R v Bentley (Deceased) [2001] 1 Cr.App.R. 307

No: 97/7533/S1

IN THE COURT OF APPEAL
CRIMINAL DIVISION
Royal Courts of Justice
The Strand,
London
WC2A 2LL

Thursday 30th July 1998

B E F O R E:

THE LORD CHIEF JUSTICE OF ENGLAND
(Lord Bingham of Cornhill)

THE VICE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(LORD JUSTICE KENNEDY)

and

MR JUSTICE COLLINS

R E G I N A

- v-

DEREK WILLIAM BENTLEY
(Deceased)

Handed Down Transcript of Smith Bernal Reporting Limited
180 Fleet Street, London EC4A 2HD
Tel No: 0171 421 4040 Fax No: 0171 831 8838
(Official Shorthand Writers to the Court)

MR E FITZGERALD QC and MR H BLAXLAND appeared on behalf of the Appellant
MR N SWEENEY and MR D PERRY appeared on behalf of the Crown

JUDGMENT
(As approved by the court)

Lord Chief Justice:
On the evening of 2 November 1952 Police Constable Sidney Miles was shot dead in the execution of his duty on the roof of a warehouse in Croydon. Two men were charged with his murder: Christopher Craig, who was then aged 16; and Derek William Bentley, who was 19. On 17 November 1952 they were committed to stand trial on 9 December at the Central Criminal Court, where they were tried before Lord Goddard CJ and a jury. They were convicted on 11 December, in Bentleys case with a recommendation to mercy. The trial judge passed on each the only sentence permitted by law: On Craig, because of his age, that he be detained during Her Majestys Pleasure; on Bentley, sentence of death. An appeal by Bentley against conviction was dismissed by the Court of Criminal Appeal (Croom- Johnson, Ormerod and Pearson JJ) on 13 January 1953. He was executed on 28 January.

The Criminal Cases Review Commission has referred the conviction of Derek Bentley to this court under section 9 of the Criminal Appeal Act 1995. By section 9(2) of that Act a conviction so referred is to be treated for all purposes as an appeal against conviction under section 1 of the 1968 Act. We are accordingly required by section 2 of that Act to allow the appeal against conviction if we think that the conviction is unsafe, and otherwise to dismiss the appeal. Maria Bentley- Dingwall, a niece of Derek Bentley, has been approved by this court under section 44A of the 1968 Act to begin and conduct the appeal on his behalf. We shall henceforward refer to him as the appellant.

On 29 July 1993 the appellant was granted a royal pardon in respect of the sentence of death passed upon him and carried out. We have no function to perform in relation to that sentence, although some of the fresh evidence reviewed in section III below has obvious relevance to that aspect of the case.

Rarely has the court been required to review the safety of a conviction recorded over 45 years earlier. In undertaking that task we conclude:

(1) We must apply the substantive law of murder as applicable at the time, disregarding the abolition of constructive malice and the introduction of the defence of diminished responsibility by the Homicide Act 1957.

(2) The liability of a party to a joint enterprise must be determined according to the common law as now understood.

(3) The conduct of the trial and the direction of the jury must be judged according to the standards which we would now apply in any other appeal under section 1 of the 1968 Act.

(4) We must judge the safety of the conviction according to the standards which we would now apply in any other appeal under section 1 of the 1968 Act.

Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time. This could cause difficulty in some cases but not, we conclude, in this. Where, however, this court exercises its power to receive new evidence, it inevitably reviews a case different from that presented to the judge and the jury at the trial.

I
THE CASE AT TRIAL

We must first consider the case that was presented to the judge and the jury at the trial. We have had the advantage of reading a verbatim transcript of the trial, including the opening and closing addresses of counsel, and copies of the statements of the witnesses who were called and of those who were not called. We have also had copies of the original plan of the warehouse roof and surrounding area, and the original photographs at the trial, all of which are of enormous help in understanding where the various witnesses say that the important incidents occurred and where they themselves were at various material times. Since one of the grounds of appeal (Ground 16) asserts that there are such irreconcilable inconsistencies and improbabilities in significant parts of the evidence of certain police officers as to raise a real doubt as to the reliability and truthfulness of their evidence, it will be necessary to consider parts of the evidence given at the trial in some detail.

The main thrust of the prosecution case was straightforward. Craig had deliberately and wilfully murdered P.C. Miles and the appellant had, to use prosecuting counsels words in opening, incited Craig to begin the shooting and, although technically under arrest at the actual time of the killing of Miles, was party to that murder and equally responsible in law.

In order to prove the appellants participation, the prosecution relied heavily on what counsel described as the most important observation that Bentley made that night, namely "Let him have it, Chris". That was said to be a deliberate incitement to murder Detective Constable Fairfax, who had just arrested the appellant. It led, it was said, to Craig immediately firing at and wounding D.C. Fairfax. Counsel said in opening:-

> *It was spoken to a man who he, Bentley, clearly knew had a gun. That shot began a gun fight, in the course of which Miles was killed; that incitement .... Covered the whole of the shooting thereafter, even though at the time of the actual shot which killed P.C. Miles, Bentley was in custody and under arrest.*

The indictment which the two defendants faced contained only one count of murder. A separate indictment alleged other offences, including shooting at D.C. Fairfax and another officer, Police Constable Harrison, with intent to murder and various firearms offences. In accordance with a rule of practice established by the Court of Criminal Appeal in *R v Jones* [1918] 1 K.B. 416, no other count could be joined in an indictment with a count of murder. That rule has since been disapproved (see *Connelly v D.P.P.* [1964] A.C. 1254), but it explains why the jury had to concentrate on the killing of P.C. Miles and was only required to bring in verdicts on a single count of murder.

Craig's defence was that he was not guilty of murder, but guilty only of manslaughter because, although he had pulled the trigger and fired the shot, he had intended only to frighten the police officers and the killing had been an accident. Because of the doctrine of constructive malice, to which we shall have to return later in this judgment, the trial judge considered that Craig had no defence to murder even if his account was believed and he expressed that view to the jury. Notwithstanding that, he left it to the jury to consider manslaughter. In reality, the case against Craig that he had deliberately murdered P.C. Miles was very strong; and on the law as it then stood any verdict other than guilty of murder in his case would have been perverse.

The appellant's case was that he had not incited Craig to fire the gun and had at no time been party to its use. He had not known that Craig had a gun until the first shot was fired and he had not used the words Let him have it, Chris or any words which amounted to an incitement to use the gun. He had been standing with D.C. Fairfax for an appreciable time, making no effort to get away from him and behaving in a wholly docile manner, when Craig had fired the fatal shot. He had not participated in the murder.

In order to prove its case against the appellant, the Crown set out to establish that he was party to an agreement to use such violence as might be necessary to avoid arrest. The Crown sought to prove that he was on a felonious enterprise, namely warehouse breaking, and that he knew that Craig had a gun with him. To support the contention that there was a common purpose to use violence to resist arrest, the Crown relied on evidence that the appellant had had in his possession a knife, which was described, perhaps somewhat emotively, as a dagger, and a knuckle-duster, which had been made the more dangerous by having a piece of metal, described as a spike, protruding from its side. Craig had had, in addition to the gun, a knife, which was somewhat larger than that which had been in the appellant's possession. The weapons in the appellant's possession had been taken from him by D.C. Fairfax and it was accepted that he had at no time tried to make any use of them. The appellant denied that he had gone on a warehouse breaking expedition with Craig. It was, he said, only when Craig climbed over the gates leading into an alleyway at the side of the building that he realised that they were going to break into the warehouse. Craig's evidence was that the appellant had dared him to go with the appellant and break into a butchers shop. That had been frustrated because someone was at the shop and so they had gone to the confectionery warehouse. He said he had not told the appellant that he was armed until they were on the roof, when he saw someone down at the gate whom he did not at the time realise was a police officer. This was before any shooting took place. Craig's evidence thus contradicted the appellants in two very material particulars; first, that the appellant was unaware until Craig climbed over the gates that any warehouse breaking was to occur and, secondly, that the appellant was unaware that Craig had a gun until the first shot was fired.

We must now turn to a more detailed review of the salient parts of the evidence. The warehouse of Messrs Barlow and Parker, wholesale confectioners, was in Tamworth Road, Croydon. It extended over Nos. 27 to 29 on the northern side of what was otherwise a largely residential street and was opposite No. 74. It consisted of a two storey building with a flat roof which was just over 22 feet from ground level. The frontage on Tamworth Road was 54 feet and the building stretched back for a distance of 90 feet. Behind and attached to it and forming part of the same warehouse was a building with a sloping roof covered by asbestos tiles with glass nearer the apex. This building extended to the east of the building with the flat roof, thus forming with it an inverted L. There was a narrow gully at its edge which would enable a person to crawl along leaning against the asbestos tiles.

