Neutral Citation No: [2022] NICA 40	*Ref:* **TRE11896**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **30/06/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

DAVID LYNESS

Neil Connor QC with Michael Chambers (instructed by the PPS) for the Prosecution
The Appellant appeared as Litigant in Person

Before: Treacy LJ, Maguire LJ and Horner J

TREACY LJ ***(delivering the judgment of the court)***

Introduction

[1] The appellant appeals against his conviction. He was unanimously convicted by a jury of murdering his girlfriend Anita Downey in the early hours of 20 January 2017. At the conclusion of the hearing before this court, we unanimously dismissed the appeal and said we would give our reasons later which we now do.

Issues in the Case

[2] At the court's direction the PPS filed a list of issues in this appeal which they identified as follows:

> "1. Will the appellant be permitted to raise issues in his skeleton argument that don't relate to the grounds of appeal which he has lodged? In the event that the court permits him to do so, we have treated the issues raised in his skeleton argument as if they were grounds of appeal and have responded to them in our skeleton argument.

2. Will the appellant be permitted to refer to matters that were not in evidence before the lower court? The appellant has not made any application to admit fresh evidence. Therefore, we respectfully suggest that he ought not to be permitted to refer to and rely upon material which was not in evidence before the lower court.

3. How can the court deal with the allegations made by the appellant against his former legal advisers both in terms of the way in which they represented him at trial and in their conduct generally. Many of these matters were not in evidence before the lower court. The appellant has made these allegations in the form of a skeleton argument and has not submitted a sworn affidavit about these matters. He has refused to permit his legal representatives to respond to his allegations by refusing to waive his legal professional privilege.

4. Whether any of the grounds of appeal are made out?

5. If any of the grounds are made out, does this affect the safety of the conviction?"

[3] The appellant has never offered any cogent explanation of how Mrs Downey sustained a 15cm long knife wound to her neck, consistent with at least two separate movements of the knife, which severed her jugular vein and which was inflicted with such force that it penetrated and left a notch in her spine.

[4] We agree with the prosecution that both in this court and at trial in the Crown Court, the appellant has attempted to frustrate and derail the trial process. He has sought to drag the criminal process into chaos by engineering or inventing conflict with his lawyers and then dismissing them. He appears to be seeking to make himself unrepresentable by constantly changing instructions and making allegations against his lawyers. He then uses this status as an attempt to frustrate the trial process.

[5] This tactic has continued in the Court of Appeal where the appellant has dismissed his counsel after repeatedly changing his instructions to them and then makes spurious and invented allegations of impropriety against them.

[6] We agree the appellant will never be satisfied with any legal representatives and would have continued in this vein had the court permitted him legal aid for a further set of representatives.

Background

[7] The background has been extensively set out in the written arguments which we summarise below.

[8] At the time of her murder Mrs Downey was 51 years of age. She had been in a relationship with the appellant for approximately 3 years, although they resided in two separate addresses. They became engaged in the year prior to her death and appeared to have lived together at her home for a period.

[9] After the trial commenced on 17 June 2017, an amended defence statement was served. In this statement it was claimed that Mrs Downey had planned to have the appellant murdered on the night of her death. It was also claimed that the appellant had been involved in a struggle with Mrs Downey for a handbag and he had got a knife to cut the strap of the handbag. He claimed that the deceased had then got the knife off him, attacked him with it and that the knife had never been in his hand at all and somehow the deceased had cut her own throat in the course of trying to attack the appellant.

[10] On Thursday 19 January 2017 the appellant and the deceased boarded the train at Lurgan at around 5.10pm. They drank white wine on the train which they had poured into plastic water bottles for the journey. They arrived at Great Victoria Street Station at around 5.40pm and made their way to a restaurant at Franklin Street where they consumed a bottle of white wine with cheese as part of an advertised special offer. At around 8pm they made the short journey on foot to Brennan's Bar on Great Victoria Street where they purchased 3 bottles of beer.

[11] By this stage of the evening, the deceased was affected by drink and her attempt to purchase further beer was refused by staff and led to them both leaving the bar shortly thereafter. They returned to the train station in Belfast and boarded the 8.40pm train to Lurgan, arriving at around 9.20pm.

[12] Much of their journey to and from Belfast was captured by various CCTV cameras. The appellant and the deceased were picked up on William Street walking towards Lurgan town centre at approximately 9.25pm. Within five minutes or thereabouts they reached Church Place where they went their separate ways.

[13] The appellant obtained a taxi to his home at 8 Toberhewney Hall whilst the deceased made her way to JP's bar on Edward Street. Once there she ordered and consumed two drinks. She conversed with other patrons at the bar before leaving by taxi at around 10.30pm. She was described as being drunk but still able to walk.

[14] The taxi took her to the appellant's home. The taxi driver described her as being "between tipsy and drunk."

[15] The appellant and his son Shane, then aged 20, were present in the house whenever the deceased arrived. Police subsequently interviewed Shane Lyness as a witness by way of ABE.

[16] Shane suffered from a learning disability and as a result had the assistance of a Registered Intermediary when he gave evidence on behalf of the prosecution. Prior to the trial and during the contested committal proceedings, Shane had expressed, at various stages an unwillingness to give evidence. This culminated in him making a statement of withdrawal in August 2018. On one occasion, during a meeting with police, when accompanied by his brother Levi, he claimed to have been smoking cannabis on the night of the incident and that he no longer recalled what had happened on the night in question.

[17] The appellant was prosecuted in a separate indictment for perverting the course of justice in respect of seeking to influence the content of Shane Lyness' withdrawal statement. After his conviction for murder, a decision was taken by the PPS that it would not be in the public interest to pursue a trial in respect of that offence and the charge was left on the books.

[18] All of this information was disclosed to the defence in advance of the trial and the appellant himself clearly had significant knowledge of his son's reluctance to give evidence and the statements he had made calling into question the reliability of his recollection. The PPS would have compelled Shane to attend the trial ultimately. However, this wasn't necessary, as he attended voluntarily.

[19] The evidence that supported the prosecution for perverting the course of justice was served as additional evidence in the murder trial. As the defence did not raise the issue of Shane Lyness' withdrawal statement or the suggestion that he had been smoking cannabis, accordingly it was not necessary for the prosecution to seek to adduce this evidence.

[20] In his ABE interview, Shane explained that over the course of the next few hours both the deceased and the appellant consumed more white wine. The appellant was playing poker on his laptop computer as well as playing music from it, to which the deceased was dancing.

[21] At some stage matters deteriorated and an argument concerning what had transpired earlier broke out. This argument caused Shane Lyness to leave the living room and go to his bedroom. Within a short period of time Shane returned to the living room having heard his father shout at the deceased: "I'm going to beat you up." Upon opening the living room door, he observed the deceased prone on the floor with the appellant astride her, punching her to the area of her head and face.

[22] Shane Lyness asked him what he was doing and the appellant got off the deceased and pushed past Shane into the kitchen where he armed himself with a large kitchen knife. He pointed the knife at Shane and told him to get upstairs. He retreated briefly, but returned in response to the deceased screaming for help. When he opened the living room door on this occasion, the appellant was in the same position on top of the deceased. He was observed holding her head with his left hand and "sawing" at the left side of her neck with the kitchen knife in his right hand. Shane noted that there was blood everywhere and he turned and ran out of the house through the front door.

