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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT SITTING AT DUNGANNON

THE KING

v

JOHN MILLER

Mr Hutton KC with Ms Cheshire (instructed by Phoenix Law Solicitors) for the Appellant
Mr Weir KC with Mr Simon Reid (instructed by the PPS) for the Crown

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Before: Keegan LCJ, McFarland J and Kinney J

KEEGAN LCJ

Introduction

[1] The appellant renews an application for leave to appeal a conviction for murder. This followed a jury verdict on 8 October 2019. A life sentence was imposed on that day and subsequently on 10 February 2020 a minimum tariff of 16 years was set by the trial judge, His Honour Judge Fowler KC ("the judge"). The appellant has been refused leave to appeal by the single judge, Mr Justice O'Hara.

[2] There are two grounds of appeal as follows:

(i) That the judge erred in failing to withdraw the case from the jury at the close of the prosecution case after an application of no case to answer otherwise termed a *Galbraith* type application.

(ii) In the alternative, if the case was not one which should have been withdrawn from the jury at the close of the prosecution case there were material irregularities in the conduct of the trial which have an adverse effect on the safety of the conviction.

Factual background

[3] The appellant was charged with the murder of Charlotte Murray, alleged to have been committed by him between 30 October 2012 and 2 November 2012. He pleaded not guilty at arraignment and a trial was held at Dungannon Courthouse in September 2019. This trial ran from 11 September 2019 until the jury reached a verdict on the 8 October 2019 which convicted the appellant of murder.

[4] The Crown case was to the effect that the appellant and Ms Murray had been in a relationship and lived together at 3 Roxborough Heights, Moy, near Dungannon, for some time prior to her disappearing in late 2012. Ms Murray had not been seen or traced since disappearing despite extensive police investigation seeking evidence of her being alive. The Crown case was that she had been killed by the appellant on the night of 31 October into the morning of 1 November 2012. The Crown further suggested that the likely motive for this was that Ms Murray had sent intimate photographs of herself with another man in the run up to this event. It was common case that these photographs were taken on the night of 21 October 2012 when Ms Murray stayed the night at the home of a friend and acquaintance of the appellant called Ciaran McMahon. It was asserted by the Crown that on seeing the photographs the appellant would have known that the photographs related to this night and that they were taken by Ciaran McMahon, and as a result the appellant would have been led to kill Ms Murray as a result of this behaviour.

[5] It was also suggested by the prosecution that having killed Ms Murray, the appellant disposed of her body and set about laying a false trail by manufacturing text messages between her phone and his, posting a message on her Facebook account and generally indicating that she was away to live a new life. After Ms Murray disappeared, her mobile phone was used on several occasions to contact the appellant's mobile phone. The cell site evidence indicated that these text messages were sent using cell sites that serviced the general area of the couple's home at 3 Roxborough Heights and its environs.

[6] The defence disputed the claims made by the prosecution. Whilst it was accepted that there was a breakdown in the relationship the appellant denied that he had killed Ms Murray. The defence placed emphasis on the fact that Ms Murray was a vulnerable person who had a history of seeking assistance for depression in the run up to her disappearance. She had not had contact with her family for some considerable time in the run up to her disappearance. She had also in the period before disappearing been in contact with various other individuals including a former boyfriend, another unidentified woman, two foreign national males, and a person called Peter. In addition, it was pointed out that her personality was characterised by elements of aggression and violence particularly when under the influence of alcohol. She admitted to hitting the appellant when in conversation with a psychiatrist.

[7] It was also common case that Ms Murray had blinded a member of the travelling community with the heel of her shoe in an incident in 2007 and that she had been confronted by members of his family on a number of occasions in a public house prior to her disappearance. Another important aspect of the defence case was that there were some sightings of Ms Murray following the night when she is said to have disappeared. These sightings were disputed by the prosecution but, ultimately, the defence called two witnesses, a Mr Mroz and a Ms Logue. Ms Logue ultimately could not attend court, but her evidence was submitted in written format. Mr Mroz attended court and gave evidence of a sighting and there was other evidence of sightings of Ms Murray that were raised by the defence.

The characteristics of this case

[8] Self-evidently, this was a circumstantial case. In addition to the points raised that Ms Murray effectively disappeared without trace other circumstances were highlighted by the prosecution to make the case that she was murdered by the appellant. An important aspect of the factual matrix was that it was only in May 2013 after Ms Murray's family became concerned that the police were notified of the disappearance.

[9] The prosecution also relied upon cell site evidence in support of its case and maintained that the appellant had laid a false trial by sending messages from Ms Murray's mobile telephone, purportedly written by Ms Murray, stating that she wanted to live a new life. The prosecution, relying on evidence from the family of Ms Murray, disputed the authenticity of the text messages and maintained that the style of the texts was not the usual for Ms Murray.

[10] Further the prosecution relied upon evidence of Ms Murray's blood in the bathroom. This was found when the house where Ms Murray and the appellant resided was eventually searched. However, it was common case that Ms Murray had cut herself shortly before her alleged disappearance and she had a wound which required two stitches. The prosecution also relied on the fact that Ms Murray had left behind her beloved pet dog called Bella, and that shortly after Ms Murray disappeared the appellant had tried to sell her engagement ring and that he made some enquiries about blades or axes in November 2012 some three weeks after the alleged disappearance.

[11] To complete the picture, the prosecution relied on inconsistencies in the account given by the appellant to police and that he relied on evidence that he failed to give to the police when questioned, contrasted with the fact that when the appellant did give evidence, he gave varying different explanations for his conduct and also as to why Ms Murray disappeared.

[12] Fundamental to the defence case was the claim that there were reasonable alternative possibilities that Ms Murray, if dead, died sometime after 1 November 2012 and in circumstances other than those purported to be definitive by the Crown.

In other words, the defence raised the possibility of suicide or the possibility that someone else had killed Ms Murray or the possibility that she had, in fact, simply disappeared to another jurisdiction or within Northern Ireland given her need to start a new life as the appellant said she had put it. In this sense, the defence strongly objected to the proof of life evidence of the prosecution as they said it was inadequate.

Consideration of the grounds of appeal

[13] Before we turn to the two specific grounds of appeal there are some preliminary observations that we make. First, we point out that there is no case made as to inadequate legal representation of the appellant at trial. That is unsurprising as the appellant was represented by Mr Pownall KC along with Mr Hutton who was then a junior counsel and is now his senior counsel and the same solicitor.