About half way along the western side of the flat roof was a brick structure 7 feet 6 inches high forming the head of a staircase giving access to the roof through a door which opened outwards, being hinged on the south or Tamworth Road side. Directly opposite the door was the south end of four roof lights, each measuring some 8 by 16 feet and standing some 2 feet 3 inches at their sides to 7 feet 6 inches at their apices. Some 14 feet north of the north-westerly of these four roof lights and on the northern edge of the flat roof was a

concrete structure standing 11 feet 6 inches high which was the head of a lift shaft. The narrow gully at the foot of the sloping roof of the building forming the other part of the warehouse ran behind this structure. To avoid confusion, we will call the brick structure on the western edge, the stairhead, and that on the northern edge the lift shaft, although at the trial they were described in various different ways by witnesses.

At about 9.15p.m. On the night of Sunday 2 November 1952, a Mrs Ware, who lived at 74 Tamworth Road, saw 2 young men acting suspiciously in the road and then climb over a 6 foot high gate which led into a passage running along the western (for her, the left hand) side of the warehouse building between it and the house at No.30 Tamworth Road. The police were summoned by her husband, who went to the nearest police call box and at 9.25 p.m. A police van, containing P.C. Harrison and D.C Fairfax, and a police wireless car, containing Police Constables McDonald and Miles, arrived at the scene. The initial actions of the officers following their arrival at the scene were not explored in any detail at the trial. The story was taken up from the time that D.C. Fairfax began to climb up to the flat roof. He was the first officer on the roof. But their statements showed that P.C. Harrison and D.C. Fairfax had initially gone to the roof of premises running behind number 25 Tamworth Road, i.e. To the east, and that as a result of P.C. Miles (who was in Tamworth Road) spotting someone on the flat roof, D.C. Fairfax had climbed over the gate into the passageway running along the west side of the warehouse. P.C. McDonald was there too and attempted to climb a drainpipe behind D.C. Fairfax but was insufficiently athletic and could not manage the last six feet. It was a dark night, with little moonlight, and D.C. Fairfax had no torch. His account was that when he got onto the roof about 23 feet south of the stairhead, which was to his left, he saw the two defendants standing between the roof lights and the lift shaft. As he approached, they backed away behind the lift shaft. He shouted that he was a police officer and that they should come out from behind the lift shaft, whereupon Craig shouted "If you want us, fucking well come and get us." D.C. Fairfax then rushed behind the lift shaft, it would seem going round the right hand or east side of it, and grabbed the appellant. He pushed (in cross-examination he said pulled) the appellant round the front of the lift shaft, intending to apprehend Craig, but as they reached the south west corner of the lift shaft, the appellant broke away from him and, as he did so, shouted Let him have it, Chris, whereupon there was a flash and a loud report and he felt something strike his right shoulder which caused him to spin round and fall down. When this happened, he was about 6 feet from Craig. As he got up, he saw one person moving to his left and one to his right. He grabbed at the one to his right, who turned out to be the appellant, and punched him. The appellant fell down and at the same time there was a second loud report. He then pulled the appellant up and, using him as a shield, made his way to the corner of the north easterly roof light. He then felt over the appellants clothing and found a knuckle- duster in his right hand coat pocket and a knife in his right hand breast pocket. He told the appellant that he intended to work him round the roof to the door in the stairhead, and did so. Craig followed, but remained on the east side of the roof about half way along it, thus roughly opposite the stairhead. He then retreated to the north- east corner of the roof. The appellant, when told what he intended to do, said to D.C. Fairfax "He'll shoot you".

P.C. McDonald's account was somewhat different. He said that he realised he could not climb the last 6 feet or so and was just beginning to climb down again when he heard someone shout "Let him have it, Chris". He did not hear an immediate shot, but had time to descend to the ground, when he heard two or three shots fired. He said that the time that elapsed between hearing the shout and the shots was a matter of minutes, but, when questioned by the trial judge, agreed it was less than a minute. In any event, there was, on his evidence,

clearly an appreciable time lapse. P.C. Harrison, who was at the eastern end of the building with the sloping roof, and so about 60 to 70 feet from the lift shaft, saw D.C. Fairfax detain the appellant and begin to walk him towards the stairhead. P.C. Harrison called out to D.C. Fairfax to ask if he was all right and received the reply "I've got one: There's another one on the roof". He then saw the appellant break away from D.C. Fairfax and heard him call out: "Let him have it, Chris". Immediately afterwards, he heard two shots fired from the direction of the lift shaft and saw D.C. Fairfax spin round and drop to the roof. He then began to edge along the gully towards the flat roof. Craig came from behind the lift shaft to the side of the flat roof and aimed and fired two shots at him which fortunately missed but caused him to retreat.

There were, as can be seen, a number of discrepancies between the accounts given by the three police officers who claimed to have heard the appellant shout "Let him have it, Chris". P.C. McDonald spoke of an appreciable time lag between the shout and the shots and P.C. Harrison placed D.C. Fairfax and the appellant a greater distance from the lift shaft and, so it would seem, more than 6 feet from Craig. In addition, he spoke of a conversation between himself and D.C. Fairfax which the latter did not recall. Mr Fitzgerald Q.C. For the appellant relied on those discrepancies to support an argument that the officers evidence was too unreliable to establish that the appellant had shouted as alleged. Rather, it was submitted, the evidence had been invented. Apart from the discrepancies (and, it was submitted, the impossibility of P.C. Harrison having seen what he alleged if D.C. Fairfax was correct about where he was when the appellant broke away from him), Mr Fitzgerald sought also to rely on two extraneous matters. First, he drew attention to the date of P.C. Harrison's statement, namely 2 November, and the fact that it was taken and signature witnessed by Detective Sergeant Shepherd. The statement recounted that P.C. Harrison had been one of those who took P.C. Miles body to the mortuary at the Mayday Hospital, which is only a short distance from Tamworth Road. Other evidence showed that P.C. Miles body was not taken from the roof until 10.10 p.m. And D.S. Shepherds own statement showed that he went to Croydon General Hospital at about 11 p.m. Where he saw Craig. He remained there dealing with him until well into 3 November and thereafter carried out further investigations. Thus, it was said, it looks, if not impossible, at least highly improbable that P.C. Harrison's statement could have been made on 2 November. This matter was not but could have been explored at the trial if counsel had then thought there was anything in it. In any event, it is quite impossible for us to regard it with such suspicion as to throw doubt on the reliability of the officers evidence. If it had been explored, a reasonable explanation could easily have been forthcoming: An obvious one is that the statement was started, and so dated, before midnight and completed some time later or that a mistake was made as to the date.

The second matter related to the expression "Let him have it": these words were used in a case in 1940, *R v Appleby* (1940) 28 Cr.App.R 1, by one of two professional criminals who were found guilty of murdering a police officer. It was suggested that it was too remarkable a coincidence that those self same words were used by the appellant, and that the officers, probably at the behest of Detective Chief Inspector Smith, the officer in charge of the investigation, had drawn on their knowledge of that case and invented that piece of evidence. We are bound to say that we found that submission far fetched. The expression "Let him have it" meaning 'kill him' was hardly an unusual one, and would have been well known to anyone who had been to see gangster films, particularly those imported from the United States of America. It was suggested that there is other material which shows that D.C.I. Smith was not telling the truth in a material particular. This was a reference to the statement under caution made by the appellant which was said to have been taken entirely

at his dictation without any questions being asked by the officers who took it. The appellant was illiterate and of low intelligence, which in itself, it was said, made dictation improbable, and it was argued that fresh evidence established that questions must have been asked. We shall deal with that later, but any untruths told by D.C.I. Smith and D.S. Shepherd, who took the statement, cannot support a conclusion that all the other officers must therefore be regarded as unreliable. It was suggested that D.C.I. Smith might have dishonestly orchestrated this evidence. We would only comment that, as the discrepancies show, if he did, he made a poor job of it. There is in our judgment nothing in those submissions.

We have concentrated on the "Let him have it, Chris" shout because of its obvious importance to the prosecution case. Both the appellant and Craig denied that it had been said. But it was on any showing ambiguous. It could bear an innocent meaning, being an encouragement by the appellant to Craig to hand over his weapon. That is admittedly an improbable construction if it was said when the appellant moved away from D.C. Fairfax and, if the appellant admitted saying the words, he would be admitting that he knew Craig had a gun. For his part, the firing by Craig of the gun and the wounding of D.C. Fairfax after the words had been used would hardly have been consistent with the defence of accident. However, what was important was what the appellant intended to convey by whatever he said, not what others, and particularly Craig, understood by the words. In his final speech, counsel for the appellant (Mr Cassels) put to the jury that there could be some interpretation of the words other than that put upon them by the prosecution and that the words were not capable of that strong meaning. He did not, however, spell out what that other meaning could be, perhaps because he realised the difficulty he was in having regard to the appellants denial that the words had been used at all. The appellants subsequent conduct may have thrown some light on what he meant by the words, if they were spoken. At least the jury should have taken his conduct into account in deciding whether the words in question, if they were sure he had uttered them, showed that he had been participating in an agreement to use violence to resist arrest or encouraging Craig to shoot at the officer and so to kill P.C. Miles.