[23] The appellant followed him out of the house, but Shane ran off and phoned the police via the emergency 999 number. The timing of the call was at 2.47am. At the outset of the call Shane Lyness stated that "My dad has just sliced his girlfriend's throat." He was clearly distressed and remained on the phone with the emergency operator until he was located by a police patrol shortly thereafter. He told police what he had observed a short time earlier and other police patrols were dispatched to 8 Toberhewney Hall.

[24] During cross-examination, Mr Greene QC (counsel for the appellant) put to Shane Lyness that Mrs Downey had been violent towards Mr Lyness in the past and had attacked him with scissors. Shane told the court that his father had told him that this had happened but that he had not seen it. Mr Greene put to Shane that Mrs Downey had attacked the appellant with knives in the past and Shane said he was not aware of this. Shane did say that he was aware that Mrs Downey had slapped the appellant in the past.

[25] Shane Lyness gave evidence that he had been on the phone to his friend Patrick Kingsmore during part of this incident and Mr Kingsmore gave evidence that he overheard aggressive shouting in the background between the appellant and the deceased which corroborated Shane Lyness' version of events.

[26] The first officers arrived at approximately 2.55am. There were verbal exchanges between the attending officers and the appellant. The appellant told the first responding officers that he wanted them to shoot him. These brief exchanges were conducted through the closed living room door which was held shut by police in order to detain the appellant until the arrival of the Armed Response Unit at 3.10am. Upon their arrival, they entered the living room and the deceased was located on the floor with her head closest to the door and her feet closest to the fireplace. The appellant was lying at her left side, with his arm draped over her upper body.

[27] He was forcibly removed from the vicinity of the deceased and handcuffed on the ground. It was obvious to those present that the deceased had suffered a catastrophic wound to the left side of her neck and that there was no sign of life. The carpet to the left side of her head and neck was saturated in blood and a large knife

with a 20cm blade was found within the area of blood staining and partially obscured by the deceased's left shoulder.

[28] Photographs of the scene and the post mortem demonstrated the scale and extent of the gaping wound to Anita Downey's neck. They also showed the appellant's slippers situated in a position which is consistent with him having been kneeling astride her in the way Shane Lyness described, when he was punching her face and "sawing" at her neck.

[29] Once the scene was secure, paramedics entered the living room at 3.15am and confirmed that Anita Downey was dead, noting that she had sustained injuries which were incompatible with life.

[30] The appellant was removed from the scene at 3.51am and taken to Musgrave Street Police Station where he was interviewed in the presence of his solicitor. He described their movements on the afternoon and evening of 19 January 2017. He stated that the deceased was already drunk when they met up prior to travelling to Belfast and that they came home earlier than anticipated because she had been refused drink twice. He stated that she was in a bad mood when she arrived at his home, although her mood did improve and they listened to music and she danced along to some songs. He stated that he had reminded her in Belfast that their relationship was over and that the deceased responded to this by removing her engagement ring and putting it in her handbag. He intimated that this was still an issue after her arrival at his home and that the deceased was finding it difficult to accept that the relationship was at an end.

[31] The appellant stated that things went downhill in the living room and that a heated argument ensued. The deceased who was seated on the middle seat of a three-seater settee jumped up and came at him with a knife in her hand. The appellant was seated on a single chair to the left of the door as one enters the room. Despite being "fairly drunk as well" he raised his feet to keep her at bay before getting to his feet and trying to "grapple" for the knife. He described them falling into the corner of the room at the right hand side of the door and banging off the wall. He stated he was very frightened. They both then fell to the ground and were scrambling about when he noticed a lot of blood and that he knew "something drastic" had happened. The knife was still in the deceased's hand when he noticed the blood. She was on her knees at this time and then she fell down. He stated, "It was an accident - it was through no fault of mine."

[32] The appellant had a number of superficial wounds to his neck which he told police were self-inflicted as he had wanted to kill himself after realising that Mrs Downey had died.

[33] The Assistant State Pathologist, Dr Christopher Johnson, examined the body of the deceased. Although various defence teams indicated that they were seeking

reports from Forensic Pathologists, no report was ever served on the court or relied upon by the defence.

[34] Dr Johnson's most significant finding was the presence of a large incised wound to the left side of the deceased's neck which was 15cm in length. This had completely severed the long muscle at the side of the neck and had cut to the level of the spine, with the major injury being to the internal jugular vein. This had led to copious bleeding.

[35] Dr Johnson noted that the appearance of this wound was in keeping with more than one movement of the blade across the neck in keeping with the description of the appellant 'sawing' at the deceased's neck. Dr Johnson also told the jury that the knife had been driven into the neck of the deceased with such force that it had actually nicked her spine, leaving a notch in her spinal column.

[36] He also noted a second incised wound, consistent with causation by a knife tip, to the left shoulder and a number of blunt force injuries to the face consistent with having been caused by blows, such as punches.

[37] Dr Johnson's findings corroborated the account given by Shane Lyness that the appellant was "sawing" at Mrs Downey's neck with the knife and that the appellant had punched Mrs Downey repeatedly in the face. The injury to the neck could not have been caused by any mechanism other than more than one movement across the neck.

[38] Dr Johnson was asked if the injury to Mrs Downey's neck could have been caused by an accident and he stated that he didn't accept that.

[39] No evidence was called at trial to contradict the evidence of Dr Johnson. Mr Greene QC, who appeared for the appellant at trial, asked the following question:

> "…Is there any circumstance you can think of where in a fall, as part of a struggle, that a knife being fought for between two people and in close quarters could have crossed the throat of Anita Downey at some point either as she fell or when they were struggling on the floor, that would have caused this sort of injury."

Dr Johnson replied:

> "No I think the only explanation would be that there was a struggle on the floor and somebody took a knife and cut her throat with it. I cannot see how, no matter and I thought carefully about this, about how 2 people

> struggling how you can accidently cut somebody's throat and cause such a severe injury as a result of an accident."

[40] The jury also heard evidence that the appellant had a significant criminal record for offences of violence and possessing offensive weapons. This included an incident in 2003 where the appellant pulled a 10 inch kitchen knife on a female partner and threatened her, as well as an offence of wounding from 1992. This evidence was admitted by agreement from the defence since the appellant had attacked the character of the deceased in the course of the questions put by his counsel and in his PACE interviews.

[41] The jury also heard bad character evidence from a witness, Dermot Gribben, who claimed to have witnessed Mr Lyness grab Mrs Downey by the throat during an argument in the Forrester's Club in Lurgan in December 2016.

[42] The appellant elected to give evidence at his trial. He began by setting out the background to his relationship with Anita Downey. He also informed the jury that his son Shane had previously moved out of the family home but wasn't able to cope with living on his own. He was then asked by Mr Greene QC to explain what the first problem in the relationship was. The appellant stated:

> "Actually I don't know how to approach this Mr Greene, you've asked me to lie here to this court and that is where I am going to have problems with any of your questions here as they develop, you have put me in a bad situation…"

[43] The appellant then said he had repeatedly complained about his representation and that he would not answer any more questions from Mr Greene. The appellant was then cross-examined by prosecuting counsel. He repeatedly refused to answer any questions.