[14] A further distinctive feature of this case is that whilst a *Galbraith* application was made there were no requisitions in relation to the material irregularities that are now alleged. This court has consistently pointed out the importance of requisitions in a trial because of the particular benefit that a trial judge has over an appellate judge in terms of engaging with the strength or otherwise of arguments made. In this case Mr Hutton now raises a total of eight material irregularities, some of which he says are irregularities which caused substantial prejudice to the appellant. We find it hard to believe that none of these substantial issues of prejudice resulted in an application to the trial judge. We have no doubt that strategy plays an important part in criminal trials, but we reiterate some basic principles in terms of the need to raise issues at trial if they are to be considered thereafter on appeal.

[15] *Blackstone's Criminal Practice* 2023 Section D at 26.24 states as follows:

> "Errors on the part of advocates may lead to a conviction being found to be unsafe. If the decision of the advocate is taken in good faith, having weighed the competing considerations and having consulted the client, where appropriate, the Court of Appeal is much less likely to interfere than where the decision is taken in defiance of instructions and without reference to the client: see *R v Clinton* [1993] 2 All ER 998."

[16] *Blackstone* goes on to discuss formulations of the test for determining when an advocate's conduct is sufficient to lead to the quashing of a conviction. The core point if there is to be an argument about incompetent representation is encapsulated in the decision of *R v McCook* [2014] EWCA Crim 734, where Lord Thomas CJ provided guidance to the effect that all counsel dealing with an appeal who have replaced trial counsel are required to "go to … counsel who have previously acted to ensure that the facts are correct."

[17] In this case that issue does not arise directly. However, a recurring theme in the submissions of Mr Hutton was that mistakes may have been made but, ultimately, the court would have to consider the safety of the conviction notwithstanding any errors made. We are understanding of the point that with hindsight different decisions may be made. We also understand that counsel's omissions are not determinative of an appeal. However, the procedure adopted at the lower court may be factored in by the appellate court in deciding on the outcome on any case as it is relevant when and how points emerged.

[18] We also remind counsel practising in the criminal courts that the appellate court is not as well placed as a trial judge to determine issues which arise during the cut and thrust of a criminal trial. Therefore, when issues arise on appeal which are said to amount to substantial prejudice to a client, the court must question why they were not raised at the lower court and take a view as to whether that was due to the inherent weakness of the argument which is subsequently raised on appeal, a conviction having been secured, or whether there is something more that would lead a court to consider a conviction unsafe.

[19] All of the above said, the ultimate appellate test flows from the case of *R v Pollock* [2004] NICA 34 which requires us to consider the safety of the conviction in all the circumstances of a particular case as follows:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe?'
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> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.
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> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

Consideration of the grounds of appeal

Ground 1 - The judge's refusal to grant an application of no case to answer

[20] The leading authority on the test a trial judge should apply in determining whether there is no case to answer is *R v Galbraith* [1981] 2 All ER 1060. This authority has been applied in the jurisdiction of Northern Ireland consistently and was discussed in the case of *R v Grimes* [2017] NICA 19.

[21] The *Galbraith* decision contains the classic articulation by Lord Lane CJ of the two limbs to an application of this nature as follows:

> "How then should the judge approach a submission of no case?
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> (i) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will, of course, stop the case.
>
> (ii) The difficulty arises where there is some evidence, but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.
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> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at it highest, is such that a jury properly directed could not properly convict upon it, it is his duty upon a submission being made, to stop the case.
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> (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury … There will, of course, as always, in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[22] This case was a second limb case. *Blackstone* Section D16.56 discusses the approach in relation to this as follows:

> "This approach inevitably involves the court considering the quality and reliability of the evidence, rather than its legal sufficiency, and therefore, involve the court carrying out the assessment of evidence and witnesses that would otherwise be the exclusive prerogative of the jury. The judgment in *Galbraith* makes clear that it is not appropriate to argue on a submission of no case that it would be unsafe for the jury to convict, which would be an invitation for the judge to impose his own views of the witness's veracity.
>
> However, the second limb of the *Galbraith* test does leave a residual role for the court as assessor of the reliability of the evidence. The court is empowered by the second limb of the *Galbraith* test to consider whether the prosecution's evidence is too inherently weak or vague for any sensible person to rely on it. Thus, if the witness undermines his or her own testimony by conceding uncertainty about vital points, or if what the witness says is manifestly contrary to reason, the court is entitled to hold that no reasonable jury properly directed could rely on the witness's evidence, and therefore, in the absence of any other evidence) there is no case to answer."

[23] The correct approach in determining an application of this nature is to look at the evidence in the round, and ask the question whether, looking at all the evidence and treating it with appropriate care and scrutiny, there is a case in which a properly directed jury could convict: *R v P* [2008] 2 Cr App 6 [2007] EWCA Crim 3216.

[24] Further, in this sphere *Blackstone* D16.64 refers as follows:

> "On the proper application of the test in *Galbraith*, the prosecution are not required to show that the jury could not reasonably reach any alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended by the prosecution."

[25] The authors refer to a number of decisions, in particular, *R v Edwards* [2004] EWCA Crim 2102 and the same approach in *R v Jabber* [2006] EWCA Crim 2694, *R v Goering* [2011] EWCA Crim 2 and *R v Goddard* [2012] EWCA Crim 1756. This is, of course, a common-sense approach because, by virtue of this application of the test, the prosecution case may be taken at its height in terms of circumstantial evidence,

that is whether or not the adverse inferences can properly be drawn from the circumstantial evidence that is put before the court. The judge will have to look at the totality of the circumstantial evidence adduced, and the submissions put before the court. Part and parcel of that is what the defence say about the inherent weaknesses of the circumstantial evidence. Hence, the workable articulation of the test in *Blackstone* that we have referred to.

[26] The characteristics of this case are also important. As we have said this was a circumstantial case. The particular nature of such a case has been described by this court in the case of *R v Robinson* [2021] NICA 65 at paras [7]as follows:

> "[7] The seminal decision in relation to circumstantial evidence is a decision of the House of Lords in *McGreevy v DPP* [1973] 1 All ER 503. There, this well-known passage from Lord Morris is found:
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> > 'In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or maybe so they could not say that they were satisfied of guilt beyond all reasonable doubt.
> >
> > In my view, it would be undesirable to lay it down as a rule which would bind judges that a

> direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt.'"