Before returning to the evidence of events after the initial firing of the gun and the wounding of D.C. Fairfax, we should consider the discrepancies. The situation on the roof that night was confused and frightening. In those circumstances, it is not at all surprising that different witnesses should give different versions. It is common knowledge that eye witnesses of fast- moving events usually do, when testifying, give versions of events which may differ substantially. Such witnesses are not necessarily lying: Indeed, usually they are doing their honest best, but have seen things from different viewpoints. Differences of recollection about the sequence of events, about where people were when particular things happened and who was involved in them and about what was said and when are commonplace. Each witness may remember a particular event or recall having heard particular words spoken but may not be able to recall how the two were, if at all, connected. We recognise that it is likely that the officers had, since 2 November and before trial, discussed what each had seen and heard, but the maintenance of the discrepancies is perhaps more consistent with honesty than with an attempt to concoct a false account. That is not to say that a mistake could not have been made as to the precise words used or their import: Indeed, D.C. Fairfax in his statement made very shortly after the events had recalled the words as being Let em have it, Chris. Discrepancies in descriptions of events such as those occurring on the night of 2 November 1952 are not indications that lies were being told but are to be expected. Unless collaboration in the compiling of statements were admitted or established, the absence of discrepancies would give rise to grave suspicion that heads had been put together. We see no reason to believe that the discrepancies identified create doubt about the officers evidence that the words were used. Furthermore, we see nothing inherently improbable in the evidence given by any of the officers of what each heard and saw. It was for the jury to decide, having heard all the evidence, what was said and done and the significance of it.

Once he had got behind the stairhead with the appellant, D.C. Fairfax went to assist P.C. McDonald who had climbed up the drainpipe again. This meant leaving the appellant free to move away if he had wished to do so. While he had nowhere to escape to, being on the roof and aware that there were a number of policemen about, he could have tried to rejoin Craig and make a stand with him. He did not. Once P.C. McDonald was on the roof, he asked D.C. Fairfax what sort of gun Craig had whereupon, according to both officers, the appellant interrupted and said, as D.C. Fairfax recalled, "He's got a .45 Colt and plenty of bloody ammunition too" and, as P.C. McDonald recalled, "It's a .45 Colt and he has plenty of ammunition for it". The appellant denied saying this, alleging that Craig had shouted out that he had a .45 Colt. P.C. McDonald stated (although D.C. Fairfax did not give evidence of this) that the appellant had said before this:- "I told the silly bugger not to use it." This was denied by the appellant. In the meantime, P.C. Harrison had got down to the ground and gone round to the front of the warehouse where he met up with other officers including P.C. Miles. They had access to the building and went up the internal staircase and kicked open the door which led onto the roof. As P.C. Miles emerged from the stairhead, Craig fired the gun and he was killed by a bullet which hit him between the eyes. He died instantly. P.C. McDonald and D.C. Fairfax went to P.C. Miles assistance and discovered that he was dead. The appellant was left standing nearby: Again, he made no attempt to go anywhere or to do anything. Craig was heard to shout:- "I am Craig. You've just given my brother 12 years. Come on, you coppers, I'm only 16." And: "Come on you brave coppers, think of your wives."

The appellant, who had been brought towards the stairhead, was alleged to have said:-"You want to look out: He'll blow your heads off."

He was then taken downstairs and, just before he went to the stairhead, he said:- "They're taking me down, Chris".

According to D.C. Fairfax, no shot followed this remark, although P.C. Harrison said another shot was fired. The Crown suggested that this remark was a further incitement to Craig to shoot at the police. The appellant said he was afraid for his own safety and was warning Craig that he would be in the firing line: in effect, it was intended to prevent him shooting. Whilst we accept that the remark could have been a further incitement to use the gun, we feel that the appellant's explanation is much more persuasive. It was, we think, unsafe to infer that the remark constituted further incitement. There is also considerable doubt whether Craig fired any shot which could have been regarded as a response to the remark.

The appellant was placed in a police car. On the way to the police station, he is alleged to have said:- "I knew he had a gun but I didn't think he'd use it. He has done one of your blokes in".

This he denied. Later, he made a statement under caution. It contains the sentence:- "I did not know he was going to use the gun", which, it was suggested, showed that he knew that Craig had a gun. It was suggested in cross examination of the police officers who took the statement that that had arisen from the putting of a question, but they denied it. In his evidence, the appellant stated that he had never said that. Later in the statement, he is recorded as having said:- "I did not have a gun and I did not know Chris had one until he shot".

We consider the significance of these alleged observations in section III below.

Once the appellant had been taken down, D.C. Fairfax returned with a firearm, with which he had been issued, and went back up to the roof. He fired twice at Craig but missed, Craig having fired at him. Craig's revolver was by now empty and he jumped or dived off the roof, suffering a fractured spine, breast bone and left forearm. Notwithstanding this, he was able to tell the first police officer who reached him that he wished he had killed the fucking lot. He later made a number of statements to police officers sitting with him in hospital, displaying a hatred of the police and a total lack of remorse at what he had done.

Nothing said or done by the appellant after he had been taken round behind the stairhead by D.S. Fairfax was aggressive to the police nor did he try to incite Craig to further violence. Craig's words and actions displayed a hatred of the police. Furthermore, on at least two occasions, that is to say when D.C. Fairfax went to assist P.C. McDonald on to the roof and when both officers went to P.C. Miles after he had been shot, the appellant was left free to go over to Craig, who remained at or near the lift shaft. It is important to try to assess the time which must have elapsed between the first shot, which wounded D.C. Fairfax, and the killing of P.C. Miles. The first officers arrived at the warehouse at 9.25 p.m. And we know from his statement that the police surgeon was telephoned at 9.57 p.m. To come because a police officer had been shot. The shooting of P.C. Miles must therefore have occurred a little before 9.57 p.m. Although some minutes must have elapsed before D.C. Fairfax got onto the roof, there cannot have been a very long time between the arrival of the police and the firing of the first shot. It seems likely that the killing of P.C. Miles occurred some time after the wounding of D.C. Fairfax.

It is not entirely clear how many shots were fired by Craig. Three spent cartridges were found by the lift shaft and, when it was recovered, the revolver contained six cartridges, two of which had misfired and four of which were spent. Thus at least seven shots had been fired and Craig had at some stage reloaded the weapon. The gun itself had had part of the barrel sawn off, which made it more inaccurate. Four of the cartridges were the wrong size, being .41 instead of .45. This meant that the velocity would be greatly retarded. D.C. Fairfax's wound was relatively superficial and it seemed that his shoulder had been struck by a bullet travelling in an upward direction which had passed over the surface of but not penetrated the skin. The bullet had lodged in his braces. The combination of the inaccuracy caused by the shortening of the barrel and the wrong size of the cartridge, together with the lack of proper velocity, made it possible that the gun was fired as close as 6 feet from him, particularly if Craig had been crouching down when he fired. We return to this question briefly in section III below.

In order to determine the appellant's guilt, the jury had to resolve a number of issues. They included in particular the following:-

1. What was the nature and scope of the joint enterprise on which Craig and the appellant embarked?

2. When did the appellant get to know that Craig had the gun with him? None of the observations allegedly made by him were inconsistent with the knowledge having been acquired when the two were on the roof. The trial judge in the course of his summing- up to the jury suggested (see below) that it was inconceivable that Craig would not have told the appellant when they were going on a shopbreaking expedition that he had the gun. We do not think that that is necessarily so. The appellant had no record of violence and Craig may not have wanted him to know he was armed in case he refused to accompany him.

3. Did the appellant shout out "Let him have it, Chris"? If he did, what did he intend by the words he used? In particular, it could be argued that his actions and words while on the roof thereafter were consistent with his not having wanted to incite Craig to shoot any officer and that Craigs display of hatred towards the police suggested that he was engaged on an enterprise of his own.

4. At the time P.C. Miles was shot, was the appellant participating or had he withdrawn from any joint enterprise that could be inferred from the evidence? Here again his actions and words on the roof were relevant and the jury would have to determine the intention behind his shout "They're taking me down, Chris".