[44] Although the appellant had sought to dismiss Mr Greene at the commencement of the trial, after that the trial had proceeded relatively smoothly. On quite a number of occasions Mr Greene had sought short adjournments to allow him to take instructions from the appellant and Mr Greene also told the court that he was conducting the case based upon a "proof of evidence" from the appellant that was only finalised shortly before Shane Lyness gave evidence. An amended defence statement was served six days into the trial and at no stage did the appellant raise any issue with it.

[45] We agree with the prosecution that it is significant that the appellant was content to answer questions on the background of the relationship and also to draw the jury's attention to the educational issue suffered by Shane Lyness before then refusing to answer any questions about the case. It can readily be inferred that the appellant did not want to answer questions about the circumstances of the murder

as he would have been incapable of explaining how Mrs Downey suffered such devastating injuries given that Dr Johnson had made clear that they could not have been caused in the way the appellant claimed, by some sort of self-inflicted accident.

[46] Further, even if the appellant genuinely believed that Mr Greene had previously asked him to lie, this does not explain why he would not have answered innocuous, open questions he was being asked in relation to the murder. It also does not explain why he would not answer questions in cross-examination from the prosecution.

[47] The spectacle of the appellant giving evidence then dramatically refusing to answer questions and publicly accusing his own senior counsel of having previously asked him to lie, has all the hallmarks of a planned attempt by the appellant to sabotage the criminal trial. He agreed to give evidence and took the oath knowing that he was going to refuse to answer questions so he could use the opportunity to criticise his counsel in front of the jury. This can only have been an attempt to frustrate the trial process.

Grounds of Appeal/Issues in the Appeal

[48] In light of the strength of the case against the appellant, it is the prosecution's contention that even if the appellant succeeds in persuading the court that any of the grounds of his appeal are made out, this is a classic case where the principles espoused in *R v Pollock* [2004] NIAC 34 are critical:

> "[32] …
>
> 1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe.'
>
> 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.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
>
> 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."

Legal Teams

[49] In his skeleton argument the appellant has claimed that Mr O'Rourke QC simply refused to represent him. He claims that Mr McDonald QC hadn't read the papers and wasn't prepared for the trial. He then claims that at trial that Mr Greene QC tried to get him to perjure himself.

[50] Despite the seriousness and outlandish nature of these claims against three eminent criminal Queen's Counsel, the appellant has refused to permit the court to hear a response from his lawyers, by refusing to waive his legal professional privilege.

[51] The appellant had been returned for trial in the summer of 2017 and his case fixed for trial in December 2017. On 24 November 2017, Mr O'Rourke QC informed the court that the appellant wished to dismiss him and his solicitors and find alternative representation. The appellant was present at this hearing and informed Mr Justice Colton that he wished to instruct alternative lawyers and that his junior counsel had been at the wedding of the deceased.

[52] This contradicts the appellant's assertion that Mr O'Rourke QC refused to represent him. It is quite clear that it was the appellant who dismissed his solicitors and counsel. It is also apparent that Mr Moriarty was not at the wedding of the deceased but was a guest at a wedding at which the deceased was present.

[53] This last minute dismissal of his legal team meant that the trial which had been listed in December 2017 had to be stood down and it was relisted for February 2018. McConnell Kelly and Co came on record. The case was reviewed on a number of occasions through January and the defence informed the court that various reports had been obtained or were being obtained and that the trial would be in a position to proceed in February.

[54] On 12 February 2018 the appellant informed the court that he was dismissing his legal team. He said he was unhappy with Mr Burke as he had cancelled appointments and he wanted to instruct Mr Ingram. Mr Justice Colton made clear that in his view Mr Burke had prepared the case meticulously and that the appellant would not be allowed to manipulate the legal system. With reluctance, the judge indicated he would permit the change of representation if Mr Ingram was prepared to accept instructions.

[55] On 16 February 2018, Mr Ingram appeared before Mr Justice Colton, confirmed he would accept instructions, and the trial was stood down for the second time due to the appellant dismissing his legal team and was relisted in June 2018.

[56] On 10 May 2018, the case was listed and Mr Taggart BL indicated that he understood the appellant would be seeking to dismiss his legal team again.

[57] On 11 May 2018 Mr Justice Colton conducted a hearing into this issue. The judge carried out a detailed enquiry into the reasons why the appellant wished to change his representation again. The appellant claimed that he was unhappy that his instructions were being ignored and that he wanted to make a bad character application in relation to the deceased because she had been "complicit in murder and arson."

[58] The judge was satisfied with the assurances he was given by the appellant's lawyers that they ought to continue to represent the appellant.

[59] On 15 May 2018 Mr Taggart BL drew to the court's attention that the appellant hadn't received a written copy of his instructions. On this occasion the appellant complained that Mr Greene QC had "read out" a defence statement which bore no relationship to his instructions. Mr Lyness also complained to Mr Justice Colton that Mr Greene had tried to get him to "perjure himself." The judge indicated that he was satisfied that the appellant was receiving effective representation and suggested that he consult further with his lawyers about the matter.

[60] On the morning of trial, 11 June 2018, the appellant provided a letter to HHJ Miller QC. The judge made clear that he considered that all appropriate preparations had been completed and that the trial was in a position to proceed. The appellant then informed the court that he wasn't ready for his trial as he had not yet had an opportunity to listen to all of his PACE interview tapes. The judge ruled that the jury would be sworn, and the trial would proceed. The appellant then indicated that he did not wish to leave the issue of challenging jurors to his solicitor and that he would do it himself, the appellant then asked to speak to his solicitor.

[61] Mr Greene QC then asked that the letter handed in by the appellant be returned to him so that he could read it and advise his client. HHJ Miller QC permitted this and then stated:

> "This court is determined that this trial will proceed, a jury will be sworn today and the trial will commence and the court will brook no further obfuscation or attempt to derail the proceedings. Every opportunity has been afforded for the full and proper professional preparation of the trial. This court is fully satisfied that counsel and solicitor instructed in this case have exercised their duties and the court is determined to ensure that the defendant has a fair trial."

[62] This was a further example of the appellant seeking to delay and derail the trial. It also demonstrated, as the prosecution contend, that the appellant was confident to the point of impudence in interrupting the court proceedings and making his complaints clear to the judge. This also chimes with the conduct of the appellant before the Court of Appeal where he was quick to speak out when he wished to make a point about any matter.

[63] Mr Greene QC then made an application to withdraw from the case. The judge refused this application.

[64] Thereafter the trial proceeded relatively smoothly. There were a number of occasions when Mr Greene asked for additional time to consult with the appellant. He also informed the court, on a number of occasions that he was working from a proof of evidence. An amended defence statement was served on 17 June 2018 and the appellant did not raise any objection to this amended defence statement.

[65] Then on 25 June 2018, at an early stage in his examination in chief, the appellant refused to answer any more questions, justifying this on the basis that Mr Greene QC had tried to get him to perjure himself. At the conclusion of the appellant's evidence Mr Greene QC closed the case on behalf of the defence.

[66] On 26 June 2018 the appellant dismissed his lawyers and they applied to come off record. HHJ Miller QC then ruled that neither party should be permitted to close the case.

