Neutral Citation Number: [2019] EWCA Crim 2145

Case No: 2019 00266 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
HIS HONOUR JUDGE BEDDOE
T2014 7625

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5.12.2019

Before:

Lord Justice Simon
Mr Justice Jacobs
and
Her Honour Judge Munro QC
(sitting as a judge of the Court of Appeal, Criminal Division)

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Between:

Nicholas Reynolds	**Appellant**
and	
Regina	**Respondent**

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Mr David Spens QC and **Mr Philp Evans QC** (instructed by **Corker Binning**) for the Appellant
Mr Martin Evans QC and **Ms Janet Weeks** (instructed by **Serious Fraud Office**) for the Respondent

Hearing dates: 21 and 22 November 2019

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Approved Judgment

Lord Justice Simon:

Introduction

1. On 19 December 2018 in the Crown Court at Southwark the appellant was convicted of a single charge of conspiracy to corrupt, contrary to s.1 of the Criminal Law Act 1977. He appeals against the conviction with the leave of the Single Judge.

2. The conviction was at a retrial before HHJ Beddoe and a jury, following an earlier trial at which a jury were unable to agree.

3. On 21 December, the appellant was sentenced to a term of 54 months' imprisonment.

4. The particular of the offence charged were that the appellant had, between 4 January 2002 and 31 March 2011, conspired with Johannes Venskus, Anders Wikström and others to give, or agree to make, corrupt payments and or other consideration to officials or other agents of AB Lietuvos Electriné and/or public officials and other agents of the Government of Lithuania as inducements or rewards for showing favour to companies within the Alstom Power group of companies in relation to the award of performance of contracts in Lithuania.

5. The two named co-conspirators had pleaded guilty to the charge before the retrial: Venskus before the first jury were sworn and Wikström before the retrial.

Background

6. The factual background to the issues raised on the appeal is complex and hotly disputed. However, in our view, only a limited amount of factual context is necessary to enable this Court fairly to decide the relevant issues.

7. In 1999, Lithuania agreed to timetables for the permanent decommissioning of high-risk nuclear power plants so as to meet the requirements in EU Accession Partnership Agreements. As part of the scheme the Lithuania Power Plant ('LPP'), located in the town of Elektrenai, had to be upgraded.

8. In June 2004, the European Bank of Reconstruction and Development invited tenders for contracts to upgrade and refit LPP. Among these were two contracts which were to address the requirement that the plant meet the required nitrogen oxide emission levels (Low NOx) and the necessary air pollution control systems to treat flue gas emissions (Flue Gas Desulphurisation, or 'FGD'). These contracts were won by companies within an international group of companies (the Alstom group): an English company, Alstom Power Limited ('APL'), and a Swedish company Alstom Power Sweden ('APS'). During the sales phase these two companies worked together to ensure that their tenders were successful. Once the contracts were secured, they were performed separately.

9. APL's boiler refit unit was based in Derby. From March 2001 to July 2003, the appellant was Head of Business Development at APL. In July 2003, he became Manager of Sales & Tendering for Performance Projects (Europe); and in March 2006, he was appointed acting General Manager of APL.

10. Venskus was a Lithuanian national. Until his retirement in January 2006, he was employed by APL, and spent part of his time in Derby and part of his time in Lithuania, until he became a self-employed consultant retained by APL and APS in January 2006. The nature of his role within APL was one of the issues in the trial; but he was clearly involved in the arrangements to use a small Lithuanian company, UAB Vilmetrona ('Vilmetrona'), as the conduit for the bribes. Vilmetrona had previously been used by APL as an electrical subcontractor in a previous project. The director and controlling shareholder of Vilmetrona was Evaldas Cibulskas, who spoke almost no English.

11. APS was part of 'Environmental Control Systems'. Its business unit was in Växjö, Sweden and Anders Wikström was employed as its sales director.

12. It was common ground at the appellant's trial that the award of the contracts was tainted by corruption of senior officials at the power station and politicians, and, in particular, that unlawful inducements had been made by APS and APL in order to ensure that the tenders would be successful. The bribes were agreed at the pre-tender and tender stages but were to be paid by APL and APS only after the contracts were awarded to them, using money paid by the power station to the two companies under the respective contracts. As part of the conspiracy, records were falsified so as to ensure that checks designed to prevent bribery were avoided.

13. The bribes were disguised in three ways: first, by paying for substantial building works on the Catholic church in Eleketrenai in 2003/4; second by paying false invoices rendered by Vilmetrona as the 'consultant' appointed by APS and APL on the Low NOx and FGD projects; and third, via a sub-contractor, UAB Kruonio HAE Stayyba ('Kruonio'), which was appointed by APS on the FGD contract and, with its connivance, inflated the price it charged so as to pay bribes.

14. The trial was mainly concerned with payments made to Vilmetrona by and on behalf of APL in order to secure the Low NOx contract.

15. The appellant's case was that the conspiracy to bribe was centred on APS among those who worked for APS, including Wikström; and that the appellant was not involved or made aware of the corrupt payments.

16. The prosecution case was that the appellant was aware of what was going on and was a party to the conspiracy to make the corrupt payments via Vilmetrona.

17. A number of matters were agreed between the prosecution and the defence. (1) APL paid £475,000 in bribes within the indictment period via Vilmetrona (§152 of the Agreed Facts). (2) The documents provided by Vilmetrona in support of its invoices on the Low NOx contracts ('proof of services') were false (§150). (3) Although Vilmetrona was notionally engaged to provide site support and other consultancy services on the Low NOx and FGD projects under Consultancy Agreements, in fact Vilmetrona provided no consultancy services at all (§148). Its involvement was to provide a conduit for corrupt payments. (4) The prosecution was not aware of any evidence that the appellant received any unexplained or otherwise suspicious payments (§156). (5) He had made available to the Serious Fraud Office all his own and his wife's bank statements and other financial records.

The trial

18. The case against the appellant was circumstantial; and most of the evidence was not in dispute. The substantial amount of documentation in the case was presented to the jury by electronic means. The jury had electronic tablets, loaded with a timeline of relevant documents and events, which enabled them to access 648 documents (plus a further 40 documents added in the course of the trial). Each row in the timeline identified the date and local time of the document or event, gave a brief 'event description' and set out material extracts from the document or described an event. It also provided electronic links both to the extract and the complete document. In addition, there were screens set up in Court. This provided a highly efficient way of adducing the evidence, with witnesses, advocates and the Judge being able to refer to a document which was almost instantly accessible to the jury. Thus, simply by way of example, where an email was forwarded, the particular row in the timeline showed the date, time, recipient of the forwarded email and additional comments, in a way which would have been very much less easy to follow in hard copy since it would have been necessary to scroll from the bottom of a hardcopy page to the top. We were told and accept that the jury were fully able to use the tablets in the way intended.