The appellant faced the problem that the jury was likely to find that he had told some lies. His evidence that he was wholly unaware that Craig was intent on any warehouse breaking until he climbed over the gate was difficult to reconcile with the evidence of Mrs Ware and in our view unlikely to be believed. The police evidence of the various remarks made by him, which were in general helpful to him in the sense that they showed a concern for the officers safety as well as his own, was consistent with his having known of Craig's possession of the gun, at least when Craig said he had told him of it. Furthermore, the appellants explanation for his possession of the knife and the knuckle-duster does not appear convincing. Both he and Craig said that Craig had given him the knuckle-duster when they were on the bus travelling to Croydon. He was asked why: His answer was that he did not know. The appellant agreed that the knife was his, having been given to him by one of his friends. He had left it in the coat because it was an old one which he did not usually wear, and for that reason it did not matter that the knife might damage its lining. Although he did not attempt at any time to make use of either of the weapons, his possession of them coupled with the decidedly feeble explanations for such possession could well have persuaded the jury that the pair of them had had violence in mind that night. Nevertheless, his possession of those weapons did not of itself prove that he was aware that Craig was armed with a loaded revolver.

On the evidence presented to the court we conclude that a properly directed jury would have been entitled to convict. The case against the appellant was, as it seems to us, a substantial one, albeit not, in contrast to that against Craig, overwhelming. We reject the submissions that the officers evidence of matters which incriminated the appellant, particularly the shout "Let him have it, Chris" should be regarded as necessarily unreliable or invented. The discrepancies were apparent at the time of the trial and were before the jury. Counsel had to make a very difficult tactical decision about the extent to which the defence should attack the police. There was an obvious risk of alienating the jury, and jeopardising any chance of a reprieve on conviction, if in a much- publicised trial arising from the wanton killing of a policeman in the execution of his duty the defence were to impugn the good faith of his colleagues. There were also dangers if the appellant's character had been fully before the jury: See section III below. We have deliberately gone through the evidence in some detail to show why we have reached this conclusion. It follows that we should not regard the appellants conviction as unsafe if the summing-up had been fair and the directions in law adequate. We have also had to consider the fresh evidence which has been put before us, and to decide whether anything disclosed in it affects the safety of the appellants conviction.

II
THE SUMMING UP TO THE JURY

Mr Fitzgerald QC for the appellant criticised the trial judge's summing up to the jury on a number of grounds, both general and particular. It is necessary to examine these criticisms in turn and in some detail.

(1) The standard of proof

At page 132C of the transcript of his summing up the trial judge directed the jury in these terms:

> Now there are one or two preliminaries to which I call your attention, though it is hardly necessary. The first one is hardly necessary, because you know as well as I do that in all criminal cases it is for the prosecution to prove their case, and it is said correctly that it is not for the prisoners to prove their innocence. In this case the prosecution have given abundant evidence for a case calling for an answer, and although the prisoners do not have to prove their innocence, when once a case is established against them they can give evidence, and they can call witnesses, and then you have to take their evidence as part of the sum of the case. The effect of a prisoner's evidence may be to satisfy you that he is innocent, it may be it causes you to have such doubt that you feel the case is not proved, and it may, and very often does, have a third effect: It may strengthen the evidence for the prosecution.

At page 138F of the transcript of his summing up, in the penultimate paragraph of his jury direction, the trial judge added:

> Gentlemen of the jury, I started by saying this was a terrible case. It is dreadful to think that two lads, one, at any rate, coming, and I daresay the other, from decent homes, should with arms of this sort go out in these days to carry out unlawful enterprises like warehouse- breaking and finish by shooting policemen. You have a duty to the prisoners. You will remember, I know, and realise, I know that you owe a duty to the community, and if young people, but not so young- they are responsible in law- commit crimes of this sort, it is right, quite independent of any question of punishment, that they should be convicted, and if you find good ground for convicting them, it is your duty to do it if you are satisfied with the evidence for the prosecution.

It was not suggested to us that any other passage of the summing up was directed to the standard of proof.

Mr Fitzgerald submitted that these passages did not amount to a direction on the standard of proof at all; that insofar as there was any direction it was inadequate; and that the summing up was fundamentally flawed by the absence of a clear and adequate direction on this crucial matter. In *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481 Viscount Sankey LC said:

> Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt.

In *Mancini v Director of Public Prosecutions* [1942] AC 1 at 13 Viscount Simon LC said:

> There is no reason to repeat to the jury the warning as to reasonable doubt again and again, provided that the direction is plainly given.

We were referred to a number of cases tried at or about this time, and in all of them the jury were told that they must be satisfied of the defendant's guilt beyond reasonable doubt, or that they should be sure of his guilt, before they convicted: See, for example, *R v Appleby*, (unreported, 10 May 1940), *R v Heath* (1946), *R v Evans* (1950) and *R v Christie* (1953).

Lord Goddard himself gave important guidance on this topic. In *R v Kritz* [1950] 1 KB 82, at 89, (1949) 33 Cr.App.R. 169 at 176 he said:

The only other point which has been seriously argued is that because the learned Common Sergeant told the jury that they must be reasonably satisfied, and did not use the words satisfied beyond reasonable doubt, he was not stating sufficiently the onus of proof. It would be a great misfortune, in criminal cases especially, if the accuracy or inaccuracy of a summing up were to depend upon whether or not the Judge or the Chairman had used a particular formula of words. It is not the particular formula of words that matters; it is the effect of the summing up. If the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the learned Judge uses one form of language or whether he uses another is neither here nor there. In our opinion, there was a perfectly fair and a perfectly proper summing up by the learned Common Sergeant in this case. We do not think that any jury could have been left in any doubt as to what was their duty. Juries, in my humble opinion, are not such fools as they are very often thought to be. They know when they have been a short time in the jury box that it is the duty of the prosecution to prove the case and that they have to be fully and thoroughly satisfied, and they very seldom want guidance on that point. It is right that they should have it. It is right that they should be reminded that the onus is on the prosecution all the way through the case. It is right that they should be reminded in a criminal case that they must be fully satisfied of the guilt of the accused person and should not find a verdict against him unless they feel sure. That is the direction which I myself constantly give to juries when I am at assizes or at the Old Bailey. When once a judge begins to use the words reasonable doubt and tries to explain what is a reasonable doubt and what is not, he is much more likely to confuse them than if he tells them in plain language: It is the duty of prosecution to satisfy you of the mans guilt. I am not saying that the learned Common Sergeant used that formula of words, nor am I saying that it is to be preferred before all others, but what I do say is, and I am sure I can say it with the full assent of my brethren, that it is not the actual formula used that matters, but the effect of the summing up, and if the effect of the summing up is to convey to the jury what is their duty, that is enough.

In *R v Summers* (1952) 36 Cr. App. R. 14 at 15 Lord Goddard made very much the same point:

> It is far better, instead of using the words reasonable doubt and then trying to explain what is a reasonable doubt, to direct a jury: You must not convict unless you are satisfied by the evidence that the offence has been committed. The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt. If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of Guilty, that is much better than using the expression reasonable doubt and I hope in future that that will be done. I never use the expression when summing up. I always tell a jury that, before they convict, they must feel sure and must be satisfied that the prosecution have established the guilt of the prisoner.

It appears that this passage misled some judges into thinking that a reference to being satisfied without any reference to reasonable doubt or to being sure was an adequate direction: See Glanville Williams, The Proof of Guilt, (3rd ed.,1963) at p.190. This misconception was, however, rectified by *R v Murtagh and Kennedy* (1955) 39 Cr. App. R. 72. It was not a view which Lord Goddard ever supported. In *R v Hepworth and Fearnley* (1955) 39 Cr. App. R. 152 at 154 he said:

> Another complaint that is made in this case is that the Recorder used only the word satisfied. It may be, especially in view of the number of cases recently in which this question has arisen, that I misled courts when I said in *Summers* (36 Cr. App. R. 14 at 15; [1952] WN 185)- and I still adhere to it- that I think it is very unfortunate to talk to juries about reasonable doubt, because the explanations given of what is and what is not a reasonable doubt are so very often extraordinarily difficult to follow and it is very difficult to tell a jury what is a reasonable doubt. To tell a jury that it must not be a fanciful doubt is no real guidance. To tell them that a reasonable doubt is such a doubt as would cause them to hesitate in their own affairs never seems to me to convey any particular standard; one member of the jury might say he would hesitate over something and another member might say that that same thing would not cause him to hesitate at all. I, therefore, suggested in that case that it would be better to use some other expression, by which I meant that it should be conveyed to the jury that they should convict only if they felt sure of the guilt of the accused. In some cases the word satisfied has been used. It is said that the jury in a civil case has to be satisfied and, therefore, one is laying down only the same standard of proof as in a civil case. I confess that I have had some difficulty in understanding how there is or there can be two standards; therefore, one would be on safe ground if one said in a criminal case to a jury: You must be satisfied beyond reasonable doubt and one could also say: You must be completely satisfied or better still: You must feel sure of the prisoners guilt. But I desire to repeat what I said in the case of *Kritz* (33 Cr. App. R. 169 at page 177; [1950] 1 KB 82, at page 89):
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> > I hope it will not be thought that we are laying down any particular form of words which must be used, but we are saying it is desirable that something more should be said than merely telling the jury they must be satisfied.