[27] In this jurisdiction, the Court of Appeal has set out the correct approach when dealing with circumstantial evidence in *R v Kincaid* [2009] NICA 67 particularly at paragraph [22] as follows:

> "The case against the appellant depended on circumstantial evidence. While that evidence is different from direct or expert evidence it can be no less compelling and often more so. The classic approach to circumstantial evidence is to be found in the well know passage from the judgment of Pollock CB in *R v Exall* 1866 4 F&F:
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> > 'What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise ... Thus, it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved.'"

[28] The above analogy has been reiterated in our courts on numerous occasions. For instance, in *R v Meehan & Ors* [1991] 6 NIJB Hutton LCJ also said:

> "Mr Weir QC criticised the approach of the trial judge as set out in this passage and submitted that each strand of the Crown case must be tested individually, and that if it is not of sufficient strength, it should not be incorporated into the rope… We reject this submission. It is, of course, clear that each piece of evidence in the Crown case must be carefully considered by the trial judge but it is also clear law, as stated by Pollock CB, that a piece of evidence can constitute a strand in the Crown case, even if as an individual strand it may lack strength, and that, when woven together with other strands, it may constitute a case of great strength."

[29] Returning to the legal principles in play when a *Galbraith* application is made, in *R v Grimes* Gillen LJ adopted the guidance of *G and F v R* [2012] EWCA Crim 1756 where Aitken LJ at para [36] outlined the approach to be taken at the direction stage in cases where the matter is one of circumstantial evidence as follows:

> "36. We think that the legal position can be summarised as follows:
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> (1) In all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the "classic" or "traditional" test set out by Lord Lane CJ in Galbraith.
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> (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence.
>
> (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence,

> putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

[30] Next, we turn to the substance of the application made and how it was dealt with by the judge. There were written submissions made to the judge in relation to the application for no case to answer. There was also a substantial hearing conducted where senior counsel made various points to the judge and the judge then provided a ruling. In passing, we note that the judge said that he would provide a written ruling if requested, but no request was made. We can therefore only proceed on the basis of the transcript that we have, which is necessarily compact given the fact that this ruling occurred whilst the jury were out in the course of a running trial. There is no argument taken with the legal principles applied by the judge.

[31] We note that Mr Pownall KC started by suggesting that it is for the court to determine whether there exists a cogent body of evidence sufficient in law which would entitle a jury to infer guilt to the standard beyond reasonable doubt and, in doing so:

(i) Rule out all reasonably tenable possibilities which are consistent with the evidence and inconsistent with guilt; and

(ii) Conclude that the inference of guilt is the only possible inference.

[32] He then went through in meticulous detail the aspects of the case which he said meant the prosecution had not satisfied the burden. First, he argued that there was not enough proof of life provided by the prosecution. He said, inter alia, in his submissions that Ms Murray was "a very troubled young woman, who had fallen out with her family, who had in the past attempted to commit suicide, who had not seen certain members of her family for many months if not years." He went on to refer to the fact that she had contact with many other people, also that the psychiatric evidence showed the prescription of medication for depression and that she was recorded as having low self-esteem and wanting to get away to start a new life. Incidentally, Mr Pownall pointed out that she had praised the defendant, describing him within the notes before the jury and the court as a nice guy who supports her. He also referred to her aggressive personality, her drinking to excess and her association with people who had not been identified by the police.

[33] In addition, Mr Pownall relied on what he described as "lawful identifications" of Ms Murray in various different vicinities. He then said that the cell phone evidence produced by the prosecution was not definitive. He also disputed the argument that the appellant had manufactured messages purportedly from Ms Murray. He disputed the case in relation to blood in the property and he disputed whether or not the lack of explanation at interview had any real relevance to this consideration.

[34] In response, Mr Weir essentially and economically said that all the submissions made by defence counsel are jury points because each and every one of the points relates to the weight that has to be given to the evidence not the existence of it. He said that the varying strands of the evidence exist and that they pass the test and meet the overall test in terms of the sufficiency of evidence that should go to a jury at this stage, because otherwise the court would be usurping the function of the jury, and the court must look at the prosecution case at its height. Therefore, Mr Weir said that when one takes all the factors into account, applies the legal test, which was agreed, the evidence should be left to the jury to consider.

[35] The ruling of the judge is given at the end of submissions as follows:

> "The approach that the court should take to an application for dismissal at the end of the prosecution case in a circumstantial case is that set out in para [51] of the case of *Grimes* [2017] NICA 19:
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> > 'Having applied this test to the evidence in this case, I am satisfied that looking at all of the prosecution evidence in the round at this, the direction stage, there is sufficient evidence on behalf of the prosecution to allow the case to go to the jury. I therefore reject this application. A jury properly directed will require to have clearly pointed out to them, those pieces of evidence which arguably are inconsistent with guilt and consistent with innocence, and to this end, I will, in charge, remind the jury of all of those aspects of the evidence.'"

[36] The defence did not request further reasoning from the judge as we have said. In any event it has not been alleged that the judge has misapplied the law or misdirected himself in relation to law. He has not left out of account any of the relevant features of the case. He had substantial submissions from defence counsel in relation to the elements of the case which they said were so weak that the case should be withdrawn from the jury. However, he had to weigh that up against the prosecution argument that this was a circumstantial case where all strands needed to be considered and that the jury would have to consider alternative explanations.

[37] We understand the submission that this case may be described as unusual given that the body of Ms Murray was not found. However, that fact is not in itself indicative of weakness in a case. Rather, in a circumstantial case the jury are entitled to weigh up all the strands of evidence to determine whether or not there is a sufficiency of evidence. We cannot realistically say looking at the decision-making in this case and applying our minds to the submissions now made by the defence that this was a judgment of the trial judge that fell outside the bounds of a

reasonable view on the facts of this case. In other words, we consider that the question whether a reasonable jury could on one possible view of the evidence be entitled to reach an adverse inference in this case was satisfied because of all the evidence looked at collectively putting the prosecution case at its height.

[38] We are not convinced that this was a borderline case, albeit we think it was complicated by Ms Murray's body not being found. However, there were various strands of evidence which we think the judge was correct to consider should be considered by the jury. In summary they were these: the timing of Ms Murray's disappearance, the cell phone activity, the disappearance without any trace, the accounts given and the proof of life investigations that took place. Therefore, in all the circumstances of the case, we consider the judge was correct not to accede to the application of no case to answer. Accordingly, we dismiss the first ground of appeal.