19. In addition to this, there was a hardcopy jury bundle which contained a 24-page (165 paragraphs) schedule of Agreed Facts and 48 pages of graphics.

20. It was the prosecution case that the appellant had been active in trying to promote a man named Stasys Mikelis as a local agent to provide site support services. Mikelis was a politician who appeared to have been involved in corruption. When the appointment of Mikelis failed, the appellant became involved in promoting Vilmetrona to provide site support services, justified by a consultancy agreement. As in the case of Mikelis, many key senior personnel at APL Derby were unaware of any support services provided by Vilmetrona such as to justify the large payments that were in fact made to the company by APL.

21. It was also said that the appellant subsequently assisted in providing false 'proof of services' documents in support of payments to Vilmetrona.

22. The defence case, in summary, was that the appellant had relied upon and trusted Venskus; and that Wikström and others concealed the truth from him. Whilst there was clear and well-documented evidence of the involvement of these and others in the corrupt payments, there was none in relation to the appellant. It was significant, for example, that the appellant was not at a meeting on 8 December 2004 [timeline row no.266] between Wikström, Venskus and Cibulskas when the amount of bribes was discussed; and nor had he been copied in to the schedule of bribes subsequently sent by Wikström to Venskus on 13 December 2004 [timeline row no.271].

23. The appellant's case was therefore that he had been unaware of any need for bribery or the covert arrangements to conceal it. He had been duped by Wikstrom and Venskus for 7 years and as a result had unwittingly helped to set up the arrangements.

24. These facts provided the framework for the primary issues at trial.

The appeal

25. There are three grounds of appeal. Ground 1 is a complaint about the lack of balance in the summing-up which contains a number of individual criticisms. Ground 2 is a challenge to part of the summing-up where the Judge dealt with how the jury should treat the appellant's evidence. Ground 3 is a challenge to the Judge's ruling refusing to admit in evidence part of what Venskus had said when interviewed by the Serious Fraud Office in 2013. We take these points in chronological order.

Ground 3

The application

26. At the start of the trial an application was made to place passages in Venskus's interview before the jury. These were allegations of 'misconduct' by personnel at APL (Derby). First, that Donna Wright (the appellant's secretary) had been involved in the falsification of proofs of service. Second, that Paul Stones (who had taken over as APL's project manager in Lithuania) had asked Venskus to rewrite or amend minutes of meetings. In essence, Venskus was arguably alleging that Stones had instigated the falsification of minutes of meetings subsequently used as false proofs of Vilmetrona's services. Third, that Martin Jones (an APL engineer) had made similar requests of Venskus.

27. The defence application was that, since Donna Wright, Paul Stones and Martin Jones were prosecution witnesses whose evidence was put before the jury on the basis that it was true, it must follow that the prosecution must accept that what Venskus said in interview was untrue. Since Venskus was prepared to lie about these three witnesses in order to advance his own position and, since the appellant's case was that he had been the innocent victim of the lies and deceptions of Venskus and others carried out for their own dishonest purposes, it was essential that he was able to show the extent of Venskus's dishonesty in every instance that he could. The application was not in relation to hearsay evidence because it was not intended to rely on Venskus's statements for their truth, but rather to prove that he was a man of such dishonesty that he was prepared to implicate those with whom he worked and whom the prosecution put forward as honest witnesses in order to advance his own position.

The Judge's ruling

28. The Judge was referred to the arguments in the transcripts of the first trial and of the ruling that he had made following a similar argument. He said that he understood the nature of the argument, did not wish to rehear the argument and informed the parties that his earlier ruling would stand as his reasons for rejecting the defence application in the second trial. This is the explanation for his reference to evidence, which had not at that stage been given in the second trial. It is common ground that the ruling is to be treated as his reasons for dismissing the application in the second trial and no objection is taken as to the process that was adopted.

29. The Judge noted that in interview Venskus said that the three individuals had been complicit in the production of materials providing proofs of the services provided by Vilmetrona. None of these witnesses gave evidence suggesting that they were complicit in the production of such material; and in response to general questions, that if anyone suggested that they had, they had denied it. However, the Judge noted that one of the witnesses, Donna Wright, had acknowledged that she had tippexed out of

the transmission data headers in certain faxes which were used as part of the material providing proof of the services. The Judge also noted that the appellant's case was that, although he was involved in the production of material to prove that Vilmetrona had provided services, he had done so unaware that the services had not actually been provided. His case was that he was the victim of Venskus's deceitful assurances that Vilmetrona had in fact provided the services.

30. The Judge accepted that the statements were not hearsay.

31. He noted that the assessment of the credibility of a witness was for the jury in every case. To admit the evidence from Venskus would be to introduce a collateral issue, which the jury might or might not be able to resolve, particularly in the absence of hearing from Venskus; but which in any event it would be unnecessary for them to do. In these circumstances, the evidence of what Venskus had said in interview was irrelevant. The jury knew that Venskus had pleaded guilty to the conspiracy; and they had uncontradicted material that showed that over a period of years he was party to the giving of bribes and to creating 'a raft of documents' to conceal his misconduct. The fact that he was deceitful and dishonest might or might not support the proposition that he had deceived the appellant. However, to the extent that he told lies in interview about third parties (if he did), it did not provide support for the proposition that he had deceived the appellant.

The argument on appeal

32. Mr Philip Evans QC submitted that the extracts from Venskus's interview should have been admitted. Although one of the reasons that the Judge concluded the evidence was irrelevant was that the jury would not be able to conclude that the allegations were untrue, this only applied to the allegations against Donna Wright (who had tippexed out the headers). It could not have applied to Paul Stones or Martin Jones. The prosecution called these witnesses as witnesses of truth. There was never any suggestion from the prosecution that any of these witnesses (and certainly not Messrs Stones and Jones) ever conducted themselves in the manner suggested by Venskus. It would have been contrary to its case. In fact, during the second trial in 2018, the prosecution had confirmed to Martin Jones whilst he was in the witness box that it was making no allegation of wrongdoing against him, let alone alleging that he had had a hand in falsifying proofs of service documents, as Venskus had asserted in interview.