Since then the courts have consistently insisted on the need for a clear direction to the jury on the standard of proof, and have consistently held that a mere reference to being satisfied without a reference to being sure, or being satisfied beyond reasonable doubt, was inadequate: See, for example, *R v Bradbury* [1969] 2 QB 471, (1969) 53 Cr. App. R. 217, *R v Gray* (1973) 58 Cr. App. R. 177, *R v Gourley* (1981) Crim. L. R. 334 and *R v Quinn* (1983) Crim. L. R. 475.

In *R v Edwards* (1983) 77 Cr. App. R. 5 the trial judge had omitted to give a rape jury any direction on the standard of proof. This court regarded that as a serious defect, not cured by references in the speeches of counsel, but applied the proviso to section 2(1) of the 1968 Act as the subsection stood before amendment in 1995. We would accept that, in the light of that authority, a conviction may be regarded as safe despite the absence of an adequate direction even on a matter as fundamental as the standard of proof. But that could only be an appropriate conclusion where the case against the defendant was properly held to be overwhelming, as the court found it to be in *R v Edwards*; and we would question whether a conviction could ever be regarded as safe in a capital case if there were no adequate direction on that matter (see *R v Dunbar* [1958] 1 QB 1).

Mr Sweeney for the Crown rightly accepted that there was force in this ground of appeal. The first passage which we have quoted, while discussing the effect which the evidence of the defendants might have on the jurors minds, contained no direction on the standard which the evidence of the prosecution had to meet before the jury could properly convict. In the second passage there was reference to good ground for convicting, but no assistance whatever was given to the jury as to what would or would not be such good ground. Even if it would have been enough for the jury to be clearly told that they must be satisfied of the defendants guilt before convicting, and on our reading of the authorities that would not have been enough, the jury did not even receive that direction. In our judgment this ground of appeal is made good.

(2) The burden of proof
Mr Fitzgerald submitted that the trial judge had failed to give the jury a clear direction on the burden of proof, and had indeed reversed the burden by suggesting that there was an onus lying on the appellant and his co- defendant.

In support of this submission Mr Fitzgerald relied first on the passage in the summing up, already quoted, at page 132C of the transcript. In this passage the trial judge said that it was for the prosecution to prove their case and that it was not for the prisoners to prove their innocence. This was of course a correct and orthodox direction. Mr Fitzgerald, however, submitted that the effect of that direction was undermined by the passage immediately following in which the trial judge suggested that the prosecution had given abundant evidence for a case calling for an answer, and that a case had been established against the defendants, then continuing in effect to consider whether the evidence of the appellant and his co- defendant was such as to rebut that case. Mr Fitzgerald argued that that misdirection was not cured by the later direction, in the passage already quoted at page 138F of the transcript of the summing up, that it was the duty of the jury to convict if they were satisfied with the evidence for the prosecution.

Mr Fitzgerald further argued that the confusion which these directions were bound to leave in the minds of the jury was compounded by additional misdirections given to the jury in relation to the case against Craig. At page 132G of the transcript of the summing up the trial judge said:

> Now let us take first of all the case of Craig: It is not disputed, and could not be disputed, that he fired the shot which killed that Police Constable. You are asked to say that the killing was accidental, and that therefore the offence is reduced to manslaughter. Gentlemen of the jury, it is the prerogative of the jury in any case where the charge is of murder to find a verdict of manslaughter, but they can only do it if the evidence satisfies them that the case is properly reducible to one of manslaughter- that is, not with regard to any consequence that may happen, but simply whether the facts show that the case ought to be regarded as one of manslaughter and not of murder.

Then, at page 133H of the summing up, the trial judge added:

> In that case the only possible way of reducing the crime to manslaughter is to show that the act was accidental, and not wilful.

These passages, Mr Fitzgerald argued, gave the jury the clear impression that there was a burden on Craig to show that the killing was accidental and that therefore the proper verdict was one of manslaughter and not murder.

Mr Sweeney did not accept any of these criticisms. He relied on the opening passage at page 132C of the transcript and the closing passage at page 138F of the transcript to submit that the direction, viewed as a whole, was defensible; and pointed out that the other directions related to Craig, not the appellant.

The jury must be clearly and unambiguously instructed that the burden of proving the guilt of the accused lies and lies only on the Crown, that (subject to exceptions not here relevant) there is no burden on the accused to prove anything and that if, on reviewing all the evidence, the jury are unsure of or are left in any reasonable doubt as to the guilt of the accused that doubt must be resolved in favour of the accused. Such an instruction has for very many years been regarded as a cardinal requirement of a properly conducted trial. The courts have not been willing to countenance departures from it. We cannot regard the direction in this case as satisfactory. By stressing the abundant evidence calling for an answer in support of the prosecution case, and by suggesting that that case had been established, and by suggesting that there was a burden on Craig to satisfy the jury that the killing had been accidental (however little, on the facts of this case, the injustice caused to Craig thereby), the jury in our view could well have been left with the impression that the case against the appellant was proved and that they should convict him unless he had satisfied them of his innocence. We do not regard the earlier direction as cured by the passage at page 138F of the transcript.

(3) Observations on the treatment of police evidence
Mr Fitzgerald drew our attention to two passages in the summing up. The first was at page 137E of the transcript:

> There is one thing I am sure I can say with the assent of all you twelve gentlemen, that the police officers that night, and those three officers in particular, showed the highest gallantry and resolution; they were conspicuously brave. Are you going to say they are conspicuous liars?- because if their evidence is untrue that Bentley called out Let him have it, Chris!, those three officers are doing their best to swear away the life of that boy. If it is true, it is, of course, the most deadly piece of evidence against him. Do you believe that those three officers have come into the box and sworn what is deliberately untrue- those three officers who on that night showed a devotion to duty for which they are entitled to the thanks of the community?

The second passage was at page 138E of the transcript of the summing up where, having summarised the appellants defence and his denial of saying "Let him have it, Chris", the trial judge said:

> Against that denial (which, of course, is the denial of a man in grievous peril) you will consider the evidence of the three police officers who have sworn to you positively that those words were said.

Mr Fitzgerald criticised those observations as obviously prejudicial and unfair to the appellant. Mr Sweeney accepted that, applying the standards of today, there was force in that criticism.

The courts have in recent years deprecated judicial comments which suggest that police officers will be professionally ruined if a defendant is acquitted (*R v Culbertson* (1970) 54 Cr. App. R. 310) or which place police officers in a different position from other witnesses (*R v Beycan* [1990] Crim. L. R. 185). If observations to the effect quoted were made in a trial conducted today, we have no doubt that this court would condemn them as prejudicial and unfair. We have not been referred to any authority dating back to the 1950s or earlier in which judicial observations to the effect quoted were disapproved, and it may be that such comments were at that time regarded as acceptable. It is, however, difficult to reconcile comments of that kind with the general principles underlying jury trial. The guilt of a defendant is to be judged by the jury as the tribunal of fact on all the evidence in the case. That tribunal should make its collective judgment on the evidence in an open- minded and fair- minded way. There is an obvious risk of injustice if a jury is invited to approach the evidence on the assumption that police officers, because they are police officers, are likely to be accurate and reliable witnesses and defendants, because they are defendants, likely to be inaccurate and unreliable. This is the pitfall into which the trial judge, for all his vast experience and authority, fell. In our judgment his direction on this matter cannot be supported.

(4) The balance of the summing up
Mr Fitzgerald submitted that the trial judges direction to the jury, read as a whole, was unfairly adverse and prejudicial to the appellant, put unfair pressure on the jury to convict and failed adequately to put the appellants case to the jury. Mr Sweeney accepted that there was force in some of these criticisms.

At the outset of his summing up the trial judge described the case as a terrible one, which on any showing it plainly was, and urged the jury in conventional terms to approach it in as calm a frame of mind as they could. He then continued:

> Here are two lads, one of 16 and one of 19, admittedly out on a shop- breaking expedition at night, armed with a Service revolver, a dreadful weapon in the shape of a knuckle- duster, and two knives which may or may not be described as daggers,- one of them I should think certainly could be- and the result is that a young policeman is shot dead while in the execution of his duty. You may think it was almost a miracle that others were not shot too. One of them, we know, Sergeant Fairfax, was wounded, but fortunately only slightly.
>
> Now let us put out of our minds in this case any question of films or comics, or literature of that sort. These things are always prayed in aid nowadays when young persons are in the dock, but they have really very little to do with the case. These two young men, or boys, whatever you like to call them, are both of an age which makes them responsible to the law- they are over 14- and it is surely idle to pretend in these days that a boy of 16 does not know the wickedness of taking out a revolver of that description and a pocketful of ammunition and firing it when he is on an unlawful expedition and the police are approaching him. You will remember that so far as Craig is concerned, by his own words he supplied a motive for what he was doing, for he said that he hated the police because they had got his brother 12 years- which seems to show that his brother was convicted for a very serious offence to receive a sentence of that length.

