested getting the deceased and afterwards once they had completed the attack did not support any case that she did not have the requisite intent. Similarly, her remarks to McCartney and Dundon did not support the suggestion that she did not have the requisite intention because of her consumption of alcohol.

[21] Where a judgment of this sort is to be made those involved in the trial process will invariably have a better feel for the issues in the case and a better sense of the matters in issue. The discussion between the judge and counsel did not touch upon the suggestion that the appellant's intention may have been affected by her consumption of alcohol. We accept that the appellant's counsel may not have wished to engage with that issue since that might have undermined his client's credibility. That ought not, however, to have stopped the prosecution alerting the judge to the issue and the judge himself dealing with it if the evidence raised such an issue. We would not have criticised the judge for giving a Sheehan and Moore direction out of an abundance of caution but we do not consider that the facts and circumstances of this case required such a direction to be given.

[22] We wish to make it clear, however, that we accept Mr O'Donoghue's submission that where the evidence does raise an issue about the effect of alcohol on the specific intention necessary for a criminal offence there is an obligation on the court, whether or not the matter is raised by counsel, to ensure that the jury is properly directed in relation to it. That follows from R v Bennett [1995] Crim LR 877 where the court said that the judge is required to direct the jury, not only on those issues specifically raised by the defendant, but also on issues which, though not pursued by the defendant, are on the evidence capable of serving as a defence, or bearing on facts which the prosecution must prove to bring home the offence to the accused.

The application for leave to appeal

[23] The appellant renewed her application for leave to appeal on the basis that the trial judge had not given the jury an adequate warning about the caution they should exercise when considering the evidence of Cunningham, an accomplice. He was first interviewed about his involvement in the murder on 9 July 2009. He accepted that he had punched the deceased but denied that he had been responsible

for his death. He did not implicate the appellant in the murder but said that he had struck the deceased because he feared that the deceased was going to attack her.

[24] He underwent a total of 16 interviews up to 11 July 2009. The appellant had been arrested in London on 9 July 2009 and returned to Northern Ireland where she was interviewed and made the case that Cunningham was responsible for the murder. That was put to Cunningham and on 12 July 2009 he began to accept his involvement. The defence case, however, was that he then sought to diminish his responsibility by involving the appellant and asserting a particular role in relation to her by way of kicking the deceased's head and stamping on his throat.

[25] After being charged Cunningham then had a further set of interviews in anticipation of his giving evidence against the appellant at trial. Before this court Mr O'Donoghue applied under section 25 of the Criminal Appeal (Northern Ireland) Act 1980 to introduce in evidence those interviews in order to demonstrate inconsistencies that he submitted were evidence of lies and a schedule setting out various contradictions between what Cunningham said at his various interviews and the evidence that he gave at trial.

[26] It was accepted that this was all material that was available at the original trial and further that all of the contradictions upon which the appellant now relied had been explored by trial counsel before the jury. The materials which Mr O'Donoghue sought to put forward by way of additional evidence effectively related to the presentation of the evidence rather than the substance. In fairness that was accepted by him.

[27] We accept the submission approved by this court at paragraph [25] of R v Walsh [2007] NICA 4 that the power of the court to admit fresh evidence is fettered only by what is necessary or expedient in the interests of justice. The factors listed in section 25(2) are merely factors which are to be taken particularly into account. We consider, however, that issues of the presentation of evidence are generally a matter of tactical judgment for counsel involved in the trial. One can well understand that those representing the appellant may not have wished to overburden the jury with documentation and that greater effect might have been achieved by sequentially dealing with the inconsistencies in cross examination. The evidence does not raise any new substantive issue and we do not consider that we should admit it.

[28] The principles governing how a jury should be directed in relation to accomplice evidence were set out by Lord Taylor in R v Makanjoula [1995] 1 WLR 1348. Where a witness has been shown to be unreliable the judge may consider it necessary to urge caution. In the more extreme case of witnesses shown to have lied

or made previous false complaints or borne the defendant some grudge a stronger warning may be thought appropriate and the judge may suggest that it would be wise to look for some supporting material before acting on the witness's evidence. There was, however, no formula and the court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of the witness's evidence as well as its content.