33. The prosecution must therefore have accepted that Venskus's assertions in relation to the witnesses were lies to further his own position and with no regard for people he knew well and with whom he had worked for years. The evidence was clearly relevant to show the type of person Venskus was. Although, the Judge said there was other material which demonstrated his dishonesty (his plea and the unchallenged evidence of his close involvement in the payment of bribes), that evidence was of a different nature and did not assist the defence in showing how Venskus would or might have deceived the appellant. In contrast, the material that the defence wished to put before the jury was probative of this issue; and was capable of assisting them.

Conclusion on ground 3

34. Hearsay evidence may be admitted under s.114(1) of the Criminal Justice Act 2003 only where it is relied on as 'evidence of any matter stated': in other words, where it is sought to establish the truth of the matter stated. In the present case, the defence was relying on what Venskus had said in interview, not to establish the truth of what he said, but to demonstrate the untruth of what he said: that he was prepared to lie about the involvement of others and therefore that he had lied to and misled the appellant about Mikelis and Vilmetrona. Chapter 2 of Part 11 of the Criminal Justice Act 2003 had no direct application.

35. On this basis, the Judge was right to approach the admission of the evidence on the basis that he did: was it relevant evidence? There was no dispute that the Judge was entitled to exclude evidence which was irrelevant. Similarly, evidence of 'marginal relevance may be excluded on the grounds that it would lead to a multiplicity of subsidiary issues, involving the court in a protracted investigation and distracting it from the main issue', see Blackstone's Criminal Practice, §F.19. The question of relevance or marginal relevance involved a consideration of its probative value of the evidence in the context of the case as a whole. Viewed in this way, it is difficult to see how the lies of someone who is not a witness about those who were witnesses could have assisted the jury in deciding whether the appellant was aware of, and joined, the conspiracy to bribe. In answering that question about the appellant, they would have gained no assistance from answering the question, whether or not allegations made by Venskus about the three witnesses were true. The Judge was correct in stating that the evidence (as to alleged lies told about the three witnesses) did not establish more than what the jury already knew: that Venskus was a deceitful man who had been a party, over many years, to the giving of bribes and the creation of a large number of documents intended to conceal such conduct. The fact that Venskus was deceptive was therefore clearly established. The question for the jury was whether the appellant was one of those who was deceived. On that question, the fact that Venskus told (alleged) lies to the SFO in interview about three other individuals was of no probative value. The Judge was fully entitled to the view that such evidence had the potential to raise a tangential and distracting issue: whether these prosecution witnesses had in fact misconducted themselves as Venskus has said.

36. What Venskus said about Wright, Jones and Stones in his interviews, even if it had been clear, was an irrelevant distraction, and the basis for the application was unsound. We add the qualification 'even if clear' because having considered the passages to which we were referred, we consider that it is by no means clear that Venskus was making the allegations against the witnesses in a way which permitted only one view of what he was saying. If the jury were able properly to address the question of whether Venskus had lied in interview about the three witnesses, they would have needed to see the whole of the relevant passages of the interview, and then try to work out what exactly Venskus was saying about them; and to do so in circumstances where Venskus was not himself a witness. This consideration highlights the distracting nature of the evidence which the defence sought to introduce.

37. Although, the grounds of appeal disavow the intent, we also consider that the effect of the admission of the evidence would have been potentially to undermine the evidence of these witnesses notwithstanding that the statements of Venskus in interview were not being tendered as evidence as to the truth of their contents, and that the defence

were contending that Venskus was a liar and that the contents of his statements were lies. A further difficulty with the introduction of this evidence was that it would have been necessary to avoid giving the jury the misleading impression that these three witnesses were the only people that Venskus had sought (arguably) to implicate. In fact, as the prosecution correctly pointed out, the passage relied on in Vesnkus's evidence concerning Donna Wright also sought to implicate the appellant.

38. In these circumstances it is unnecessary to consider the further argument which found favour with the Judge: that the mere fact that the prosecution did not contend that Wright, Jones and Stones were involved in the production of false proofs of services did not, of itself mean that Venskus was telling lies, that this would be a matter for the jury to determine, and that unless they concluded that he was lying, there was nothing in the point.

Ground 1

39. This ground of appeal is directed to what is said to be an imbalance in the summing-up. It contained 13 separate matters of complaint.

40. Before considering this ground, it is convenient to set out a number of points about the trial.

41. It began on 22 October 2018 and the evidence concluded on Friday 7 December 2018. The Judge summed-up the law on 10 December; and prosecution and defence closing speeches were made on 10 and 11 December. In his summing-up of the law, the Judge reminded the jury of the considerable amount of documentary material: the timeline (with exhibits) loaded on their tablets, printed graphics, Agreed Facts and interviews. He made clear prior to speeches that, when he came to review the evidence, it would be a summary of the evidence and would not be a repetition of all that they had heard. He emphasised the importance of the jury making up their own minds about the evidence. So that if in the second part of the summing-up he commented on a piece of evidence or posed a question, they should not simply accept the comment or consider the question relevant because it came from him, they should think about it independently:

> You are free to agree or disagree throughout this exercise and it must be exactly always throughout this exercise because it is your view and yours alone that counts.

42. He reminded the jury that the case was circumstantial and that the defence contended that the jury could not reasonably be sure of the defendant's guilt from such evidence: that there were too many gaps and that it was rebutted by the appellant's evidence, which there was no good reason to dismiss. By reference to involvement in the conspiracy, the Judge reminded the jury of the defence case that there were 'some very sensitive emails' that revealed that Wikström and Venskus were involved in the conspiracy, but which were not copied to the appellant, adding later in relation to a particular communication [timeline row no.217]:

> In my example he wasn't copied in to it and that's a consideration if you find other examples to which this direction

> might apply. And so, he wasn't in a position to respond, challenge or disagree with it at the time it was made.

43. The Judge also made the point that the communications on which the prosecution relied might be ambiguous or incomplete, or come from someone whom the appellant had not had an opportunity to cross-examine.

44. In relation to his interviews with Mr Byrne of the Serious Fraud Office in 2011 and 2013, of which the jury had copies, the Judge pointed out that there was no complaint that he had failed to mention any matter at the time that he had later relied on at trial, adding:

> The more consistent a witness is in the accounts he gives you of an event or events, or in explaining something he did or did not do, the more truthful he may be and vice versa.'

45. The Judge gave a full and appropriate good character direction, drawing specific attention to witnesses who had spoken favourably of his personal qualities: his competence and his honesty. He also pointed out that the appellant had answered questions in interview and given evidence at the trial, and that his good character was to be taken into account in his favour when deciding whether to believe his evidence, as well as when considering whether it was likely that he would have committed the offence charged. The Judge also directed the jury on delay, on its effect on memories and whether in these circumstances the passage of time may have put the appellant at a serious disadvantage.