The trial judge then gave the direction on the burden and standard of proof, at page 132 of the transcript, which has already been quoted, and proceeded to direct the jury on the need to consider the charges against the two defendants separately and on the respective functions of

judge and jury. He then gave the direction on the liability of Craig, at page 132G of the transcript, which has already been quoted, and went on to give directions on the law of murder and of constructive malice in cases where a police officer was shot. He gave the direction on reduction to manslaughter in the case of Craig, at page 133H of the transcript, which has already been quoted, and continued with his direction on constructive malice, questioning (with some reason on the law as it then stood) whether Craig had any defence to the charge of murder against him. He summarised the evidence relating to Craig and then, turning to the case of the appellant, directed the jury on the legal approach to the liability of a party to a joint enterprise. At page 136F of the transcript of the summing up he said:

> Now let us see what the evidence is with regard to Bentley. The first thing that you have to consider is: Did Bentley know that Craig was armed? Now, you know, because I sit on the Bench and you sit in the jury- box it is not necessary that we leave our common- sense at home. The great virtue of trial by jury is that jurymen can exercise the common- sense of ordinary people. Can you suppose for a moment, especially when you have heard Craig say that why he carried a revolver was for the purpose of boasting and making himself a big man, that he would not have told his pals he was out with that he had got a revolver? Is it not almost inconceivable that Craig would not have told him, and probably shown him the revolver which he had? That is quite apart from what Bentley said afterwards. I should think you would come to the conclusion that the first thing, almost, Craig would tell him, if they were going on a shop breaking expedition, was: "Its all right. I've got a revolver with me".
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> Then see what Bentley had on him. Where is that knuckle- duster? Apparently it was given to him by Craig, but Bentley was armed with this knuckle- duster. Have you ever seen a more horrible sort of weapon? You know, this is to hit a person in the face with who comes at you. You grasp it here, your fingers go through,- I cannot quite get mine through, I think- and you have got a dreadful heavy steel bar to strike anybody with; and you can kill a person with this, of course. Then did you ever see a more shocking thing than that? You have got a spike with which you could jab anybody who comes at you; if the blow with the steel is not enough, you have got this spike at the side to jab. You can have it to see, if you like, when you go to your room. It is a shocking weapon. Here was Craig armed with a revolver and that sheath knife. Hand me that sheath knife- the big one. One wonders, really what parents can be about in these days, allowing a boy of 16- they say, perhaps, they do not know, but why do not they know?- to have a weapon like this which he takes about with him? It is not a new one, you can see; it is pretty well worn. That was the thing that Craig was taking about. Where is the other knife? Here is Bentley with a smaller knife, but you can feel it is sharp and pointed. What is he carrying that with him for in his coat, not even with a sheath on it?
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> Can you believe it for a moment although Bentley had said he did not know Craig had the gun? You are not bound to believe Bentley if you think the inference and common sense of the matter is overwhelming that he must have known that he had it. Now, of course, the most serious piece of evidence against Bentley is that he called out, if you believe the evidence, to Craig "Let him have it, Chris!", and then the firing began, and the very first shot struck Sergeant Fairfax. Gentlemen, those words are sworn to by three police officers Sergeant Fairfax, Police Constable McDonald, and Police Constable Harrison; they all swear that they heard Bentley call that out, and that then the firing started. ..

And then the judge gave the direction at page 137E of the transcript, concerning the conspicuous bravery of the police officers, to which reference has already been made.

The trial judge then reminded the jury of the evidence and the alleged admissions of the appellant and at page 138A of the transcript continued:

> Then in his statement he said: I didnt know he was going to use the gun. Again, if he said that, it shows that he knew it. If he knew that he had the gun, can you believe he did not know he had ammunition? Why did he have ammunition? Why did he have the gun? Why did he have the ammunition? You will remember that at one stage the officers said that Craig on the roof told them that he had a 45 and lots of ammunition. I think they said something about blowing your head off- Hell blow your head off. Then later in his statement he said he did not know Chris had a gun till he shot. That, of course, is quite inconsistent with what he said earlier in his statement. You can have the statement when you go to your room, if you like. He did say I didnt know he was going to use the gun, and then he said afterwards I didnt know Chris had one until he shot. It does not seem very consistent, but, as I say, the real thing is, is it not, as a matter of common sense, can you believe for a moment that if Bentley had gone on that expedition with this boastful young ruffian who said he carried a gun for the purpose of making himself out bigger than he was, he would not have told Bentley he had the gun? What had he got the gun for, and what did Bentley think he had the gun for?

The trial judge then observed that that was the whole case. He proceeded to summarise Craig's defence in four sentences, and the appellant's in two:

> In the case of Bentley, Bentley's defence is: I didn't know he had a gun, and I deny that I said "Let him have, Chris". I never knew he was going to shoot, and I didn't think he would.

The judge then made reference to the appellants denial as that of a man in grievous peril in the passage at page 138E of the transcript, already quoted, and continued with the passage at page 138F of the transcript, already quoted, in which the jury were reminded of their duties.

The courts have had occasion in many cases over the years to consider the balance of judicial summings-up to juries and the permissible limits of judicial comment. In *R v Cohen and Bateman* (1909) 2 Cr. App. R 197 at 208 Channell J, giving the judgment of the court, said:

> The learned judge is said to have interfered improperly in the conduct of the case, and not to have put it fairly to the jury, and not to have stated the law properly. The latter would be fatal unless the case came within the proviso of the section. The other observations of the learned judge only become grounds of appeal if they have in fact caused substantial miscarriage of justice. In our view, a judge is not only entitled, but ought, to give the jury some assistance on questions of fact as well as on questions of law. Of course, questions of fact are for the jury and not for the judge, yet the judge has experience on the bearing of evidence, and in dealing with the relevancy of questions of fact, and it is therefore right that the jury should have the assistance of the judge. It is not wrong for the judge to give confident opinions upon questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the jury. It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of very confident expressions in the summing up does not show that it is an improper one. When one is

> considering the effect of a summing up, one must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact. No doubt the learned judge did express himself very strongly. But on the main question we think him right.

In *R v West* (1910) 4 Cr. App. R. 179 at 180 Lawrance J observed that a judge must not put himself in the position of the jury as regards the decision of facts and that the proviso to section 4(1) of the Criminal Appeal Act 1907 did not apply where the judge decided facts instead of the jury. In *R v Frampton* (1917) 12 Cr. App. R. 202 at 203 Lord Reading CJ considered that a trial judge had gone too far in his comments and could not really be said to have put the defendants case to the jury. He said:

> We cannot allow a summing up which puts the case so strongly against the prisoner to stand.

In *R v ODonnell* (1917) 12 Cr. App. R. 219 at 221 Lord Reading CJ said:

> In regard to the second point, it is sufficient to say, as this court has said on many occasions, that a judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they must find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoners story is a remarkable one, or that it differs from the accounts which he has given of the same matter on other occasions. No doubt the judge here did express himself strongly on the case, but he left the issues of fact to the jury for their decision and therefore this point also fails.

In *R v Canny* (1945) 30 Cr. App. R. 143 at 146 Humphreys J put the matter in this way:

> There are many decisions of this Court, and, indeed, many decisions before the existence of this Court, to the effect that in England a man is entitled to a fair trial by jury on any offence which is indictable. It does not matter how absurd the defence is, or how unlikely it is that any sensible person would pay the least attention to it. A prisoner is entitled to make his defence to the jury, and it is for the jury and not for the Judge to decide on its weight. The Judge has no power to stop a defence and say: This is an absurd defence and I will not let you put it before the jury. When we find that the learned Judge, owing entirely to the initial mistake, has really prevented the jury from trying the prisoner fairly and squarely on the evidence by repeating over and over again: This is an absurd defence, there is no foundation for this allegation against his wife, and the truth is, as you will find in a minute, that the prisoner did assault his wife, that is not a trial at all according to our methods and understanding. It is a mistrial. We find it quite impossible to say, if this incident had not happened and if the jury had been properly directed, what they would have done, and we cannot speculate. What we do know is that the law of this country is that a prisoner is entitled to take his chance of finding a stupid jury and is entitled to put his defence before the jury with a view to persuading them to acquit him.