Ground 2 - Material irregularities at trial

[39] There were eight points relied upon by Mr Hutton in support of this ground of appeal which we summarise as follows:

(i) That the issue of evidence as to a plaster seen on Ms Murray in video material was dealt with by the prosecution in evidence in a prejudicial way which could not be corrected.

(ii) That the sex video evidence was also dealt with by the prosecution in such a prejudicial way when the appellant gave evidence that it could not be corrected.

(iii) That the court should have made a *Lucas* direction.

(iv) That the court's direction on sightings of Ms Murray which flowed from evidence called by the defence was imbalanced.

(v) That the Crown closed the case in a highly prejudicial way, specifically by referring to a case not specifically put to the appellant during his evidence.

(vi) That the written directions given by the judge were lopsided and prejudicial to the defence.

(vii) That the judge's direction on the intent required for a murder charge was inadequate.

(viii) That the judge should have left loss of control as a partial defence to the jury.

[40] We will deal with each of these matters in the following order starting with the plaster and sex video issue which will be considered together.

The plaster and sex video issues

[41] During the trial the appellant was cross examined in relation to photographs which had been sent to him on 1 November 2012 containing intimate images of Ms Murray. The prosecution case was that the appellant must have known that the photographs had been taken after 19 October 2012 because that was the date on which Ms Murray injured her buttock and had a plaster on her buttock. The appellant in cross examination confirmed that Ms Murray was in the images and that he knew that she had a plaster on her buttock. He was pressed by the prosecution that one of the photographs plainly showed the plaster on Ms Murray's buttock. The appellant said that he didn't really notice it.

[42] The prosecution said the presence of the plaster would assist in dating the photographs. The appellant continued to assert that he didn't look at the photographs that closely and that he did not stare at them. When the point was pursued the appellant continued to say that he did not look at the photograph that deeply.

[43] It subsequently transpired that 17 photographs were taken but only 12 of them were sent to the appellant and they did not include a photograph showing the plaster. Once this became clear the parties provided agreed facts to the jury. The jury were told that only 12 images were sent to the appellant's phone and that these 12 images did not include the image relied upon by the prosecution that showed Ms Murray with a plaster on her buttock.

[44] This was unfortunate and led to a situation where the defendant was cross examined by Mr Weir on a false basis. He rightly raises a concern about this. However, the significance of this failing must be assessed by consideration of the entire trial. We have approached our analysis in that way.

[45] In this analysis a standout feature is that the appellant had never seen the photograph containing the plaster was reemphasised to the jury in the closing address by the prosecution and in the closing address by the defendant's senior counsel to the jury where Mr Pownall KC said:

> "Just as Mr Miller was right when he said that he had never seen the image of the plaster on the buttock, again, I can only imagine what you thought when cross-examination was taking place. Some of you might have thought, "why don't you just admit it? It's obvious you must have seen the plaster." And you may have made more of it and thought "well why are you denying it? Is it because you really were jealous, and you really did realise that it was Mr McMahon?"

> But then that assumption, as with the boy and the woman chasing after him, once you heard all the evidence was demonstrated to be false because you heard that, in fact, out of the 17 images, it was established by the defence expert that only 12 were sent and those 12 didn't include that image and despite the prosecution's inevitable retreat on the issue, they persevere in the suggestion that he knew the film of her was her with Mr McMahon and he became so incensed that he murdered her."

[46] The judge also dealt with this matter in his charge to the jury when he said:

> "The defence also make the point that the defendant was not to know that the man in the image was his friend McMahon most particularly because the image containing the dressing from Charlotte's buttock, which would have timed the taking of these images, was never sent to him and he couldn't have had a timeframe in which to scale up when those images were taken or who they may well have been."

[47] The appellant asserts that in this context the danger is that a subconscious and unfavourable impression might have been formed by the jury of the appellant. This he suggests was as a direct result of the prosecution not ensuring that accurate information was put to the appellant in cross examination.

[48] The second inaccurate allegation put to the appellant was in relation to a video made by the appellant and Ms Murray of them having sex together. The appellant accepted in cross-examination that he made the video, and it was filmed from his point of view. The appellant said that the film was made for the purpose of sending it to Mr McCoy. It was made at the request of Ms Murray. Various aspects relating to the video were explored in cross-examination. The appellant said that during the recording he had referred to Mr McCoy seeing the video. He was cross-examined by the prosecution about the fact that no such reference was made on the videos.

[49] It was subsequently discovered that there was a further video recorded on this date which had been deleted. It was not one of the videos shown during the trial. The prosecution returned to the subject in the cross-examination. In this passage of evidence, the appellant confirmed that the videos were filmed in mid-October and that one of the videos was deleted. It appeared it was the second video in sequence. The first video showed the appellant and Ms Murray getting undressed. The appellant could not recall why he deleted the second video and was asked when in the sequence he claimed something was said about sending the video to Mr McCoy. The appellant said it was just after Miss Murray was taking her clothes off. He said he did not hear that comment when he watched the videos.

[50] The above was also made the subject of an agreed fact which was placed before the jury in the following manner:

> "11. The jury heard evidence that video files were extracted from PD4, a mobile phone attributed to Johnny Miller and that these video files were files recorded on 18 October 2012. The files showed intimate activity between Charlotte Murray and Johnny Miller. These video files had been extracted from the phone and transposed to DVD format. There were four video files showing video clips of varying length.
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> 12. During his cross-examination Mr Miller gave evidence that these video recordings were recordings made at Charlotte Murray's suggestion and it was proposed by her that the videos would be forwarded on to Mr Brian McCoy, the "psychic." In support of this Mr Miller recalled viewing one of the files what he recalled referencing Mr McCoy by name and saying words such as "what do you think of that."
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> 13. Mr Miller was challenged about this evidence, and it was suggested that on the video clips obtained by police there was no mention of him referencing "Brian." He maintained that he recalled this reference, and the evidence was paused so that he could view the video clips which he had not seen for some years. After viewing the clips on DVD he confirmed that on the clips he was shown there was no mention of him referencing 'Brian.'
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> 14. Further investigation of Mr Miller's phone indicates that originally it contained five video files appearing to have been recorded on 18 October 2012. One of the video files had subsequently been deleted. The filename on this deleted video file indicates that this clip was recorded at 01:43 hours on 18 October 2012. This file would in sequence have been the second clip recorded that night."