46. We start with these matters because, apart from ground 2, which arises from what was said in the summing-up of the facts, no complaint is made as to the directions of law.

47. We turn then to further points which are relevant to ground 1.

48. In the light of the Judge's indication that his summing-up of the facts would be relatively short, Mr Spens QC was able to begin his closing speech with an excuse (if excuse were necessary) about the length of his speech. He added:

> So please feel free to note what you will of what I have to say because it may be you won't hear it again … I have unsurprisingly got a lot to say and so request, please be generous with your patience'.

He began by raising 27 items in the evidence which, he said, pointed to the appellant's innocence. We will return to this part of his closing speech later in this judgment.

49. Following the closing speeches, the Judge summed-up the facts on Wednesday 12 December. He reminded the jury of what he had said earlier: that what he thought of the case was irrelevant and that it was a matter for them. He addressed both the prosecution case and the appellant's response chronologically and by reference to some, but by no means all, of the timeline material.

The purpose and nature of the summing-up

50. Before addressing the appellant's criticisms of the summing-up, we set out some general observations on the purpose and nature of the summing-up of facts. It serves two purposes: first, to the extent necessary, it reminds the jury of the salient facts and the prosecution and defence cases in relation to those facts; and secondly, since a jury's verdict is not reasoned, it provides an assurance that the verdict is founded on the facts described in the summing-up, albeit that (as discussed below) it is not necessary for a summing-up fully to rehearse all the facts and arguments.

51. It is unnecessary in the present case to set out a general review of the scope of a judge's task. However, we would note the following points, which are material to the present appeal.

52. First, counsel's closing speeches are no substitute for a judge's impartial review of the facts. A review of the facts cannot be left to counsel's closing speeches to the jury, see *Amado-Taylor* [2000] 2 Cr App R 189 at 191D, a case in which the judge did not sum-up the facts at all.

53. On the other hand, the summing-up need not rehearse all the evidence and arguments. As Lord Morris of Borth-y-Gest said in *McGreevy v. DPP* (1973) HL (NI) 2 Cr App R 424 at 431:

> The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also on the view formed by a Judge as to the form and style that will be fair and reasonable and helpful.

54. What is helpful will depend on the case. A recitation of all the evidence and all the points made on each side is unlikely to be helpful; and brevity and a close focus on the issues is to be regarded as a virtue and not a vice, see Rose LJ in *Farr* (The Times, December 10, 1998) cited in *Amado-Taylor* at 192A. Since a summing-up of the evidence is by its nature a summary, it is bound to be selective; and providing the salient points are covered and a proper balance is kept between the case for the prosecution and the defence, this Court will not be lightly drawn into criticisms on points of detail.

55. Second, a succinct and concise summing-up is particularly important in a long and complex trial, so as to assist the jury in a rational consideration of the evidence, see *D, Heppenstall & Potter* [2007] EWCA Crim 2485:

> 33. One principle is, however, of cardinal importance in assessing the fairness of the trial process. A summing-up must accurately direct the jury as to the issues of fact which it must determine (see *R v Lawrence* [1982] AC 510 at 519). The summing-up must:
>
> > fairly state and analyse the case for both sides. Justice moreover requires that [the judge] assists the jury to reach a logical and reasoned conclusion on the evidence. (See per Simon Brown LJ in *R v Nelson* [1997] Crim.L.R. 234

> The directions given by the judge to the jury should provide the jury with the basis for reaching a rational conclusion. The longer the case the more important is a short and careful analysis of the issues.

56. In *Amado-Taylor* (relied on by Mr Spens), the Court of Appeal noted at p.124F that, generally speaking, the longer a trial lasts the greater will be the jury's need for assistance in relation to the evidence, since many jurors do not have 'the experience, ability or opportunity of a judge to note significant evidence and to cross reference evidence from different sources relating to the same issue.' However, this point inevitably carries less weight in a case in which much of the evidence is available to a jury electronically. In such cases, although there may be a need to cross reference evidence from different sources, for example where a defendant has a particular point to make, we would regard it as a wholly pointless exercise for a judge to recount the contents of a factual timeline or (in a different context) a schedule relating to the use of mobile phones, which the jury have in front of them, which has been the basis on which the evidence has been deployed and which they will have with them in retirement. In this context it may be sensible to recognise that the efficient use of digital material during the trial may result in longer jury retirement, see for example, *Woodward and others* [2019] EWCA Crim 1002 at [80], and make case management decisions accordingly.

57. The indication that a long complex case need not be summed-up in a long and complex way is not new. In *Charles* (1979) 68 Cr App R 334 at 338-9, this Court (Lawton LJ) addressed the issues that may arise from a lengthy summing-up following the order in which the evidence was given ('a notebook summing-up'):

> The method of summing up in this kind of case, particularly the reading out of the judge's note of all the evidence is, in our judgment, unsatisfactory. It is unsatisfactory for a number of reasons. In plain language it must bore the jury to sleep; and that is what happened in this case.

Later, at p.341 the Court added this:

> It is pertinent to point out that in *Bates* (1952) 36 Cr.App R 175, which was one of the longest and most complicated commercial frauds which the Central Criminal Court had to deal with in that decade, and which lasted 18 long working days, the trial judge, Donovan J, summed up the case in one afternoon. His summing up was described … on the hearing of the appeal … as a masterpiece. That is a standard which judges should aim at. They should not indulge in long-winded summings-up which are more likely to confuse than help a jury.

58. The dangers of boring a jury rather than assisting them must have occurred at some point to any judge who has sat in the Crown Court; but it is a danger that it is particularly important to avoid in a case which is based largely on documents with which the jury are familiar, on which they have already heard closing submissions and which they will consider further after the summing-up.

59. Third, and following from the above, it is not usually necessary to remind the jury of points made in counsel's speech, unless a defendant has not answered questions in interview or has not given evidence, see for example, *Lunkulu* [2015] EWCA Crim 1350 at [43]:

> The judge emphasised a number of times that the facts were for the jury. He instructed them to ignore any comments on his part if they did not agree with them. He did not refer, and he was not required to refer, to each and every point made by counsel for the prosecution or the accused.

60. See also in this context, CPD Part 26K.21:

> it is not necessary for the judge to recount all relevant evidence or to rehearse all significant points raised by the parties.