In *R v Marr* (1990) 90 Cr. App. R. 154 the court allowed an appeal and quashed a conviction because a defence, unattractive as it may have been, had not been put to the jury with the balanced treatment and consideration which the court held to be the right of every criminal defendant. On an appeal from the Court of Appeal of Jamaica in *Mears v R* [1993] 1 WLR 818 at 822, (1993) 97 Cr. App. R. 239 Lord Lane giving the advice of the Judicial Committee of the Privy Council, said at page 243:

The Court of Appeal took the view that the trial judge was not putting forward an unfair or unbalanced picture of the facts as he saw them. In rejecting the defendants submission that the comments of the judge were unfairly weighted against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. In the view of their Lordships it is difficult to see how a judge can usurp the jury's function short of withdrawing in terms an issue from the jury's consideration. In other words this was to use a test which by present day standards is too favourable to the prosecution. Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judges views or wishes. As Lloyd LJ observed in Gilbey (unreported) January 26, 1990:

A judge ..is not entitled to comment in such a way as to make the summing up as a whole unbalanced.. It cannot be said too often or too strongly that a summing up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.

Their Lordships realise that the judges task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views. Whether that is what has happened in any particular case is not likely to be an easy decision. Moreover, the Board is reluctant to differ from the Court of Appeal in assessing the weight of any misdirections. Here, their Lordships have to take the summing up as a whole, as Mr Andrade submitted, and then ask themselves in the words of Lord Sumner in *Ibrahim v R* [1914] AC 599, 615, whether there was:

Something which deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.

Their Lordships consider that the judges comments already cited went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting.

In *R v Wood* [1996] 1 Cr. App. R. 207 this court quoted that passage in *Mears v R* and accepted that the degree of adverse comment allowed today was substantially less than it had been 50 years ago. But it went on to say that the defendant in that case, allegedly an IRA terrorist, whatever the merits or lack of merits of his defence, was entitled to a fair trial, which the court considered he had not had.

The killing of PC Miles had, very understandably, aroused widespread public sympathy for the victim and his family and a strong sense of public outrage at the circumstances of his death. This background made it more, not less, important that the jury should approach the issues in a dispassionate spirit if the defendants were to receive a fair trial, as the trial judge began by reminding them. In our judgment, however, far from encouraging the jury to approach the case in a calm frame of mind, the trial judges summing up, particularly in the passages we have quoted, had exactly the opposite effect. We cannot read these passages as other than a highly rhetorical and strongly- worded denunciation of both defendants and of their defences. The language used was not that of a judge but of an advocate (and it contrasted strongly with the appropriately restrained language of prosecuting counsel). Such a direction by such a judge must in our view have driven the jury to conclude that they had little choice but to convict; at the lowest, it may have done so.

These complaints formed no part of the appellants appeal against conviction. We do not know why not. We question whether, in the light of the authorities to which we have referred, this summing up would have been thought acceptable even by the standards prevailing at the time. Complaint was made on appeal of the trial judges failure to put the appellants case adequately to the jury, but this ground of appeal was dismissed; the court, it seems, held that the idea that there was a failure on the part of the Chief Justice to say anything short of what was required in putting that sort of case to the jury is entirely wrong. In his summary of the appellants defence towards the end of his summing up, the trial judge did indeed remind the jury of three of the essential points that he relied on: That he did not know Craig had a gun; that he did not know that Craig would shoot; and that he did not incite him to do so. But this very brief and somewhat dismissive account, coming at the very end of the summing up and following a much longer account described as the whole case, did not in our judgment do justice to the points which, good or bad, had been made on behalf of the appellant and which the jury should have been invited to consider. We refer to some of these (in particular those relating to the existence, scope and duration of any joint enterprise between the appellant and Craig, and the possible ambiguity of Let him have it, Chris, if that was ever said) below. Whether the jury would have been impressed by these points if they had been dispassionately identified and laid before them we can never know. As it was, the jury were never fairly invited by the trial judge to consider the points which had been made on the appellants behalf. The effect was to deprive him of the protection which jury trial should have afforded.

It is with genuine diffidence that the members of this court direct criticism towards a trial judge widely recognised as one of the outstanding criminal judges of this century. But we cannot escape the duty of decision. In our judgment the summing up in this case was such as to deny the appellant that fair trial which is the birthright of every British citizen.

(5) The direction on constructive malice and joint enterprise

At the trial the Crown relied, in presenting their case against the appellant, on two doctrines of the common law. By the first (constructive malice), malice aforethought sufficient to support a charge of murder was in certain circumstances imputed to a defendant who committed an act causing death in the course of committing a felony or when resisting an officer of justice. This doctrine had obvious relevance to the Crown case against Craig. By the second doctrine, a participant in a joint criminal enterprise is held liable for the acts of another participant pursuant to and within the scope of the joint criminal enterprise. The application of this doctrine could make the appellant liable for what Craig did. Mr Fitzgerald argued that the trial judges direction to the jury on constructive malice and joint enterprise, so far as it related to the appellant, was wrong in law.

At page 136A of the transcript of his summing- up the trial judge directed the jury in these terms:

> Well, now I turn to Bentley. Members of the jury, these two youths are tried together, and they are both tried for the murder of the policeman. It is quite unnecessary, where two or more persons are engaged together in an unlawful criminal act, to show that the hand of both of them committed the act. The simplest illustration I could give you- after all, this is only a matter of common sense- is this: If two men go out house- breaking, it is a very common thing for one of them to break into a house and the other to stand outside and keep watch, but they are both taking part in the unlawful enterprise, and therefore they are both of them guilty, so if one stands outside so that the other may hand out the loot to him, he is not guilty merely of receiving stolen property; he is guilty of breaking- in, because he is a party to the breaking- in; and where two people are engaged on a felonious enterprise,- and warehouse- breaking is a felony- and one knows that the other is carrying a weapon, and there is agreement to use such violence as may be necessary to avoid arrest, and this leads to the killing of a person or results in the killing of a person, both are guilty of murder, and it is no answer for one to say I did not think my companion would go as far as he did.
>
> Now you can only judge whether there is an agreement to use such violence as may be necessary by looking at what happened and all the circumstances of the case, but I do remind you that it is no excuse and no defence to say I knew he was carrying a loaded revolver- if you find he was- that he was carrying a loaded revolver, or a revolver, but I didn't think he would use it. If one is carrying a revolver and the other knows that he intends to use some degree of violence, it is no answer, if that violence results in death, to say Well, I didn't think he would go as far as that. What you have to consider is: Is there evidence from which you can properly infer that these two youths went out with a common purpose not merely to warehouse- break but to resist apprehension, even by violence if necessary? That is all. It is, as I repeat, no answer, if you come to that conclusion, for one to say: Yes, but I didn't think he would go as far as he did.

At page 137H of the transcript of his summing up, the trial judge added:

> Then in the car first of all he said: I knew he had a gun- that is sworn to by three officers- I knew he had a gun, but I did not think he'd use it. As I have told you, if he knew he had a gun, and knew he was taking the gun for protection in their common unlawful enterprise, or to prevent arrest by violence, Bentley is as guilty as Craig; he is as guilty in law as Craig.

In the years preceding the trial of these defendants there were three cases decided in the Court of Criminal Appeal, relevant to the Crown case against Craig and the appellant. The first of these was *R v Betts and Ridley* (1930) 22 Cr. App. R. 148. Betts and Ridley agreed to waylay and rob a man whom they knew would be carrying his employers money to the bank. Their plan was that Betts would push the victim to the ground and snatch the bag, while Ridley would wait in a motor car a little distance away. In the event, Betts when snatching the bag struck the victim a blow from which he later died, and both Betts and Ridley were convicted of murder. The issue on appeal, as reported, was whether Ridley was liable for an act of violence which he had not himself committed and which went beyond the violence which he and Betts had agreed should be inflicted on the victim. The court opined (at page 153) that Betts was guilty of murder if, while in the act of committing a felonious act of violence, he

caused death by some act in the course of that felonious act of violence. The court also held (at page 154) that Ridley was in the circumstances a principal in the second degree to the robbery with violence which in fact took place, and the court continued:

> … and although it might be true to say that he had not agreed before- hand that Andrews should be struck upon the head in a way likely to cause his death, it is clear upon the authorities that if he was a party to this felonious act of robbery with violence- some violence- and that the other person, the principal in the first degree, in the course of carrying out that common design does an act which causes the death, then the principal in the second degree is equally responsible in law.

The court concluded (at page 155) that even if Betts did vary the manner of execution of the agreed plan to rob, since it was a plan to rob which involved some degree of violence, Ridley being present as a principal in the second degree was equally responsible.