[67] The appellant did not ask HHJ Miller QC for permission to make a closing speech nor did the appellant tell the judge that he wished to call witnesses. The case was then adjourned overnight to 27 June 2018. On the morning of 27 June 2018 the appellant did not raise any desire to make a closing speech or call witnesses.

[68] The judge then proceeded to charge the jury on 27 June 2018. After his charge he asked for requisitions. At that time the only issue raised by the appellant related to an issue about which no evidence had been given. After a short time deliberating the appellant was convicted by the jury.

[69] After his conviction Mr Lyness instructed KRW Law, Mr Kelly QC and Mr Toal BL. These lawyers represented the appellant before this court. The court recalls that the appellant dismissed these lawyers and made allegations about their professional integrity and honesty.

[70] The appellant was asked whether he would waive legal professional privilege (LPP) so that his former lawyers could respond to the allegation.

[71] Lord Justice Stephens went to considerable lengths to explain the issue to the appellant and the potential consequences of waiving or not waiving LPP. This

process was carried out on a number of occasions. The appellant repeatedly and unambiguously waived his LPP.

[72] Thereafter the prosecution wrote to the appellant's former lawyers and the affidavits received (from some) were sent to the appellant. The appellant has however, now rescinded the waiver of his privilege meaning that these affidavits cannot be supplied to the court.

[73] The only plausible explanation for why the appellant would not waive his LPP was that he knew his allegations against his former representatives would be exposed as untrue and that their evidence would be unhelpful to his appeal.

[74] We agree that the appellant has repeatedly dismissed his representatives to frustrate, subvert and derail the trial process. We agree with the prosecution that the appellant stage-managed a contrived confrontation with Mr Greene QC during his evidence in chief in a further attempt to sabotage his trial.

[75] We cannot permit defendants to engage in this type of conduct by abusing the protections afforded to those facing criminal trial. There can be no unfairness caused to the appellant in the way that he received state funded representation of the highest calibre prior to, and during, his trial and conviction for the murder of Anita Downey.

Exhibits/Real Evidence

[76] This aspect of the skeleton argument deals with a bra and blouse that Mrs Downey was wearing at the time of her death. These items were available at the time of the trial and could have been subjected to whatever forensic examination the defence wished. Several months after the conclusion of the trial, both items were destroyed by police.

[77] It is difficult to understand the appellant's point in relation to these items. He seems to suggest that something about the blood distribution on these items is inconsistent with the evidence of Dr Johnson. This theory is completely unsupported by any expert evidence.

[78] The appellant complains that Mr Greene failed to get "expert evidence" on these items. However, for the reasons set out above he has refused to allow the court to hear Mr Greene's explanation for why no expert evidence was sought.

[79] In any event, it is quite obvious that no point could conceivably have been made about the blood on these two items. Mrs Downey suffered a very large and deep wound to her neck resulting in massive blood loss. The photographs show large pools of blood in and around her body. She was also examined by police and paramedics at the scene. There is nothing about the blood on these items which contradicts Dr Johnson's evidence.

[80] Furthermore, these items were available at the trial of the appellant and were never sought for inspection or examination.

[81] We agree that the court could not quash a conviction for murder on the entirely speculative basis that if a test had been carried out it might possibly have undermined an aspect of the prosecution's case, especially in circumstances where no explanation is advanced as to why the test was carried out in the first place.

Witnesses

[82] The appellant alleged that both Mr Greene QC and Mr Taggart refused to call witnesses who the appellant wished them to call. One of the witnesses, Saffron Lyness (the appellant's daughter) was actually listed as a bad character witness.

[83] We were informed that ultimately, after representations and discussion with the defence, the prosecution decided not to call a large number of bad character witnesses as it was considered that the prejudicial weight of the evidence outweighed its probative value and it was concluded that the court would not admit the evidence.

[84] Saffron Lyness' evidence would have been damaging to the defence case and it was a point in the appellant's favour that discussions between prosecution and defence counsel resulted in Saffron not being called.

[85] The appellant has not explained what evidence he believes that Saffron would have given in his favour. He did not raise this issue at the time of the original trial either after or before Mr Greene's dismissal. As previously noted, the appellant is by no means timid in the face of the court and is certainly not afraid to speak up if there is anything of alleged concern to him regarding his trial/appeal.

[86] Further, the appellant has refused to allow the court to hear any explanation about this issue from Mr Greene, Mr Taggart or Mr Ingram. We do not afford any weight to these claims.

[87] The appellant further claims that Mr Greene QC refused to cross-examine Shane Lyness and Patrick Kingsmore about their drug use on the night of the murder. The appellant has refused to allow the court to hear any explanation about this issue from Mr Greene, Mr Taggart or Mr Ingram. We do not afford any weight to these claims.

[88] The appellant claims that he had witnesses who he could have called to contradict Dermot Gribben's evidence. The appellant has refused to allow the court to hear any explanation about this issue from Mr Greene, Mr Taggart or Mr Ingram.

[89] The appellant has not provided the court with any affidavits from these persons about what evidence they could or would have given.

[90] Mr Gribben's evidence was a very minor aspect of the prosecution case and these complaints, even at their height, relate to minor aspects of the prosecution case and could not have any bearing on the safety of the conviction.

Convictions of Prosecution Witnesses

[91] The appellant claims that he was told by Mr Greene that none of the prosecution witnesses had criminal records. The appellant has refused to allow the court to hear any explanation about this issue from Mr Greene, Mr Taggart or Mr Ingram. In these circumstances we do not afford any weight to these claims.

[92] A number of prosecution witnesses did have criminal records. All of these records were disclosed to the defence prior to the trial. There was no prospect of a court permitting any of these criminal records to be placed before the jury as they would not have met the test set out in the Criminal Justice (Evidence) (NI) Order 2004.

HSC Report

[93] The appellant alleges that his former lawyers failed to tell him about a report from the Trust, relating to the care of his grandchild. The appellant has refused to allow the court to hear any explanation about this issue from Mr Greene, Mr Taggart or Mr Ingram. We are at a complete loss to understand how this has any bearing on the safety of the conviction.

Furniture

[94] The appellant claims that the jury asked for a photograph to show "the size of the furniture" and had a photograph been available it would have shown the narrow area of where the "corpse lay between the settee and the armchair." The appellant complains that the judge could have asked for a photo but didn't "putting the defence in peril."

[95] Prosecuting counsel have no memory of such a request being made by the jury. However, the defence had access to all photographs taken from the scene of the murder.

[96] The court also heard evidence that various pieces of furniture may have been moved by police and paramedics who came into the small room and were involved in arresting the appellant and tending to the deceased.

[97] The relevance of what amount of space was available to the appellant when he claims he was seeking to stem the blood from the deceased is unexplained.

Pictures

[98] This issue was never raised by anyone at the original trial of the appellant. The appellant's claim that the jury may have been prejudiced by artwork on the walls of his house is, as the prosecution contend, preposterous. If this matter was of concern to the appellant, he ought to have raised it at the time of the original trial.