61. Fourth, and turning from this Court's approach to balance in summing-up to particular criticisms that may be made of a summing-up, we would add that if no complaint or suggestion is made at the time of a summing-up it may be regarded on an appeal as relevant to the validity of any later complaint. A trial in the Crown Court is not to be regarded as a dress rehearsal for a challenge to a conviction in the Court of Appeal. If a point is material, it should be taken at a time and place when it can be dealt with most conveniently, by a judge who has heard the evidence and is familiar with the nature of the issues at trial, and so that the jury can consider them if necessary. The disadvantages of this Court in dealing with such matters need hardly be stated.

62. We note that the editors of Blackstone's Criminal Practice 2020 at D18.23, state:

> Beyond the duties described at D.18.14 (assisting the court) defence counsel has traditionally been able to remain silent, if he considered that to be in the best interests of his client.

63. The case of *Curtin* (1996), as well as some older authorities are cited in support of this proposition. In the summary of the judgment in *Curtin* (Rose LJ) [1996] Crim L R 831, the point is expressed in the form of a headnote:

> (2) Giving leave, the full court adverted to the question whether or not there was a duty, where a judge did not adequately deal with the defence, on defence counsel to draw this to his attention. It was plain from *Cocks* 63 Cr App R 79 that there was no such duty. The experience of the court was that had been so for many years.

64. The reference to the case of *Cocks* is to a passage in the judgment of this Court (James LJ), which did not affect the disposal of the appeal, but where the Court (at p.82) said:

> … defending counsel owes a duty to his client and it is not his duty to correct the judge if he had got it wrong.

65. Despite these observations, it seems clear that the obligations of defence were regarded as extending to pointing out errors made by a judge in summarising the

facts. In *Charles* (above) at p.338, this Court observed that defence counsel 'have a duty to correct any misstatement of fact'.

66. However, in our view, whatever the historic approach might have been, the present position should be understood differently. First, it would be inconsistent with Part 1 of the Criminal Procedure Rules, the duty of the parties to conduct the case in accordance with the Overriding Objective, for either prosecuting or defence counsel not to raise with the judge what appears to be an error in the summing-up, whether of law or fact. Second, there is nothing necessarily inconsistent between defence counsel's duty to a client and acting in that interest so as to correct what may be mistakes in the summing-up which may result in a conviction. The client's interests are unlikely to be best served by relying on the success of an appeal against conviction and the possibility of a retrial. In these circumstances, if counsel remains silent, this Court is entitled to proceed on the basis that what was said in a summing-up was not regarded as an error or at least a material error at the time. We would add that subsequent trawls through the transcript of a summing-up searching for infelicities of expression is not an exercise which is likely to prove productive of a successful appeal.

67. Nevertheless, we would accept that there may be difficulties in raising a point of objection after a matter has been summed-up by a judge, and that an accumulation of complaints (none of which in isolation might be regarded as material) may properly form the basis of a challenge to the safety of a conviction.

68. Fifth, it is clear that in general, and as a matter of fairness, if a judge is considering introducing an issue that has not been canvassed in the course of a trial, he or she should at least warn a defence advocate before final speeches, so that the correctness of the proposed course can be discussed and an opportunity afforded to the defence to deal with it, see *Evans (DJ)* (1990) 91 Cr App R 173.

69. Finally, on the propriety of judicial comment. There is a potential tension between the importance of a judge not usurping the jury's function and a judge's legitimate expression of a view, even a strong view in a proper case, of the evidence. There can be no all-embracing rule, other than that a judge's personal views must be considered carefully before being expressed; and, if they constitute the appearance of advocacy on behalf of the prosecution, they will not necessarily be regarded as appropriate simply because the jury had been told that they are not bound to accept the judge's views or by the use of the timeless refrain, 'it is entirely a matter for you.'

The particular matters of complaint in ground 1

70. Not all of the sub-paragraphs in ground 1 were pursued; and we address those that remained in the order in which they were advanced orally.

Sub-paragraph (xii) of ground 1 - the failure to sum-up the 27 items relied on by the Defence

71. The appellant gave evidence in chief for over 3 days (the 28, 29, 30 November and part of the 4 December 2018). As we have noted, in his closing speech to the jury on 11 December, Mr Spens identified 'some 27 items in the evidence which may suggest to you that Mr Reynolds is innocent.' This part of the complaint is that, although the

Judge referred to some of the timeline entries or features of the case that suggested that the appellant was not aware of, or involved in, the conspiracy to pay bribes, he did not refer to them all. Mr Spens accepted that a trial Judge is not required to repeat the arguments advanced by the defence in a summing-up; but he argued that the Judge had failed sufficiently to identify to the jury the full breadth of the appellant's defence.

72. We note that this is not a case where it is said that the Judge failed to set out the nature of the defence: he plainly did. The defence was that throughout the period covered by the indictment he remained unaware of the corrupt payments made by Venskus, Wikström and others, and did not participate in the conspiracy. This was a point made by the Judge in his reference to 'some very sensitive emails', see [42] above.

73. Although we were taken to the 27 items of evidence which were summarised in a document prepared for the purposes of the appeal and although we heard extensive argument from Mr Spens as to their significance, we are wholly unpersuaded that the Judge was bound to repeat in summing-up the same points which had been made the previous day by Mr Spens or that his failure to do so resulted in a 'lack of balance'. Mr Spens had acknowledged in his closing speech (see [48] above) that the jury might not hear the points made again; and he used that possibility to require their particular attention to the points he was going to make in relation to the 27 documents and events.

Sub-paragraph (i) of ground 1 - 'hindsight.'

74. It was an agreed fact that Vilmetrona provided no consultancy services on either the Low NOx or the FGD contracts; that the 'proof of services' documents provided to support the Vilmetrona invoices on the Low NOx and FGD contracts were false; and that a total of €5.3m was paid in bribes on the Low NOx and FGD projects (§152 of the Agreed Facts).

75. The appellant had agreed at the start of his cross-examination that substantial bribes had been promised and paid by APL, and that the only real purpose of Vilmetrona was for the payment of bribes to employees of LPP and local politicians. He knew that now. He did not know it at the time. The prosecution case was that he knew it at the time.

76. In his summing-up of the facts, the Judge told the jury that they should not look at the issues they had to decide with the benefit of hindsight. This was plainly right. Doubtless it was a point made by the defence. Although the direction, with a homely example, might have been more clearly expressed, in its essence it was a warning to the jury to look at the facts objectively and as they would have appeared at the time.