[29] He summarised the approach as follows:

> "(1) Section 32(1) abrogated the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
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> (2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
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> (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.
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> (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.
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> (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.

(6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

(7) It follows that we emphatically disagree with the tentative submission made by the editors of Archbold, Criminal Pleading, Evidence & Practice, vol. 1 in the passage at paragraph 16.36 quoted above. Attempts to re-impose the straitjacket of the old corroboration rules are strongly to be deprecated.

(8) Finally, this court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the Wednesbury sense: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223*."

[30] There was a discussion between the judge and counsel about the nature of the warning that should be given to the jury in this case. Both the prosecution and defence agreed that a Makanjoula warning was required. The defence submitted that the jury should be told that it would be wise to look for some supporting material before acting on Cunningham's evidence. The trial judge addressed Cunningham's evidence in three particular passages:

> "Now Adrian Cunningham has given evidence in this case which showed that LindseyWhite was involved in the incident. Examine that evidence with particular care. Adrian Cunningham has confessed to the murder. When he handed himself into the police he gave a statement when interviewed which both downplayed his own involvement and did not implicate LindseyWhite in the murder. He later changed that statement when re-interviewed after LindseyWhite had been arrested and had given her account. In that second statement, which he largely repeated in evidence before you, he accepted his own guilt and said that Lindsey White was involved in the attack on the victim. In saying what he did he may have been more concerned about protecting himself, minimising his own role, reducing the period that he may potentially spend in prison than about speaking the truth.

> He may also have been motivated by a grudge he had against Lindsey White for implicating him in the murder. For this reason he may have falsely attributed a role to Lindsey White. So bear in mind that risk before deciding whether or not you feel able to accept what Adrian Cunningham has told you about Lindsey White or sorry what Lindsey White did that night."

In a further short passage he said:

> "Now you may feel in this case that the main witness is Adrian Cunningham. He of course confesses to having committed the murder, he was present throughout, the Prosecution say that he is a remorseful person, he has now confessed his guilt and is giving a truthful account. The Defence, on the other hand, say that he is lying, he has attempted to deflect full responsibility away from himself. He has tried to attribute blame to Lindsey White and he is motivated by a grudge that she may have told the police about his role in the first place and his co-operation now is motivated, as it has been throughout, in attempts to either avoid justice or having been caught essentially to reduce the period of time that he would spend in prison."

Finally, he revisited these matters towards the end of his charge:

> "The Defence case is that you cannot be sure about Adrian Cunningham's evidence, in fact it goes further than that, they just say it should be rejected in its entirety, it doesn't even raise any doubt or shouldn't in your mind. This was a young man, and he admits it, that he was alienated from his parents, he had been essentially put out of the house, living in a shed at the bottom of the garden. He was a very angry young man, he had taken drugs, taken alcohol and was suffering from that abuse at the time. He was responsible for a very vicious assault and an appalling murder that night with essentially degradation of the body afterwards with the stamping or kicking to the groin.

… The Prosecution (sic) say that after this incident all Cunningham's efforts were essentially to save himself. Lindsey White was a vulnerable woman, hasn't had her troubles to seek and Adrian Cunningham was pressurising …her in the circumstances. Throughout this process he has been motivated to reduce his sentence and his time in custody. He said that in evidence, that he was of course worried about the length of time that he would spend in custody and the Defence are saying well this is just, this co-operation now is just a further example of what is motivating this young man to tell lies when the options are running out for him in Newry, during the police investigation when the noose was tightening. He did hand himself in, but really he had no option because everyone knew and certainly it would appear from the consideration of the evidence and the chat that was clearly on the street at this time, everyone knew that Adrian Cunningham was involved and he just accepted that inevitability. But even then he wasn't showing remorse, he only made a partial admission and that is borne out by the facts in this case. His admission to, his initial admission through the first series of interviews, I think it was 8 hours or so of the first series of interviews, essentially he was only admitting to being at the scene and to throwing some punches but nothing beyond that. But his full admission, his full acceptance of responsibility came when Lindsey White was arrested and she, in fact, the Defence say, told the truth at that stage Cunningham knew, the Defence say, the game was up and he then essentially agreed with her evidence about his role. But perhaps a grudge, perhaps out of annoyance he then tried to drag her into the situation with him. Even setting that aside, the Defence ask you to consider the discrepancies in the various versions that Mr. Cunningham has given. Essentially he gave his first version to police which he has admitted was a lie, this is the partial involvement version. He then, after the Lindsey White case is put to him, he then, he says, confesses the truth. He then makes a statement to the