Ground 1: The trial judge erred by permitting counsel to withdraw before the closing speeches, which included not permitting the applicant to make submissions on that course, thereby resulting in unfairness that was not subsequently rectified in the judge's summing up to the jury;

[99] The background to this has already been set out in detail earlier in this judgment. On 26 June 2018 the trial judge was faced with a situation where the appellant had, in front of the jury, accused his senior counsel of seeking to get him to lie. Secondly, as Mr Greene made clear, Mr Lyness withdrew his instructions from Mr Greene on the morning of 26 June 2018. Thirdly, Mr Greene was clearly very concerned about the impact of what the appellant had said about him in terms of the usefulness and benefit of him staying in the case.

[100] The judge then checked with the appellant that he did indeed wish to dispense with Mr Greene and the appellant confirmed he did.

[101] The judge acted entirely properly in permitting Mr Greene to withdraw from the case. The impact that this had on the case was attributable to the appellant's actions by gratuitously, unnecessarily and we infer, falsely, accusing his own senior counsel in asking him to lie and then by withdrawing his instructions.

[102] We agree there is no merit in this criticism of the trial judge, and in fact, it would have been wrong for the judge to proceed in any way other than the course of action he took.

Ground 2: In circumstances where the applicant had lost confidence in his legal team during his evidence in chief, with the result being his failure to properly communicate his case to the jury, the trial judge then erred by not permitting the applicant to make a closing speech

[103] The prosecution does not accept the premise of this ground of appeal namely that the appellant "lost confidence in his legal team during his evidence in chief." They submitted, and we accept, that it is quite clear that it was the appellant's plan all along to seek to sabotage his trial by publicly accusing his senior counsel of asking him to lie.

[104] The appellant agreed to be called as a witness, took the affirmation, and then deliberately acted in contravention of his agreement to be called as a witness and in

contravention of his affirmation to tell: "the truth, the whole truth and nothing but the truth."

[105] The appellant's accusation did not come as a result of something Mr Greene did or said during his examination in chief but rather came in response to an open, innocuous question relating to how the relationship between the appellant and the deceased had begun to change. The appellant had already made his case clear in interview and in his defence statement and could easily have answered this question.

[106] Firstly, the prosecution contends that in the highly exceptional circumstances of this case, the judge was quite right to examine whether it would be appropriate to permit the appellant to make a closing speech.

[107] In *R v Morley* [1988] 87 Cr App R 218, Lord Justice Woolf stated that, while section 2 of the Criminal Procedure Act 1865, confers a right to make a closing speech:

> "Section 2 of the 1865 Act cannot be regarded as giving a licence to a defendant to behave as he likes and to say what he wishes, irrespective of the effect of that upon the proper conduct of the trial. The right cannot be used in order to frustrate the trial and is conditional upon the defendant using that right for the purpose for which it was given, which is to advance and not to defeat the course of justice and for the proper conduct of the trial… While, therefore, the court has a reserved power to avoid its process being abused by a defendant, it is to be emphasised that this power, particularly in relation to the closing address, is to be exercised exceedingly sparingly and only in an obvious case and so far as a closing address is concerned, where there is really no alternative."

[108] The court in *Morley* examined the conduct of the defendant in that case and determined:

> "It is clear on the history that he would have taken the opportunity of a closing speech, had he been present to make one, to make an attack on the judge and the prosecution and would not have used it for the proper purpose of dealing with the evidence. By his repeated threats to withdraw because of the judge's rulings it is clear that the appellant had decided to do no more than make protests."

[109] We accept the prosecution submission that the appellant behaved in a disgraceful manner throughout the lead up to and during his trial. He had repeatedly sought to delay and disrupt the commencement of the trial. He deployed similar tactics on the first morning of trial. When these ploys had failed, and the evidence against him was plainly overwhelming, he sought to derail the trial during his evidence in chief.

[110] The judge was best placed to assess what would occur if the appellant was permitted to give a closing speech. He had to bear in mind that the last evidence the jury had heard was the appellant refusing to answer questions or give evidence in accordance with the oath.

[111] Further, the appellant had repeatedly disobeyed the judge's directions that he should answer questions asked by senior counsel for the prosecution.

[112] In addition the appellant did not ask the judge to be permitted to make a closing speech either at the time of the judge's ruling on 26 June 2018, or the next morning before the charge. As stated earlier, the appellant is forthright in making his views and complaints known. If he had really wished to make a closing speech, or felt that it was unfair that he could not make one, he would have undoubtedly made that clear to the judge.

[113] We agree that in the overall context of this case that the appellant would certainly have used his closing speech as a further opportunity to disrupt or sabotage the trial to avoid the inevitable conviction in light of the strength of evidence and moreover, that the appellant would not obey any directions given by the court. In this case, we consider that the trial judge cannot be criticised for his handling of this aspect of the case.

[114] The well-founded nature of the objective concerns as to how the appellant would abuse his right to make a closing speech are reinforced by the manner in which he conducted this appeal. For example, he repeatedly accused Mr Kelly QC and Mr Toal (in particular) of acting in an improper and dishonest way. He also behaved in a disrespectful manner to the court and in correspondence.

[115] Further, if the judge did err in refusing to permit the appellant the opportunity to make a closing speech, we agree that this does not, in the circumstances of this case, affect the safety of the conviction. We agree with the prosecution submission that no advocate, regardless of their skill and eloquence, could possibly have advanced closing submissions that would have led to the acquittal of the appellant given the strength of the case against him.

Ground 3: In circumstances where the applicant had lost confidence in his legal team during his evidence in chief, with the result being his failure to properly communicate his case to the jury, the trial judge erred by not discharging the jury

[116] Having been sworn as a witness the appellant refused to answer questions. This was a deliberate attempt to derail the trial. We further agree that it would have been grossly unfair if the judge had discharged the jury in these circumstances and would create a precedent where any defendant could behave in this way and achieve a discharge of the jury.

Ground 4: The trial judge erred by failing to adequately put the applicant's case in circumstances where the applicant did not have the benefit of counsel

[117] This ground is not established and it is manifest that the judge dealt with the evidence in his charge to the jury in a conspicuously fair and even handed manner.

Ground 5: The trial judge erred by not permitting counsel to come off record at the pre-trial stage when it was clear that the relationship with counsel had deteriorated to the extent where the applicant had lost confidence in his legal team.

[118] This application came on the morning of trial and against the background of a number of hearings before Mr Justice Colton which have been dealt with in some detail above.

[119] Mr Greene had repeatedly made clear that he was in a position to represent the appellant notwithstanding the criticisms that the appellant made about him. This included the claim the appellant made to Mr Justice Colton that Mr Greene had tried to get him to lie. Further, the court is prevented from hearing from Mr Greene on the background to his application to withdraw from the case.

[120] It is correctly accepted in the appellant's skeleton argument that the court has a discretion on whether to commit counsel to withdraw. We are satisfied that the decision to permit Mr Greene to withdraw is unimpeachable in the circumstances of this case.

[121] As the prosecution noted, the appellant had already delayed the commencement of the case on two previous occasions. He then tried to dismiss his lawyers in May of 2018 and when this was unsuccessful sought to sabotage the commencement of the trial by making his last minute intervention.

[122] After the judge refused the application to withdraw, relations between the appellant and his counsel seemed to stabilise. By refusing to waive his privilege the appellant is preventing the court from examining the matter properly. We infer that this is because he knew or believed that such an examination was not likely to be of any assistance to him.