Sub-paragraph (ii) of ground 1 - 'the conflation of APL and APS'

77. Mr Spens pointed out that another significant thread of the appellant's case, expressed in both the opening and closing speeches, was the importance of not conflating but rather distinguishing between the activities of APL and APS. APL was a UK entity for which the appellant worked; and APS was a Swedish entity for which he did not work. The defence case was that the conspiracy was controlled by the personnel at

APS, and that the evidence implicating the employees of APL and APS was significantly different. The point made under this heading is that the Judge blurred the line between the two when dealing with (a) Markus Schneider, (b) an employee of APS in Sweden, Eric Nicolaysen and (c) the appellant's account in interview about possible rivals bidding for the Low NOx and FGD contracts.

78. We have considered these complaints and find no proper basis for the criticisms.

79. Schneider was a senior compliance officer of Alstom based in Switzerland. It was the prosecution case that Schneider coached Wikström and the appellant as to how to manufacture false 'proofs of service.' It relied on the document dated 10 March 2008 [timeline row no.518].

80. The Judge had described Nicolaysen as 'more or less' the appellant's equivalent in Sweden. There was an argument before us as to whether Nicolaysen in fact held more or less senior posts in Sweden at any particular time. The evidence seemed to support both the prosecution and the defence contention depending on the time one is looking at. However, and whichever way one looks at it, whether Nicolaysen was 'more or less' the appellant's equivalent was of minimal importance.

81. The Judge had referred to the appellant identifying two potential rivals for the contracts and why they were unlikely to succeed in view of the considerable expertise that APL and APS had in their respective fields of Low NOx and FGD. The complaint is that the appellant had given evidence only of his knowledge of APL's Low NOx competitors. That may be so, and Mr Martin Evans QC accepts that he did not cross-examine the appellant on the point. However, he points out that there was an email from the appellant dated 6 July 2004 [timeline row no.168] in relation to the recruitment of Mikelis and the need to win both the Low NOx and FGD packages '… and circa €150m worth of business.' This was thought to be the combined value of the two contracts. In any event, the Judge appears to have been referring to what the appellant had said in interview. This is not a point of substance, let alone an observation that undermined the appellant's case.

Sub-paragraph (iii) of ground 1 – 'motive'

82. The Judge observed in his summing-up:

> Whether or not it is a reasonable observation that if a business doesn't prosper there is the risk of redundancies and/or divisions being closed down or indeed the whole enterprise folding is obviously a matter for you.

83. The complaint is that, since the prosecution was bound to accept that there had been no evidence of any financial benefit to the appellant, the Judge raised an issue about a possible motive for conspiring to pay bribes in Lithuania that was never advanced by the prosecution and inconsistent with the concession that the LPP contract was not essential to APL's survival. The Judge, it said, also failed to remind the jury of one of the prosecution witness's evidence that the Low NOx project at LPP was not the 'be all and end all' for the future of APL.

84. We do not regard this as a matter of material complaint. The observation quoted above was preceded by this:

> 'The defendant said, can be seen in emails saying, that winning the … Low NOx contract was critical. But he was to say to you not overcritical, not least because there were other contracts in the United Kingdom and three were obtained, Fiddlers Ferry was one, in 2005, and because it was a big multinational company there was inter-divisional support, he said.

85. The prosecution concession was in the following terms:

> The Crown does not contend that winning of the contract was essential to APL's future survival, but does contend it was very important to the Derby unit and was described as critical by Mr Reynolds, [timeline] row [no.]303.

86. It is clear that the prosecution case was that winning the Low NOx project was very important to APL. This was supported by the evidence. Timeline row no.83 was a note of a sales meeting on 10 July 2003, in which the appellant 'expressed extreme concern at the lack of orders intake and said it was vitally important for everyone to do everything possible to turn their enquiries into orders.' The Judge referred to this note after his observation to which objection is taken. Timeline row no.303 was an email dated 12 January 2005, in which the appellant passed on information that APL was the only company to bid for the Low NOx contract:

> Let's hope that EBRD and SwedPower are happy to allow a negotiated contract. Let's put our efforts into making sure that we carry on this good work and bring this critical order in [emphasis added].

87. In the light of these matters we do not regard the appellant's complaint about this matter as justified. It was a possible, if not obvious, reason why winning the Low NOx contract was important to APL.

Sub-paragraph (v) of Ground 1 - change in the arrangement with Mikelis

88. Before Mikelis was appointed as agent for the Low NOx contract, he had received payments from APL and APS through a Derby Building Society account. The appellant's case was that he was unaware of these payments. In order to appoint Mikelis as APL's agent for the Low NOx contract, the appellant first sought advice from Ethics and Compliance at Alstom as to how Mikelis was to be engaged. Following that advice, the appellant emailed Mikelis with a request that he complete the required documentation. The appellant's argument was that, if he had previously been aware of the scheme to syphon off money from contracts and pay bribes through the Derby Building Society account, why would he abandon it for an above-board and visible route that was subject to Ethics and Compliance scrutiny.

89. The complaint is not that the Judge failed to deal with the Derby Building Society account and the changed arrangements with formal documentation, but that he did not remind the jury of the appellant's point in relation to it.

90. However, it is clear from the transcript of Mr Spens's closing address to the jury that this point was highlighted by him:

> if he [the appellant] is was aware of the mechanism, the scheme to divert money from contracts that had been used up until this point, why is he responding to Ethics and Compliance asking for advice about how to reinstate this agreement?

91. The Judge might have repeated the point in the summing-up; but the fact that he did not does not form a legitimate basis for complaint. As we have noted above, a judge is not bound to repeat every point that is made by the defence. In the light of this view, it is unnecessary to consider the prosecution argument that the appellant was bound to follow different procedures following a change in Alstom's rules about engaging local consultants.

Sub-paragraph (viii) of ground 1 - a complaint that the Judge refused to summarise specific documents that had been referred to by the defence

92. This complaint is founded on the importance to the appellant's case of his belief that Venskus performed the role of a project manager in Lithuania. The appellant's case was that in that role Venskus had told him that Vilmetrona was working as a consultant on the Low NOx project. The prosecution contended that Venskus did not in fact perform the role of project manager and that the appellant knew this. The prosecution called evidence to that effect.

93. The Judge summarised the point:

> As far as Mr Venskus is concerned, [the appellant] said he understood that he had been the project manager on the Vilnius unit 1 project 2003 and on the Low NOx contract in essence jointly on each with Mr Morter.
>
> If so, or if it might be so, it might of course endorse why [the appellant] would accept what he was told by Mr Venskus about how the project was going and about Vilmetrona as the provider of support services. But there is an issue on the evidence as to whether Mr Venskus's role and authority to speak in such a way has been exaggerated and whether [the appellant] would know what other witnesses told you, as far as they were concerned, was the position.