> police and then gave his evidence and the Defence say that there are discrepancies in that and you will remember the evidence in the cross examination, discrepancies about what happened in Monaghan Street, what happened at the scene, what happened in the flat and the Defence say that these just really are evidence that this person is lying, he just can't get his story right and these discrepancies come from that fact."

[31] There is no real dispute that in these passages the trial judge identified the possible motives that might have caused Cunningham to give false evidence implicating the appellant. The content of the passages also drew to the attention of the jury the detail of the way in which his interviews had developed and the inconsistencies arising from that. The only complaint is that the trial judge did not suggest that it would be wise to look for some supporting material before acting on Cunningham's evidence. Of course, there was supporting material from the statements allegedly made by the appellant immediately afterwards outside the Railway Bar and the lies she told about leaving Newry for London shortly after the incident.

[32] In our view the warnings given by the trial judge in respect of Cunningham's evidence encouraged the jury to treat it with particular care and explained the reasons for that. We do not consider that it can be said to be outside the range of discretionary judgement available to the trial judge. Accordingly we do not grant leave on this issue.

[33] The last point raised for which leave to appeal was sought concerned the direction on joint enterprise by the trial judge. The judge advised the jury they should consider their verdict in the following manner:

> 1. Are you satisfied beyond reasonable doubt that the defendant planned with Adrian Cunningham to assault the victim and that she took part in the assault by either punching him, kicking him or standing on him or a combination of any or all of these types of assault? If you answer "no" then you should acquit the defendant of murder and you do not need to consider any more questions or an alternative verdict. If you answer "yes" you should then consider question two.
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> 2. Are you satisfied beyond reasonable doubt that the defendant participated in the attack on the victim and at the time intended to cause the death of, or really serious injury to the victim. If you answer "yes" then you

should convict the defendant of murder. If you answer "no" you should consider question three.

3. Are you satisfied beyond reasonable doubt that either before or during the assault of the victim that the defendant foresaw that Adrian Cunningham intended to cause the death of or really serious injury to the victim and having foreseen such an outcome continued to play a part in the assault by either punching him, kicking him or standing on him or a combination of any or all of these types of assault. If you answer "yes" then you should convict the defendant of murder. If your answer "no" you should acquit the defendant of murder but find her guilty of manslaughter.

[34] Although the guidance in question 3 corresponded with the law as it was believed to be at the time of this trial, the decision of the Supreme Court in R v Jogee [2016] UKSC 8 establishes that there is an error in equating foresight with intent to assist rather than treating the first as evidence of the second. At paragraph [100] of that decision the Supreme Court indicated that where a conviction had been arrived at by faithfully applying the law as it stood the time it could be set aside only by seeking exceptional leave to appeal to the Court Of Appeal out of time. Such leave would only be granted if substantial injustice could be demonstrated. Previous misconceptions about the state of the law do not afford a proper ground for allowing an extension of time in which to appeal against conviction. There is nothing about this case which would satisfy the test of substantial injustice. The questions set out by the learned trial judge required active participation by the appellant in the attack before the jury could find her guilty of murder. We refuse leave to appeal on that ground also.

Conclusion

[35] For the reasons given we dismiss the appeal and refuse leave to appeal on the other grounds.