[51] Dealing with these two complaints in relation to the plaster and the sex videos evidence, there is no doubt that during the trial the appellant was questioned on matters by the prosecution without a proper basis. He was challenged on the evidence of photographs taken of Ms Murray which showed a plaster on her buttock, but he had never seen the relevant photograph. It was also put to him that his assertion that he had referred to Mr McCoy during the video taken in

mid-October was not apparent on the video. In fact, there was a further video not before the jury which the defendant had previously deleted. All of this is regrettable and amounts to irregularity within the trial process. However, the central question is whether these irregularities render the trial verdict unsafe.

[52] In finding an answer to this question the case of *Randall v R* [2002] UKPC 19 provides a helpful guide. At para 28 Lord Bingham said:

> "While reference has been made above to some of the rules which should be observed in a well conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders the trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of clear judicial direction. It would emasculate the trial process and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash the conviction as unsafe, however strong the grounds for believing the defendant to be guilty."

[53] Of course, there are procedures and protections in place to ensure a fair trial. The judge is best placed to determine these matters, having the feel of the whole case and having been involved in the trial process and listened to the evidence. The trial judge can determine what course best accords with the overriding objective to ensure that the trial is fair and just.

[54] It is also highly noteworthy that the appellant's lawyers did not consider that these two errors which have now taken prominence on appeal were irremediable. Indeed, the remedy that was found included presenting agreed facts to the jury in clear terms. There was no request to remove the case from the jury and there was no requisition on the judge's directions to the jury. Whilst these are not determinative factors, they weigh significantly in the balance when considering whether a fair trial has taken place.

[55] In truth the problems now identified could have been avoided by counsel during the trial. Cross-examination is a very powerful tool in the trial process, and it must be conducted appropriately. It was clearly the prosecution case that the jury

were invited to disbelieve the evidence of the appellant. However, the jury were ultimately not invited to disbelieve the appellant on these matters. These matters were corrected during the trial process by way of agreed facts put to the jury, clarification during cross examination, submissions made during the closing speeches of prosecution and defence and in the judge's charge to the jury. We are satisfied that any possible lingering concern in the mind of the jury as to the credibility of the appellant on these matters was cured by the protections provided within trial process, principally the agreed facts constructed by counsel, counsel's speeches, and the judges' charge. Any mistakes were comprehensively corrected. In addition, we do not think that the appellant's position was diminished. He was in fact vindicated by maintaining his position which contradicted Mr Weir who was wrong. Therefore, this aspect of the appeal is dismissed.

Whether a Lucas direction should have given

[56] A further material irregularity which the defence suggest occurred related to the absence of direction concerning lies, more commonly referred to as a *Lucas* direction. Lane LCJ in *R v Lucas* [1981] QB 720 at 724F stated:

> "The jury should in **appropriate circumstances** be reminded that people sometimes lie, for example in an attempt to bolster a just cause, or out of shame or out of a wish to conceal disgraceful behaviour."

[57] We have added the emphasis as it is important to note that this is not a general requirement when the issue of lies, or untruthfulness arises or is alleged. The direction is only required in certain circumstances.

[58] In *R v Middleton* [2001] Crim LR 251 it was stressed that the purpose of such a direction was to warn a jury against 'forbidden reasoning' that lies in themselves are demonstrative of guilt.

[59] More specific guidance was given in *R v Burge* [1996] 1 Cr App R 163. The 'appropriate circumstances' in which a *Lucas* direction will be required will usually arise:

1. Where the defence relies on alibi;

2. Where the judge considers it desirable or necessary to suggest that the jury look for support or corroboration of one piece of evidence from other evidence in the case, and that lies told, or allegedly told, may provide that support or corroboration;

3. Where the prosecution seeks to show that something said in relation to a separate and distinct issue was a lie and rely on that lie as evidence of guilt; and

4. Where although the prosecution has not adopted this approach, the judge reasonably envisages that there is a real danger that the jury may do so. (173 D-F)

[60] In *Burge* Kennedy LJ added three important footnotes to this guidance. If a *Lucas* direction is given where there is no need for such a direction it will add complexity and do more harm than good (173F). We would add that the reference to harm, could, potentially, include harm to the defence case. Secondly, in circumstance four, there should be discussion with counsel before speeches and summing-up, to consider whether such a direction is required, and if so, how it should be formulated. Kennedy LJ added that if the matter is dealt with in that way, "this court will be slow to interfere with the exercise of the judge's discretion" (173G). Finally, that the appeal court is unlikely to be persuaded in circumstance four cases if defence counsel has not alerted the judge to the danger that the jury would treat a particular lie as evidence of guilt (174A).

[61] The appellant argued that as one of the strands of the prosecution case was the alleged 'trail of deceit' created by the text messages, Facebook posts etc with an intention to create an impression that Ms Murray was still alive, this is a case that required a *Lucas* direction.

[62] The prosecution did rely on this 'trail of deceit' as part of its circumstantial case, alleging the creation of messages purportedly coming from Ms Murray backed up by a lying account about this given in the appellant's statement to the police in May 2013 and again when he gave evidence at the trial.

[63] This is clearly not an alibi issue, and it is not a separate and distinct issue envisaged by the third and fourth considerations in *Burge*. The prosecution's case is based on the various strands of evidence. In one sense, each strand supports the other and contributes to the combined strength of the prosecution case, but it could not be said that any one of the strands requires to be supported or corroborated by the alleged 'trail of deceit' created by the appellant.

[63] This is not a case that required a *Lucas* direction, and had the judge given one it could well have resulted in confusion and could potentially have caused more harm to the appellant's case.

[64] That view is reinforced by what happened during the trial after the conclusion of the evidence when there was the usual preliminary discussion with counsel about various aspects of the summing-up. On 2 October 2019 Mr Pownall, on behalf of the appellant, specifically stated "As to other matter, a lies direction is not appropriate, we submit, there are no acknowledged lies that would call for what I would term a *Lucas* direction." (Appeal Book page 566 lines 24 – 26).

[65] Although Kennedy LJ restricted his additional comments to consideration four, it could equally apply to the other considerations, depending on the circumstances of the case. The judge correctly discussed this, and other elements of his summing-up, received the assistance from counsel, and concluded that the *Lucas* direction was not required, a view that had the full support of the appellant's counsel, Mr Pownall, whose instincts concerning the issue we prefer to Mr Hutton's.