[123] There is no basis upon which it can be seriously argued that the judge was wrong to refuse the appellant's lawyers to withdraw from the case on the morning of trial. Further, if the judge did commit an error in permitting counsel to withdraw we are satisfied that it has had no impact on the safety of the appellant's conviction.

Ground 6: Failure of the Judge to Direct the Jury on Loss of Control

[124] The appellant had never made the case that the killing had resulted from his loss of control. In para [19] of his amended defence statement served on 17 June 2018 the appellant makes the case that the death had occurred after the deceased had come at him with the knife in her right hand and he had engaged in a struggle with her in order to defend himself. The knife was never in his hands and he did not know how, where or when the deceased sustained the fatal injuries. The import of this is that the injuries must have been somehow accidentally self-inflicted by the deceased in the course of the alleged struggle.

[125] In *R v Jewell* [2014] EWCA Crim 414, Lady Justice Rafferty (referring to the earlier case of *R v Clinton* [2012] 1 Cr App R 26) stated that the trial judge must make a: "common sense judgement based on analysis of all the evidence" in deciding when a defence should be left for the consideration of the jury. It is clear that there must be an evidential basis for a defence to be left and the jury to be directed on it.

[126] In *Jewell* the defendant had consistently made the case that he had lost control and had "snapped" prior to shooting the deceased and yet the Court of Appeal did not see fit to interfere with the decision of the trial judge not to leave the defence for the jury's consideration.

[127] In the instant case there was no evidence before the jury that the appellant had killed the deceased due to loss of control. His case was at all times, that the deceased had somehow killed herself. In order to avail of this partial defence it is necessary for the defence to surmount the evidential burden. Thereafter, it would be for the prosecution to disprove the defence. In this case, given that there was no evidence at all that the appellant had lost control, the evidential burden was not discharged. There was therefore no evidential basis on which the partial defence could be left to the jury.

Grounds 7 and 8: Bad Character evidence

[128] The evidence of the appellant's bad character in the form of a list of previous convictions was placed before the jury by agreement under Article 6(1)(a) of the 2004 Order. In *R v Marsh* EWCA Crim 2696 Aikens LJ at para [46] of the judgment referred to evidence of bad character that had been admitted by agreement and stated:

> "The evidence was admitted without demur from either the highly experienced and skillful defence counsel or the equally experienced and skilled trial Judge. It was admissible because there was tacit agreement between all parties to the proceedings that the evidence was relevant, admissible and should be admitted."

At para [48] the court went on to state that as a consequence:

> "the conviction can only be unsafe… if the Judge's directions in relation to that evidence were so much at fault so as to lead to the conclusion that the jury did not know how properly to deal with that evidence when considering their verdict."

[129] The trial judge dealt appropriately with the use to which such evidence could be put at pp [44-45] of his charge to the jury. The jury were left in no doubt as to the limitations of such evidence. The trial judge indicated that they had only heard about his previous convictions because:

> "Mr Lyness has alleged that Ms Downey was someone who perpetrated acts of violence upon him and you are entitled to know about the character of the man who makes these allegations when you are deciding whether they are true or not. The defendant's previous convictions are only relevant to your consideration on this one issue… you must not convict him of this offence because he has been convicted in the past."

Ground 9: No Reference to 'Accident' in Route to Verdict document

[130] The trial judge assisted the jury with a 'Route to Verdict' document. This document dealt with the steps the jury were required to take in reaching a verdict. The inclusion of a specific reference to a defence of 'accident' would have unnecessarily complicated what is meant to be a pared down document. Any issues dealing with whether or not the deceased died accidentally are covered by the first question: "Are you satisfied to the criminal standard beyond a reasonable doubt that the defendant killed Anita Downey?" If the jury believed there was a real possibility that the deceased had accidentally killed herself, they would not have answered this question positively. The trial judge dealt appropriately with the appellant's defence regarding accident at p [45] of his charge.

Ground 10: The judge erred by not giving the applicant the option to call witnesses as part of the defence case

[131] The skeleton argument lodged on behalf of the appellant is based on the contention that the defence case had not been closed. This is incorrect, the defence case had already been closed. At the conclusion of the appellant's evidence, Mr Greene QC formally closed the defence case. Therefore, the appellant did not have the option of calling witnesses when he took over his own defence as the defence case had been closed. The judge cannot be criticised for not offering the appellant the opportunity to exercise a right that he did not have.

[132] In any event, the witnesses he claims he would have called, even assuming what the appellant claims they would have said to be true, would not have any impact on the safety of the conviction.

Ground 11: The judge erred by instructing the applicant in the presence of the jury that he did not have the right to refuse to answer questions or the right to silence, and thereafter failed to correctly direct the jury in terms of the inferences that could properly be drawn from these failures; and/or

[133] Article 4(2) of the Criminal Evidence (NI) Order 1988 provides that when the stage has been reached at which evidence can be given for the defence that the defendant can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

[134] When the appellant refused to answer questions, the judge was quite correct to inform the appellant that it was his duty to answer questions. This was because he had taken the oath and had promised to tell the truth, the whole truth and nothing but the truth. By refusing to answer questions he was clearly in breach of that oath.

[135] In any event, there was no practical effect of this admonition since the appellant ignored it and continued to refuse to answer questions asked of him.

Ground 12: The judge erred by failing to issue a Makanjuola warning in respect of the evidence of Shane Lyness

[136] The characterisation of the appellant's evidence set out in his skeleton argument bears little relationship to the reality of how compelling and reliable his evidence was. Not only was Shane Lyness shown to have not lied, his evidence was supported and corroborated by the independent evidence of the pathologist Dr Johnson and his evidence and cross-examination did not come close to the type of case in which a Makanjoula warning is necessary.

Was the appellant's trial unfair? Denial of right to making a closing speech

[137] Following the hearing of the appeal the court requested further assistance in respect of the approach the court should take having regard to the fact that the appellant [then legally unrepresented] was not permitted to make a closing speech and the manner in which the trial judge arrived at that decision.

[138] The prosecution contended that while the appellant's trial involved an aspect of procedural unfairness, his trial was not unfair. Alternatively, they submitted that if this court concludes that the trial was unfair, this does not automatically mean that the conviction must be quashed citing numerous examples where this approach has been followed.

[139] By virtue of section 2 of the Criminal Procedure Act 1865 the appellant had a statutory right to make a closing speech. This right is to be construed in the context of the judge's obligation to ensure the proper conduct of the trial. The right cannot be used to frustrate the trial. Although the court has an inherent power to prevent its process being abused by a defendant, that power is to be exercised exceedingly sparingly, only in an obvious case and, only if there is no alternative – see *Morley[1988] Q.B. 601 and Archbold* [2022] at para 4-383. While it is clear that a court does have power to withhold that right in exceptional circumstances where there is no alternative, it is accepted that the judge did not allow the appellant to make submissions about whether or not he should be permitted to make a closing speech; the judge did not enquire as to whether the appellant wished to make a closing speech; and he did not make any assessment as to what the appellant intended to say in his closing speech. In those circumstances the prosecution accept that the process by which the judge determined that the appellant should not be permitted to make a closing speech was unfair. However, they contend that if the proper process had been followed the result would have been the same in light of the background to this case that we have set out earlier. Further, the prosecution contend that the approach of the court to the closing speech issue does not render the conviction unsafe.