94. The Judge summarised the evidence from a number of witnesses (including a man named Peter Bates) all of whom had been involved in the project, and none of whom were aware of Venskus's role as a project manager or of work carried out by Vilmetrona beyond minor electrical work.

95. At a convenient moment, Mr Philip Evans QC invited the Judge to remind the jury specifically of the documents which supported the appellant's case on this point, and which had been the subject of the defence speech the previous day. The Judge declined to do so.

96. We were taken through these documents at the hearing of the appeal and, apart from a single document [timeline row no.376B] dated 27 July 2005 and described as an APL 'Contract Handover Meeting, Agenda and Record', the documents do not materially advance the point. The 27 July document describes the role of various personnel: 'Business Development Manager, John Venskus' and 'Project Managers: John Venskus and Roy Morter.' The significance of this part of the document was put to Mr Bates, who was in charge of appointing project managers and who (as the Judge recorded) had told the jury that Venskus had no project management role.

97. We reiterate that it was not necessary for the Judge to refer to every item of evidence which favoured the defence, particularly when it had been specifically referred to the previous day, providing that he maintained a fair balance. This was not a matter which the jury would have required any reminding of; and the complaint does not give rise to a sustainable ground of appeal.

Sub-paragraph (ix) – a further complaint that the Judge adopted a view of the case that was not advanced by the prosecution

98. This point relates to an exchange of emails passing between the appellant and Paul Stones, the new project manager, on 1 and 2 July 2009. The appellant informed Mr Stones that he was about to receive a request to pay Vilmetrona invoices 3, 4 & 5, valued at £47,500 for 'consultancy services' which were overdue. Mr Stones replied that he knew nothing about such overdue invoices and that all Vilmetrona's invoices for work carried out by them (work on a soot-blower) had been paid [timeline row nos.586 and 589].

99. At a meeting between the two men later on 2 July, Mr Stones (who spent half his time on site and the other half in the office in Derby) told the appellant that he was unaware of Vilmetrona providing any 'consultancy services'. The appellant told him that Vilmetrona had been brought on board as a consultant at the beginning of the contract before he (Stones) had become involved. Mr Stones told the appellant that, so far as he was concerned, Vilmetrona was merely an electrical sub-contractor carrying out technical work (cabling) on the project.

100. The prosecution case was that, even if the appellant had not known the truth about Vilmetrona before, the conversation he had with Mr Stones on 2 July revealed the true position. At that moment, he should have realised that there was a serious issue and alarm bells should have been ringing. Although this exchange did not occur until July 2009, several years after the Low NOx contract had been awarded to APL, it was significant because by this time, Vilmetrona had been paid only half of the £475,000 provided for under the Consultancy Agreement. The remaining £237,500 was paid after the conversation with Mr Stones. The episode was a central plank of the prosecution case.

101. The passage in the summing-up about which complaint is made is this:

> A matter of observation by me, whether it is of any validity or not, the email puts [the appellant] on notice that for other things Vilmetrona had been paid.
>
> ....
>
> If there is a site services agreement involving the payment of £475,000, it might beg the question as to what it was for, and whether any of the services of which Stones was particularly aware, were or were not recoverable under that agreement.
>
> ...
>
> And it might beg the question as to why Vilmetrona would be invoicing this separately, whether it was capable of being covered under that main agreement.

102. Mr Spens complained that this point was not put to the appellant in cross-examination, nor had it formed any of the prosecution case. Payment for consultancy services would be under a consultancy agreement, whereas work on soot blowers would never be a matter of consultancy nor payable under a consultancy agreement. The effect of the Judge's observations was to undermine an important part of the defence: that it was the appellant who had drawn the consultancy agreement to Mr Stones's attention. It would be the last thing he would have done if, as a conspirator, he knew Vilmetrona was a sham, merely a vehicle for the making of corrupt payments, and carrying out no work.

103. Further, when the Judge summed-up the appellant's case, that Mr Stones neither wrote nor said anything that caused him concern, he did so without reminding the jury of the reasons why he had said that he was not concerned. Among others, these were that: Vilmetrona had been approved by Ethics & Compliance at Alstom in January 2005; that the appellant had sent a memorandum, the consultancy agreement, and the schedule of payments to Messrs Morter and Venskus (co-conspirators) but with a copy to Mr Bentley, (who was not) in July 2005; proofs of services had been provided by Vilmetrona after the payment for its first invoice had been wrongly paid by APL when it should have been paid by another part of Alstrom; and Venskus had assured him that Vilmetrona was performing.

104. Mr Spens had made these detailed points as to why the appellant was not concerned about what Mr Stones wrote or said to him in his address to the jury the previous day; and we are not persuaded that there is any substantial weight to the complaint about the Judge's observation, whose validity, he made quite clear, was for the jury. The Judge's point was that, if the appellant had thought there was a genuine consultancy agreement and now discovered that Vilmetrona had been paid extra for other work, why did he not question Mr Stones about it and say that Vilmetrona had been paid in respect of proofs of service? Mr Stones described the meeting between them as 'not friendly'. The appellant's characterisation of the Judge's observation as 'a new line of attack' is to mischaracterise what was said.

Sub-paragraph (xi) - a complaint about the way the Judge summed-up a meeting that took place on 8 December 2004

105. This was a meeting of Venskus and Wikström and at which the payment of bribes was discussed with Cibulskas, the owner of Vilmetrona, and following which Wikström typed up the 'table of bribes' [timeline row no.266], a key document in the case. The appellant was aware the meeting was due to take place, but claimed in evidence that Venskus and Wikström concealed from him the true effect of what was discussed. His case was that he was excluded from key emails and meetings by the conspirators because they knew that he would object to their corrupt scheme. This was a central theme in the defence closing speech. The passage of which complaint is made reads as follows:

> ... if you accept the interpretation put on it by Mr Byrne, he [Stasys Mikelis] clearly features in the bribe schedule under the initials SM, which isn't in dispute, as I understand it, but was created as a result of the meeting on 8 December 2004 which Mr Venskus and Mr Wikstrom had with Mr Cibulskas, a meeting which followed an email on 5 December in which Mr Wikstrom had advised Mr Reynolds of the meeting.

106. The complaint in the perfected grounds is that, 'the Judge failed to remind the jury of [the appellant's] case that he was unaware of the true purpose of the meeting between the three men'.