[66] Accordingly, for the reasons outlined above we do not consider that there was any irregularity in relation to the failure to give a *Lucas* direction. We dismiss this ground.

The judge's charge on the identification evidence

[67] A further suggested material irregularity is the content of the judge's charge on identification evidence relied upon by the defence. There are two aspects to this, the first being a suggested failure to deal with the evidence of Ms Logue to an adequate degree and the second being an inappropriate direction relating to identification evidence.

[68] The evidence adduced concerning purported sightings of Ms Murray after 1 November 2012 was clearly of some importance. The jury were directed when dealing with the circumstantial case they had to be sure that there were no other co-existing circumstances which point away from the appellant's guilt and would weaken or destroy any inference of guilt. If any one of the purported sightings were to raise a reasonable doubt that Ms Murray was in fact not dead or had died after 2 November 2012 then the prosecution case collapsed.

[69] The appeal focussed on two witnesses although there was other identification evidence. Mr Mroz said that he had been acquainted with Ms Murray and that he had observed a lady from about 100 feet from behind standing in a shop in the Moy. He recognised the lady as being Ms Murray. The second was Ms Logue who was not acquainted with Ms Murray and was attending the Omagh out-patient fracture clinic in May 2013 when she observed a lady who was also attending the facility. Several days later she saw the 'missing person' notice and picture on Facebook and was '100% sure' that this was the same person she had seen at the hospital. Ms Logue did not attend court and her statement was admitted without opposition as hearsay evidence. The police gave evidence about the results of their follow-up investigations into all the sightings as well as the general scope of the 'missing person' enquiries.

[70] We reject the argument that the recounting of the evidence of Ms Logue was not complete enough or was unfair to the appellant. The section of the summing-up dealing with the disappearance of Ms Murray was in our view comprehensive, setting out what evidence the prosecution relied upon and what evidence the appellant relied upon. Emphasis was given to weaknesses and gaps in the prosecution evidence in support of the appellant's case. The details of the

identification and recognition evidence was set out to the jury. The judge also set out the weaknesses the prosecution said applied to the defence evidence.

[71] Reading the summing-up we see no valid criticism of the completeness and fairness of the content. It is not the function of a judge to set out in full detail what every witness has said in evidence. What is required is a fair and balanced summary of the entirety of the evidence, directing the jury, if required, on how the law requires them to deal with certain types of evidence, and with appropriate commentary on the evidence to assist the jury. We dismiss this ground.

Alleged failure in relation to a Turnbull type direction

[72] A discrete point is raised concerning what the appellant described as the *Turnbull* direction. Such a direction flows from the guidance given in *R v Turnbull* [1977] QB 224 as to how a judge should deal with identification evidence relied on by the prosecution both in managing the trial and, should the case be left to a jury, the directions that should be given to the jury. Essentially the direction should include a warning for the special need for caution before convicting an accused in reliance on the correctness of identification evidence. Juries should be told why there is a need for such caution and that honest witnesses can still be mistaken witnesses. Finally, the jury should be directed to look at the circumstances of the identification (or recognition) such as the length of time, the distance, the lighting etc.

[73] This is a well-established direction in identification evidence cases and specimen directions have been developed and recommended for trial judges by the Judicial Studies Board.

[74] The *Turnbull* direction specifically relates to evidence relied upon by the prosecution. This is obvious because of the burden placed on the prosecution to prove its case to the criminal standard.

[75] We agree with the court in *R v Allen* [2022] EWCA Crim 750 that it is not appropriate for such a direction to be given in relation to identification evidence relied upon by the defence.

[76] In *Allen* the accused was charged with murder. He had been in contact with the victim, a sex worker, up to 24 December 2018. The prosecution case was that she was murdered on the 26/27 December. There was no record of any sightings after 26 December and her body was discovered in January 2019. The case has some similarities to this one as the prosecution had to prove death within a limited time-frame and identification evidence beyond that time-frame assumed a critical importance. Several witnesses said that they had seen the victim during January 2019.

[77] In *Allen t*he judge when summing-up to the jury directed them as follows:

> "Well, ladies and gentlemen, when you consider the evidence of these three witnesses, who say they saw Alena during January 2019 after the time when the prosecution say she had been killed, you will need to be cautious. This is not because they are not trying to tell you the truth but, as a matter of common experience, it is not unusual for a witness to make a mistake about identification. We have all done it, been sure that we recognise someone we all know, only to find that we are wrong when we approach them. Alternatively, being sure we have seen someone, but later it has proved that it could not be the person because they were somewhere else. All this means is that you should take care when you consider this evidence. You will want to weigh it against all the other evidence in the case about when Alena was last seen, including the CCTV evidence, but it is still evidence in the case for you to consider."

[78] Holroyde LJ at para [19] stated that it would have been wrong for the judge to have given a *Turnbull* direction, but that it was clear that the judge "did no such thing. Nor, did he give a modified *Turnbull* direction":

> "All he did, and in our view rightly did, was to give a faithful summary of the evidence of the witnesses and mention briefly the need to be cautious about identification evidence because of the common experience that honest mistakes can be made. That observation was neither inappropriate nor unfair. As was said by Leggatt LJ (as he then was) giving the judgment of the court in *R v Jordan Ray Smith & Others* [2019] EWCA Crim 1151 at [39]:
>
> > 'The potential dangers of identification evidence and consequent need for care are matters which may not be known to jurors in the way that they are well known to those with experience of criminal justice. Nor do they depend on which party at the trial is relying on such evidence.'
>
> That observation was made in the context of a trial in which some of the prosecution witnesses had given evidence of identification, which was favourable to the defence, but the point is in our view equally valid here."

[79] In this case, the judge had given his direction in the following terms:

> "You will have to decide upon the quality and the reliability of his recognition evidence. When coming to a consideration of his evidence and the weight that you can attach to it, I must warn you that it is the court's experience that witnesses who have identified or for that matter recognised a person can be mistaken even when the witness is honest and sure that he is right and indeed such a witness may seem convincing but may be wrong. Consider the circumstances of this recognition and form your own assessment of Mr Mroz's reliability as a witness."

[80] The above direction did not contain the directions to be cautious or to exercise care which were given by the trial judge in *Allen*. The warning related to the experience of the court that people can make mistaken identifications, and recognitions. This is a matter of common experience, and it was perfectly proper for the judge to have given this assistance to the jury in this way.