[140] The prosecution submit that just because there has been unfairness in one aspect of the trial process, it does not automatically mean that the appellant's trial was unfair. The court must look at the entirety of the case before making a determination on whether the trial itself was unfair. The prosecution submit that while the decision to refuse to permit the appellant, to make a closing speech was unfair, the appellant's trial was fair for the following reasons:

> "(i) If the learned judge had carried out a detailed enquiry into whether the appellant ought to be permitted to make a closing speech he would have been entitled to reach the same conclusion, namely that the appellant should not be permitted to make a closing speech. The

prosecution would have sought to persuade the Court, that the appellant had manipulated the trial process by engaging in a premeditated 'stunt' whereby he theatrically accused his Senior Counsel of getting him to tell lies in evidence before the jury. Whilst this type of behaviour was different from the type encountered by the trial judge in R v Morley [1988] QB 601, we submit it was no less potentially injurious to the trial process. The learned judge would have been entitled to conclude that to permit the appellant to make a closing speech, would have been too much of a risk to the continuance and fairness of the trial. We submit that the learned judge would have been entitled to conclude, in light of the strength of the evidence and the conduct of the accused, that his only tactic left was to seek to unfairly sabotage the trial. Therefore, if a fair process had been followed and the appellant had stated that he wished to make a speech, the learned Judge would have been entitled to refuse to permit him to do so;

(ii) The appellant was present when the issue of his closing speech was raised. Indeed, he had time to reflect on the issue overnight but never sought at any stage to indicate that he wished to address the jury. The appellant is someone who is not afraid to speak directly to the court if he perceives the need to do so and was representing himself at the material time. While it is correct that the learned Judge did not invite submissions from either party (and we concede ought to have) before making his determination about whether to permit speeches, this would not have precluded the appellant raising the issue either at the time of the ruling or prior to the charge. We respectfully submit that the absence of objection from the appellant could be inferred to amount to acquiescence on his part in relation to how the Judge intended to conclude the case.

(iii) We respectfully submit that the appellant has never indicated what it was that he would have said if he had been permitted to make a closing speech. We submit this is because there is nothing that could have been said in a closing address that would have assisted the appellant's case. A closing speech normally consists of a reminder and comment upon those parts of the evidence which assists the party making the speech. In this case the defence placed no evidence before the jury which

dealt directly with the events in question or offered an alternative narrative as to what transpired in the living room at Toberhewney Hall. In the course of this Appeal, the court has heard the appellant ventilate a number of issues which he believes are matters of substance over the course of the appeal. Most of these matters, it is respectfully submitted, could not have been referred to in a closing speech as they were not part of the evidence or were otherwise of a fanciful or irrelevant nature and would have been of no assistance in undermining the prosecution case. The prosecution do not seek to denigrate the appellant, but the court might reasonably come to the view that the making of a closing speech by him might have had a negative effect on the jury's consideration of the appellant's case, especially if he had aired the possibility, canvassed by him before this court, that the deceased may have committed suicide.

(iv) The learned Judge also refused to permit the prosecution to make a closing speech. This was significantly to the advantage of the appellant as there was a wealth of evidence which the prosecution could have pointed to in order to advance their case in closing submissions. A prosecution closing speech would have been a persuasive and compelling exposition of the appellant's guilt.

(v) It is respectfully submitted that the Learned Trial Judge dealt impeccably with the appellant's case and placed all matters that could possibly be advanced on his behalf, fairly and squarely for the consideration of the jury.

(vi) The legislation which confers the right is very old and was passed at a time when a criminal trial bore little resemblance to its' modern day iteration. For example, the accused would not have had the protection of the judge's charge where all of the evidence is summarized in an even-handed manner.

(vii) The evidence in favour of guilt in this case was overwhelming. The appellant was located by police in a room with his deceased partner. Her throat had been cut with a large kitchen knife. The Assistant State Pathologist gave uncontradicted evidence that the injuries were not consistent with having been caused by accident. The

> appellant's son was an eye-witness to the killing and his initial account as to what transpired was almost contemporaneously given in the form of a '999' call recording. The appellant initially told police that the deceased had brought the knife into the living room. In an amended defence statement (submitted in the course of the trial) the appellant claimed that he brought the knife from the kitchen to cut the strap of the deceased's handbag over which they had been tussling. The appellant's explanation for the demise of Ms Downey can properly be considered ludicrous."

[141] We find this reasoning of the prosecution compelling and conclude that while the process by which the appellant was denied the right to make a closing speech was less than ideal it did not, in the particular circumstances of this case, render the trial unfair nor did it imperil the safety of the conviction.

[142] In light of our unanimous conclusion in para [141] it is unnecessary to go further. However, even if the court had concluded, which we do not, that the trial was unfair, the court would still have had to determine whether the conviction should be quashed by reference to the question of whether the conviction is unsafe. In light of the overwhelming nature of the evidence we do not entertain the slightest doubt as to the safety of this conviction. Our attention was drawn to a number of pertinent authorities on this issue.

[143] In *R v Lambert* [2001] UKHL 37 [2001] 3 WLR 206 Lord Clyde stated at para [159] (p 69):

> "No doubt in many cases an unfair trial in contravention of Article 6 will constitute an unsafe conviction (see for example *R v Togher* 9 Nov 2000 and *R v Forbes* 14 Dec 2000).…But an unfairness is not always fatal to a conviction…..If there is doubt about guilt then the conviction must be held to be unsafe. But if there is no doubt about guilt it is not every case where an unfairness can be identified that will necessarily and inevitably lead to a quashing of the conviction."

[144] The issue in *Lambert* was the finding by the Court of Appeal that the statutory legal burden of proof placed on a defendant by the Misuse of Drugs Act 1971 was incompatible with the presumption of innocence. The trial judge had charged the jury on the basis that the defendant bore the legal burden of proof in respect of the statutory defence under the Act. This was held to be incompatible with the fair trial provisions under Article 6. Notwithstanding this substantial breach which related to the most fundamental aspect of a criminal trial namely the burden and standard of proof, the House of Lords upheld the conviction given the overwhelming nature of

the evidence against the defendant. The focus of the court was on whether there was doubt about guilt.

[145] Further, in *R v Hanratty* [2002] EWCA Crim 1141 at para [87] the court referred to the decision of Lord Bingham of Cornhill in *R v Pendleton* [2002] 1 WLR 72 when he set out the statutory underpinning of the appellate process:

> "Although the 1907 Act has been repeatedly amended, the scheme of the Act has not been fundamentally altered. The most notable change has been the granting by the Criminal Appeal Act 1964 and the extension by the Criminal Justice Act 1988 of a power, on the allowing of an appeal against conviction, to order a retrial. The core provision contained in section 4 of the 1907 Act is now expressed more shortly and simply in section 2 of the 1968 Act as substituted by section 2(1) of the Criminal Appeal Act 1995: "(I) Subject to the provisions of this Act, the Court of Appeal- (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case." Lord Justice Mantell went on to say: "the most important lesson to be learnt from this part of Lord Bingham's speech is that Parliament's overriding intention….is that it should be this court's central role to ensure that justice has been done and to rectify injustice."