107. The Judge in fact made clear in a passage of the summing-up which followed the quoted passage above that the appellant had not been copied into the incriminating emails and that the only reason they had been discovered was that Wikström had sent a copy to his home computer before deleting it on his office computer, and it was this email that had been discovered. Mr Spens's argument was that the Judge failed to remind the jury of the appellant's evidence that he was not only unaware of the incriminating emails, but also of the purpose of the meeting at which the table of bribes was drawn up.

108. The Judge had made clear at an earlier point in the summing-up, that the appellant's case was that he knew nothing about the payment of bribes in Lithuania until he was shown the evidence in the course of his interviews with the SFO:

> As to Vilmetrona, based on the admission at paragraph 148, the unchallenged evidence is that as a matter of fact, Vilmetrona did nothing in relation to any consultancy agreement in relation to site support services. And that issue was broadly unchallenged until the defendant gave his evidence where he didn't accept that Vilmetrona had done nothing, because he said he relied on what Mr Venskus and Mr Morter told him of the excellent services that they were providing, and that is what he believed at the time. And so, based on that, he couldn't accept that, because he didn't know one way or the other, whether Vilmetrona had done nothing.
>
> What he did tell you was that he knew nothing of any arrangements made with Vilmetrona or with Mr Cibulskas to the effect of a sham to enable promised rewards to be paid to the corrupt in Lithuania. If through Vilmetrona bribes were

> paid, he said that he was unaware of it until his interviews with the SFO in which the suggestion came forward.'

109. In our view that was a clear and emphatic statement of the defence: that the appellant was not aware of any discussion about, or payment of, bribes in Lithuania.

110. For the reasons set out above, we reject the complaints in ground 1. Whether viewed separately or cumulatively, they do not cast doubt on the safety of the conviction.

Ground 2

111. This ground of appeal is that the Judge was at fault in two material respects in his summing-up of the facts, when addressing the jury on how they should approach the appellant's evidence.

112. Early in his summing-up of the law (#5 p.65 l.22), he had given a conventional direction that the Jury should consider how reliable, honest and accurate the relevant witnesses were; and apply the same fair standards in the evaluation of witnesses whether called by one party or the other.

113. The first element of this complaint is about the direction as to the proper allowances they should make for the stresses on a defendant when giving evidence in his own defence.

114. The Judge gave that direction:

> You will probably take into account the stresses and strains for someone in his position when evaluating that evidence.

However, he then added:

> It may be said that those stresses and strains would be the same whether somebody was giving truthful evidence from the witness box or untruthful evidence.'

115. Mr Martin Evans QC conceded that this had been 'better not said'. We agree. The observation added nothing, had the potential to undermine the proper direction which preceded it and should not have been made. However, the Judge continued:

> But you work on the presumptions that are set out in the burden and standard of proof on the document … which I have already given you, and it is right that you should take into account the stresses and strains for somebody in his position …'

116. In our view this additional remark reiterated and made clear that the jury was being invited to take into account the appellant's position and to make such allowances in his favour as they considered appropriate. The prior and objectionable passage did not undermine the overall force of the direction.

117. The Judge then went on to remind the jury that the appellant had had to go through the trial process twice, before he added what gives rise to the second element of this

complaint. Although we resist the invitation to parse the summing-up, we have added lettering for ease of reference:

> (**a**) Making all allowances and taking into account all you have heard about him, was he somebody who gave a clear and consistent account, and has given a clear and consistent account, as those who spoke for him might and would have expected from him; or (**b**) is he somebody who had spent time thinking about answers to documents and (**c**) concentrating on answering for what others might have thought or assumed, rather than necessarily directing attention to the issues himself? (**d**) It is no criticism of anyone, but was the examination of him [in chief] as much to [do with] everything we did have as opposed to that which we didn't have?

118. Mr Spens QC made four points. First, it was never suggested by the prosecution that the appellant had not given a clear and consistent account: on the contrary, it was accepted that his evidence at both trials was consistent with what he had said in his interviews with the Serious Fraud Office in 2011 and 2013; nor was it contended that his evidence was inconsistent with his extensive defence statement. Second, he had been charged in December 2014 and had stood trial previously in the autumn of 2017; and there would have been nothing surprising, let alone to his discredit, in his having thought about the answers that he would give when asked about the very large number of documents in the case. Third, the passage identified at (c), while 'somewhat oblique', implied that the Judge thought that the appellant had been evasive during the examination-in-chief. Fourth, the passage identified at (d), although it disavowed criticism, was in fact a veiled criticism of counsel who had spent 4 days examining him in chief and was linked to the point the Judge had made at (c). Mr Spens submitted that the overall effect of this passage was to undermine the appellant's evidence given over 8 days, which was the only real evidence called in his defence on the facts.

119. We see nothing objectionable in the observation at (a). It was plain that the appellant had been clear and consistent in his account. In his direction on the law, the Judge had pointed out that he had been extensively interviewed in 2011 and 2013 and invited the jury to read those interviews. At the time, the appellant had been informed that if he did not mention something which he later relied on in court, it might tell against him. The Judge made clear that there was no complaint that he did not mention something which he later relied on, and that what he said in the interviews was important material. As part of the direction on the law, the Judge had also invited the jury to consider whether the appellant had been consistent in what he said in the interviews and what he told the jury from the witness box, see [44] above.

120. It is not easy to understand why the Judge used the word 'or', at (b). It was not an alternative to a clear and consistent account, but a potential explanation for it. So far as (c) is concerned, we are unclear as to what the Judge intended to convey, although Mr Martin Evans QC suggested that this may have been a reference to occasions when the appellant had not answered question that he had been asked. However, adopting a construction that was adverse to the appellant, we do not consider that it constituted or contributed to a misdirection or amounted to an illegitimate observation on the quality of his evidence. As to (d), despite the expressed disavowal of criticism,

we would accept that it might be viewed at least as an expression of exasperation at the way in which the examination-in-chief was conducted and therefore an implicit criticism. In our view, if the Judge thought that criticism was justified (and it either was or was not) he should initially have raised it at the time in the absence of the jury and should not have reserved his complaint to the summing-up.

121. Although Mr Spens laid considerable emphasis on what he described as the undermining of the appellant in the eyes of the jury in this passage, we do not consider that this observation would tend to undermine either the appellant or Mr Spens in the jury's minds.

Conclusion

122. The summing-up addressed the defence case, and dealt with the evidence in a way that was balanced and fair. To the extent that we have identified deficiencies, they were not such, either viewed individually or cumulatively, as to have deprived the appellant of a fair trial nor such as to render the conviction unsafe. Accordingly, the appeal will be dismissed.