[81] We consider that there has been no irregularity in the way the judge dealt with the identification evidence. Therefore, we reject this aspect of the appeal grounds.

Whether the way the Crown closed the case was so prejudicial as to render the conviction unsafe

[82] This point centres upon the cross-examination of the appellant. In his examination in chief, the appellant had openly referred to the fact that he had made diary entries after Ms Murray disappeared and that he had sent her Facebook messages asking her whereabouts and asking her to get in contact. The diary had been recovered by police during a second subsequent search of his property in 2017. There had been an initial search of the property that the parties shared in 2013. Discovery and production of the diary arose subsequently to that. There was also a point raised in the appellant's examination in chief that he had taken a photograph of Ms Murray and linked it in his phone to her phone number, in other words, if his phone received a call from her, her photograph would come up. This evidence, as Mr Hutton pointed out, was led in chief without much controversy during the appellant's testimony.

[83] The argument made by the defence is that during a substantial cross-examination by Mr Weir over four days, the Crown did not suggest to the appellant that these matters had been fabricated in any way specifically. In addition, we were referred to the fact that in examination in chief two questions were asked of the appellant by his counsel in relation to these elements which were in effect leading questions that these were genuine. Putting aside the fact, as we have said,

that these were leading questions and observing that there was no objection to them, the simple point made is that the Crown did not contradict the appellant specifically on this.

[84] Mr Hutton argued that unfairness arose thereafter as, in the Crown's closing speech, Mr Weir sought to cast aspersions on the genuineness of the appellant's evidence to the effect that the appellant had fraudulently manufactured evidence to assist his case. Such points about the diary or the Facebook message were not put to the appellant during his cross-examination or raised with any other witness during the trial. Therefore, the point made is that the appellant was not given an opportunity to respond to these allegations specifically, nor did the jury have the benefit of observing the appellant's response.

[85] Whilst the issue has not been taken to the Bar Council, Mr Hutton, rather surprisingly, also raises the Bar of Northern Ireland's Code of Conduct (2022) at para 10.17 which stipulates that a barrister must not impugn a witness in his address to the jury or in any closing submissions to the trial judge unless the witness has been given an opportunity to answer the allegations in cross examination.

[86] The response to these claims were provided rather crisply by Mr Weir. This was to the effect that whilst he accepted that he did not specifically challenge on these issues, the overall thrust of his cross-examination was to suggest that the appellant was self-serving and was covering his trail. Therefore, Mr Weir submitted that his approach would have been patently obvious and was not a surprising part of the case and that the objection now raised is technical rather than substantive.

[87] In support of this argument Mr Weir relied upon a section of *Archbold Criminal Practice* 8-186 which states as follows:

> "If, in a crucial part of the case, the prosecution intends to ask the jury to disbelieve the evidence of a witness for the defence it is right and proper that the witness should be challenged when in the witness box or, at any rate, that it should be made plain while the witness is in the box that his evidence is not accepted. *Hart* [1932] 23 Cr App R 202, CCA (Alibi witnesses not cross-examined at all) and *R(Wilkinson) v DPP* 167 JP 229, *QBD* Stanley Burton J (defendant not cross-examined) see also *Brown v Dunne* [1893] 6 R.67 at 76-77 HL and *Flannigan v Fahy* [1918] 2 IR 361 at 388-289. Counsel is, however, entitled to invite the jury to reject the evidence of a defence witness where he has adopted a raised eyebrow approach but has not explicitly put to the witness that he is lying. *Lovelock* [1997] Crim LR 821 AC. See also *Nissa* [2009] EWCA Crim 189."

[88] The latter mentioned authority of *R v Nissa* is the one that Mr Weir primarily relied on. In that case at para [80] the court referred to the fact that having examined the authorities referred to in *Archbold* the court considered in the case that the jury must have been aware from the trial as it progressed that the prosecution was challenging the evidence of the witness. That, Mr Weir maintains, is the circumstance here. We think he is correct to make that assessment. Clearly, the appellant was cross-examined as to the allegations that he had killed Ms Murray, to the effect that he had been responsible and tried to detract from this by various methods.

[89] We are not quite so convinced that the issue is as straightforward as Mr Weir suggests. Unquestionably, it would have been preferable and in accordance with good practice if Mr Weir had specifically made the challenge to the witness when he referred to the diary, the Facebook entries, and the photograph. We cannot really understand why he would not have done that especially when he had cross-examined the appellant over four days. It must be obvious to prosecution counsel that if points are to be raised in the closing speech, they should have formed part of the evidence and to avoid confusion any points of significance should be specifically put to avoid grey areas and arguments being taken on appeal.

[90] We do not place much store by the fact that the witness said the entries were genuine. We think what the evidence really established was that these matters existed as a fact, and it was for the jury to determine what the motivation was for them. Again, there is a criticism here of defence counsel who asked two patently leading questions, albeit unchallenged.

[91] Whilst not perfect we are not convinced that prejudice has been occasioned in this case by the way in which the closing speech was made. The error is not of such significance as that which has arisen in other cases and explained in the passage from *Archbold* at para [87] above. For instance, this was not a case where witnesses were not cross-examined at all. In addition, it was obvious what case the prosecution was making. Mr Weir should have spelt it out in greater detail in questioning of the appellant. However, when the case is viewed in its entirety the irregularity does not call into question the safety of the conviction. Accordingly, we reject this ground of appeal.

Alleged irregularity in the written directions provided by the judge to the jury

[92] This ground of appeal was advanced utilising material that the judge provided to the jury by way of written directions which we have also considered.

[93] It is a feature of the modern criminal landscape that written directions are an appropriate tool used to assist juries in their deliberation in complex criminal cases. That said, written directions obviously cannot be prejudicial to the defence in any case.

[94] In this case there was a split charge. There is no issue about that. The judge clearly engaged with counsel to get from them views as to the bullet points that he might include in the written directions in relation to circumstantial evidence. As is apparent from the transcript there was a singular failing on the part of the defence to engage with this exercise. So much so that in a break in the charge when the judge addressed it again with Mr Hutton, the defence had not produced anything in writing. The judge, therefore, went ahead with setting out several bullet points that he thought were appropriate to go to the jury in relation to circumstantial evidence and by expressly stating that the defence obviously took issue with those.