[146] At para [95] the court referred to the two grounds which are capable of rendering a conviction unsafe:

> "Here it is important to have in mind that a conviction can be unsafe for two distinct reasons that may, but do not necessarily, overlap. The first reason being that there is a doubt as to the safety of the conviction and the second being that the trial was materially flawed. The second reason can be independent of guilt because of the fundamental constitutional requirement that even a guilty defendant is entitled, before being found guilty, to have a trial which conforms with at least the minimum standards of what is regarded in this jurisdiction as being an acceptable criminal trial. These standards include those that safeguard a defendant from serious procedural, but not technical, unfairness. A technical flaw is excluded because it is wrong to elevate the procedural rules that govern a trial to a level where they become an obstacle as opposed to an aid to achieving justice."

[147] At para [97] Lord Bingham was referred to again, in respect of his judgment in *Randall v R* [2002] UKPC 19:

> "It is also necessary to distinguish between procedural flaws which are technical and those which are not. Clear guidance as to this distinction has also been provided by Lord Bingham in the recent Privy Council decision of *Randall v R* (16 April 2002) [2002] UK PC 19 at para 28:
>
> > "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 a 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 a 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 prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

[148] The court also quoted with approval the judgment of Carswell LCJ, in the unreported case of *R v Ian Hay Gordon* [2002]:

> "We would also refer to the way the subject was encapsulated by Carswell LCJ in *R v Iain Hay Gordon* [2002] unreported CAR (3298) at para 29:

> 'It seems to us that it is now possible to formulate two propositions in respect of irregularities at trial, which formed the subject of a good deal of argument before us:
>
> 1. If there was a material irregularity, the conviction may be set aside even if the evidence of the appellant's guilt is clear.
>
> 2. Not every irregularity will cause a conviction to be set aside. There is room for the application of a test similar in effect to that of the former proviso, viz whether the irregularity was so serious that a miscarriage of justice has actually occurred.'"

[149] The court concluded in the following terms at para [213]:

> "As we have seen, even by contemporary standards of the time, there are criticisms of some substance which can be made as to the procedural defects, but these criticisms have to be seen in the context of the case as a whole. On the appeal we focus on what are alleged to have been defects in the trial process. This is particularly true in relation to non-disclosure. However, when we consider whether this was a flawed trial we have to consider the sum total of the defects against the backcloth of what was undoubtedly a thorough exploration of the real issue, namely was James Hanratty the killer and on that issue the jury came to the right answer. In making this comment we are not ignoring the two different grounds for saying a conviction is unsafe. We are recognising those two grounds but also acknowledging that the purpose of the rules is to ensure that an individual is not wrongly convicted and in the case of the procedural errors in this case this involves taking into account whether they interfered with the ability of James Hanratty to defend himself by raising a doubt as to his guilt. In that context we are satisfied the procedural shortcomings fell far short of what is required to lead to the conclusion that the trial should be regarded as flawed and this conviction unsafe on procedural grounds. The trial still met the basic standards of fairness required. We are satisfied that James Hanratty suffered no real prejudice."

[150] We consider that the loss of the right to make a closing speech in the circumstances of the present case was a defect which, as in *Hanratty*, did not interfere with the appellant's ability to defend himself by raising a doubt as to his guilt and that he suffered no real prejudice as a consequence. Furthermore, we do not accept that the way in which this issue was handled by the trial judge impacts the safety of the conviction not least of all because of the overwhelming evidence of guilt.

[151] The prosecution correctly recognised that the right to make a closing speech is a statutory right and that this elevates the importance of adherence to this right, but the prosecution also correctly observed that that does not mean that the court ought not to pay close attention to the consequences for the overall fairness of the proceedings by the failure to adhere to it.

[152] A further, recent example of a court refusing to quash an unfair trial which involves the denial of a statutory right arose in *R v Abdurahman* [2019] EWCA Crim 2239. In that case, the court was concerned with the failure of the police to caution a suspect and remind him of his right to legal advice once they reasonably suspected his involvement in a criminal enterprise. In breach of his Code C PACE rights, the investigating officers continued to treat the appellant as a witness and obtained a witness statement which underpinned his subsequent prosecution for involvement in the London bombings of July 2005. The Grand Chamber of the ECHR (subsequent to his conviction) found that he had been denied a fair trial by reason of the Code C breaches and had suffered "irretrievable prejudice."

[153] The case was thereafter referred to the Court of Appeal by the CCRC. In refusing the appeal the court stated at para [110], that the court was concerned only with the safety of the conviction and that whilst there is a considerable overlap between this and the Article 6 right to a fair trial:

> "…In every case, the safety of the conviction will depend on the kind of breach and the nature and quality of the evidence in the case."

[154] At para [122] the court went on to state:

> "When examining the safety of the conviction, the correct approach, in our view, is to examine the other evidence and assess its probative value…."

[155] At para [124] the court referred to the overwhelming nature of the evidence and at para [124] stated the following:

> "Given the basis of the CCRC's reference, we have sought to analyse the safety of the conviction through the lens of Article 6 of the Convention, taking into account the reasoning of the Grand Chamber and indicating the

> extent to which we are, and are not, constrained by that reasoning. However, even on the assumption that the Grand Chamber was correct that the fairness of the trial was 'irretrievably prejudiced', the conclusion we have recorded at [123] above would in our judgment be sufficient to compel the dismissal of this appeal. That is because, as Mr Mably submitted, the Grand Chamber itself recognised, at [315] that its conclusion on fairness did not entail that Mr Abdurahman was wrongly convicted. *Moreover, it is clear on the domestic authorities (especially Lambert and Dundon) that a conviction may be regarded as safe where the evidence against the appellant is overwhelming, even though the trial has been unfair for the purposes of Article 6.* [emphasis added]"

[156] In *Dowsett v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin), the Divisional Court heard a challenge to a decision of the CCRC not to refer a case to the Court of Appeal where the conviction had been held by the Strasbourg Court to give rise to a breach of Article 6. At para 16, Mitting J (with whom Laws LJ agreed) concluded, on the basis of statements of Lord Slynn and Lord Clyde in *R v Lambert* [2002] 2 AC 545, that:

> "…not every breach of Article 6 will make a conviction unsafe. The nature of the breach and the facts of the case must in every case be analysed."

[157] Laws LJ added at para 24:

> "While any breach of Article 6 is plainly a cause of concern, and instances of such breaches in cases where the conviction is nevertheless safe may be few and far between, in this area one would not expect to see a rigid rule with no exceptions but a case by case approach with much emphasis laid on the gravity and effect of a particular violation."
> [emphasis added]

Conclusion

[158] Having regard to the nature of the breach and the evidence in this case which is overwhelming, there can, in truth, be no question of a miscarriage of justice or the harbouring of any doubts as to the safety of the conviction. Prosecuting counsel reminded this court of Carswell LCJ's question in *Hay Gordon*: "Was the material irregularity so serious that a miscarriage of justice has actually occurred?" We agree that that question must, in the circumstances of this appeal, be firmly answered in the negative.

[159] We have previously dismissed the appeal at the conclusion of the hearing of this case and for the reasons given above we reject all the grounds of appeal.