[95] Subsequently, Mr Hutton produced a short document in relation to the defence case which the judge said that he would provide to the jury in his charge. We pause at this point to observe that the judge did faithfully set out orally to the jury all the points raised by the defence.

[96] Hence, the net point is that, due to the circumstances that arose which were not the fault of the trial judge and rather were the fault of the defence in not actually producing a document for the trial judge, the defence's points were not in the written document, whereas the strands of evidence that the prosecution wanted to rely on were. The question arises as to whether this process led to unacceptable prejudice in the minds of the jury.

[97] Mr Hutton relied on a line of authority in support of his argument which cautions against juries receiving a written account of ABE (Achieving Best Evidence) evidence. In some of these cases the court concludes that written materials to a jury can lead to a jury getting undue direction on the prosecution case and that that can have disproportionate weight. These are the cases of *R v R* [2017] EWCA Crim 1487; *R v Sardar* [2012] EWCA Crim 134; *R v Popescu* [2010] EWCA Crim 1230; *R v Hulme* [2007] 1 Cr App 26I. These authorities and some others referred to reflect a well-known concern that the jury may, in certain circumstances, give the written word undue or disproportionate weight if provided with written Crown evidence and the prosecution may obtain a procedural and evidential advantage.

[98] Of course, whether prejudice occurs depends on the circumstances of each case. We can well see where a judge gives an account from ABE interviews in writing to a jury that this written word may well influence the jury. To be clear, judges should not stray in any way into the area of the evidence called in a case through written directions.

[99] However, what happened in this case was that the judge provided several rather uncontroversial bullet points in the written directions to the jury. He was at the stage of commencing Part 2 of his charge. It seems to us that, in the circumstances, he was entitled to proceed in the way he did. It would have been better if the defence document had been provided earlier and any other bullet points included. However, the judge had to proceed on what he had. The bullet points he refers to in support of the prosecution case are all general and do not stray into a

lopsided summary of evidence. The context is also important as these bullet points were provided as part of the direction on how the jury should approach and use circumstantial evidence. It was therefore important that the jury were advised, in bullet point form, what were the actual pieces of circumstantial evidence the prosecution was relying on. In addition, the judge said that the defence case was that these strands of evidence were not accepted. The final added protection for the defence was that the judge said he would and did clearly indicate to the jury all of the defence points when he came to his charge. He was true to his word as the charge canvasses all the defence arguments.

[100] Therefore, whilst we think that in future, better attention should be given to the content of written directions in advance between counsel, in this case we cannot see that the exercise, which was by necessity not perfect, led to prejudice. We, therefore, dismiss this ground of appeal.

Alleged irregularity in the judge's charge as to intent to kill or cause grievous bodily harm

[101] We can deal with this argument in short compass as we consider this ground of appeal to be extremely weak. In summary, Mr Hutton contended the judge did not give a standard and legally sound direction on the need for intent to kill or cause grievous bodily harm as establishing a murder charge. In support of this Mr Hutton relied upon the fact that the judge did not give examples to the jury of the circumstances in which the appellant may have caused Ms Murray's death without intending to kill her or cause really serious harm.

[102] We do not consider that the judge was obliged to expand his charge as Mr Hutton suggests. We consider this a pedantic point of appeal brought after the event which has no bearing on the safety of the conviction. We also point out that the judge did leave the alternative charge of manslaughter to the jury. There is absolutely nothing to impugn from this direction and it is, in our view, a situation of over analysis post-conviction of a judge's charge. We dismiss this ground.

The alleged failure to leave a partial defence of loss of control

[103] This issue has recently been considered by the Court of Appeal in the case of *R v Joyce* [2023] NICA 67. Section 54 of the Coroners and Justice Act 2009 provides for a partial defence to murder of loss of control.

[104] It is apparent from the aforesaid legislation that the loss of control must have a qualifying trigger. Sufficient evidence must be adduced to raise the issue, that is that there is virtually sufficient evidence that the killing resulted from the defendant's loss of control. Section 54(6) provides that sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced which, in the opinion of the judge, the jury properly directed could reasonably conclude that the defence might apply. Section 55 of the Act considers qualifying triggers, the

particular point at issue in this case which arises flows from section 55(6)(c) where it is said:

> "(c) The fact that a thing done or said constituted sexual infidelity is to be disregarded."

[105] Putting aside the legislative requirements for a moment, a striking fact which bears on this aspect of the appeal is that the judge heard comprehensive submissions from counsel on this issue. During the comprehensive submissions counsel for the defence specifically said that it would be inappropriate to leave the defence to the jury. Now a volte face has occurred and after the event Mr Hutton maintains that the defence should have been left to the jury.

[106] We note that at trial Mr Weir made a submission that the defence should have been left to the jury before the trial judge. It is highly unsatisfactory that the defence simply change tack after the event on an issue such as this. However, the issue must be adjudicated considering the overarching obligation on the judge to decide one way or the other whether the defence should be left.

[107] We have considered the judge's ruling on this issue. Having done so we are of the view that he was quite correct and has not strayed outside his area of judgment in deciding that that there was not sufficient evidence to leave this defence to the jury, ostensibly for the reasons given by Mr Pownall to the judge. In our view, the judge's view that there was insufficient evidence was valid, supported as it was by the defence. This was an entirely understandable approach in a case where the defendant denied any involvement at all in this case, and where sexual infidelity was in play.

[108] Therefore, we do not consider that the judge erred in his assessment of this issue. Effectively, we consider what the defence is trying to do with this ground of appeal is reinvent the wheel post-conviction to import a further aspect of the case which was not established in evidence, and which does not have an obvious evidential basis upon which the trial judge should have included it. We, therefore, reject this ground of appeal.

Overall conclusion

[109] For the reasons given, we do not find any strength in any of the arguments raised on appeal. The *Galbraith* ground does not convince us. In addition, some of the alleged material irregularities were not irregularities at all and where irregularities did arise, they were corrected during the trial process or were not of such a material nature as to cause us to question the safety of the conviction in any respect.

[110] Finally, we point out that the judge charged the jury at the end of this long trial after extensive engagement with counsel. He did so with scrupulous fairness

having engaged with counsel throughout. His charge was of high quality. The judge fairly dealt with all the complicated evidence in this case in a manner which left the fact-finding function to the jury, which is as it should be. Accordingly, we refuse leave on all grounds and dismiss this appeal.