The second case was *R v Appleby* (1940) 28 Cr. App. R. 1. In that case Appleby and Osler, while committing an offence of warehouse-breaking, were surprised by police officers. They attempted to escape, but were pursued by the officers and a shot was fired by Osler which killed one of the officers. The trial judge had directed the jury in these terms:

> I tell you that this is the way in law it is put and urged- it is for you to say whether it is made out- against Appleby. If you are satisfied that these two men were jointly engaged on this felonious enterprise of breaking and entering these Co- operative premises in order to steal therein and were united in a common resolution to resist by violence any constable who should oppose them, and the shot fired was fired at the police constable by one of them in pursuance of that common resolution, and killed him, killed the constable, that is murder, and they are both principals in the murder and both are liable to be found guilty of murder. It may occur to you, of course, that these two men were engaged in a common enterprise of breaking and entering and stealing. You may be satisfied of that, and that that purpose of breaking and entering and stealing had been effected before the fatal shot was fired. Then you will ask yourselves: Was the shot fired in pursuance of the common design of both to resist arrest by violence, if a police officer should attempt to arrest them? If so, then it is open to you to say that death resulted in the carrying out of that design. If it did, both are equally guilty of the murder.

The issue on appeal was whether that direction, so far as it related to Appleby, was correct. The court held that it was. Having referred to Sir James Stephens Digest of the Criminal Law (7th edition) and Russell on Crime (9th edition), the court said (at page 5):

> In our view, those passages show that a much less degree of violence may be sufficient to justify a verdict of guilty of murder in the case of a police officer who is killed in the execution of his duty, in arresting a person or detaining a person in custody, so long as the arrest is lawful, than would suffice in the case of another person. If that proposition is good law today, as in the opinion of this Court it is, it seems to follow that two persons engaged in committing a felony with a common design to resist by violence arrest by an officer, have a common design to do that which, if it results in death, would amount to murder.

The third case was *R v Jarmain* [1946] KB 74. In that case the defendant, in the course of robbing a garage, pointed a loaded gun at the cashier in order (as he claimed) to frighten her. According to him, he did not intend to fire the gun, but it went off accidentally, and fatal

wounds were inflicted. It was argued for the defendant on appeal that to be guilty of murder it had to be shown that he had pressed the trigger voluntarily and not, as he claimed, inadvertently. The court rejected that argument. It held (at page 80):

> The judge was no more under a duty to direct the jury that if the pressing of the trigger was inadvertent the killing was manslaughter, than was the judge in the case of Director of Public Prosecutions v Beard [1920] AC 479 under a duty to direct the jury that if the pressure exerted by the appellant in that case voluntarily was only so much as necessary to silence the child and the extra pressure which throttled her was inadvertent and accidental, that the accused there was guilty of manslaughter. We think that the object and scope of this branch of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk, and is guilty of murder if those violent measures result even inadvertently in the death of the victim. For this purpose the use of a loaded firearm, in order to frighten the person victimised into submission is a violent measure.

It seems to us, in the light of those authorities binding on the trial judge, that his direction to the jury was in accordance with the law as it then stood and was, if anything, favourable to the appellant. But it was argued that later developments in the law governing the liability of secondary parties to joint criminal enterprises, in particular the recent decision of the House of Lords in *R v Powell and R v English* [1997] 3 WLR 959, rendered his direction unsound. The relevant law is in our judgment summarised with sufficient accuracy for present purposes in the following propositions advanced on behalf of the Crown:

(i) Where two parties embark on a joint enterprise to commit a crime and one party foresees that in the course of the enterprise the other party may carry out, with the requisite mens rea, an act constituting another crime, the former is liable for that crime if committed by the latter in the course of the enterprise (*R v Smith* [1963] 1 WLR 1200; *Chan Wing- Siu v The Queen* [1985] AC 168; *R v Powell and R v English,* above; *R v Uddin and others* (Court of Appeal), 19 March 1998.

(ii) Where the principal kills with a deadly weapon, which the secondary party did not know that he had and of which he therefore did not foresee use by the principal, the secondary party is not guilty of murder.

(iii) If the weapon used by the primary party is different to but as dangerous as the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill or vice versa (*R v English,* above at 981B- C per Lord Hutton).

(iv) The secondary party is subject to criminal liability if he contemplated the act causing the death as a possible incident of the joint venture unless the risk was so remote that the jury take the view that the secondary party genuinely dismissed it as altogether negligible (*R v English*, above, at 981C- D).

Even if we undertake the anachronistic exercise of applying those principles to the trial judges direction to the jury in 1952, the soundness of that direction is not in our view invalidated. Nothing in his direction suggested that the appellant could be liable if he did not know that Craig had a gun, nor did he suggest that the appellant could be liable if he did not foresee the use of the gun. His direction was founded on the premise of an agreement between the appellant and Craig to use such violence as might be necessary to avoid arrest:

This would plainly embrace use of the gun, even if the appellant did not intend that the gun should be fired, or fired so as to cause injury, and did not expect the gun to be fired unless the firing was regarded by the appellant as a wholly remote possibility. On the basis of the law of constructive malice as it then stood, and the law of joint enterprise as it now stands, the trial judge's direction in the passages we have quoted was in our judgment correct.

That is not, however, the end of the matter. Mr Sweeney accepted, we think rightly, that this was a case calling for a very careful direction and review of the evidence relevant to, first, the existence and nature of any agreement or understanding between Craig and the appellant; secondly, the scope and purpose of such agreement or understanding; and, thirdly, the duration and possible termination of any such agreement or understanding. This last matter was of particular importance, since the appellants defence at the trial rested strongly on the contention that if, contrary to his assertion, there had ever been any joint agreement to resist arrest by violence, he had dissociated himself from it. Reliance was placed on a number of facts already mentioned above: The absence of any struggle or resistance or attempt to escape by the appellant following his seizure by Detective Constable Fairfax; his compliant surrender of the weapons on his person; the fact that he was under arrest for a significant period, perhaps 15 minutes, before Police Constable Miles was shot; and the number of observations attributed to the appellant by the police officers ("That's all I've got guvnor; I haven't got a gun"; "He'll shoot you"; "He's got a .45 Colt and plenty of bloody ammunition too"; "I told the silly bugger not to use it"; "You want to look out; he'll blow your heads off"; "Look out, Chris; they're taking me dow"; and, of course, the important but possibly ambiguous statement (if made) "Let him have it, Chris".)

The circumstances in which a party to a joint enterprise may claim to have abandoned or withdrawn from that enterprise was the subject of consideration by Sloan J A, sitting in the Court of Appeal of British Columbia, in *R v Whitehouse* [1941] 1 DLR 683 at 685 where he said:

> Can it be said on the facts of this case that a mere change of mental intention and a quitting of the scene of the crime just immediately prior to the striking of the fatal blow will absolve those who participate in the commission of the crime by overt acts up to that moment from all the consequences of its accomplishment by the one who strikes in ignorance of his companions change of heart? I think not. After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is timely communication must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues

> alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

This reasoning has been applied in this country in *R v Becerra and Cooper* (1975) 62 Cr. App. R. 212 and *R v Whitefield* (1984) 79 Cr.App. R. 36. Whether, properly directed, the jury would have found that the appellant had done enough to withdraw and signify his withdrawal from the enterprise which they must have found to exist between him and Craig we cannot know. But this was an important limb of the appellants defence, and it is in our view clear that the trial judge should have given the jury a careful direction on it. He gave none.

The absence of a direction on this point was the second main ground argued for the appellant on his appeal against conviction. The argument was rejected. The court, it appears, said:

> It is a little difficult for Mr Cassels because his own client was asked specifically at the hearing whether he was under arrest at the time when this shot which killed Miles was fired. He would not have it. He said he had not been arrested, that he was not under arrest, that the police officer had not detained him, and all the rest of it. On the face of that it seems to us that it is idle to suggest that this point, if it be the point, about the arrest is one which the jury could take into consideration and about which the Chief Justice ought to have directed the jury. The answers given in cross-examination by an individual on trial do sometimes have the result of destroying the possibility of a good point of law being persisted in which the learned counsel has endeavoured to get on its feet before a jury.

We are not, with respect, persuaded by that reasoning. The Crown case throughout was that the appellant was under arrest (or technically under arrest, which must be the same thing) at the time when Police Constable Miles was shot; and it is very difficult to see how any answer given by the appellant could have any bearing on the legal question whether he was under arrest or not. In any event, when asked in cross- examination whether he was not under arrest at the time, he simply answered I was standing there, sir. It is quite true that for much of the time after his initial seizure he was not physically held, and he agreed that he had been free to run away if he had wanted to, but this was in itself evidence of potential significance supporting the suggestion that, for him, the criminal enterprise was over. We feel bound to say that, in our judgment, the Court of Criminal Appeal failed to grapple with this ground of appeal, which should have succeeded.

For all the reasons given in this section of the judgment we think that the conviction of the appellant was unsafe. We accordingly allow the appeal and quash his conviction. It must be a matter of profound and continuing regret that this mistrial occurred and that the defects we have found were not recognised at the time.

III
FRESH EVIDENCE
(1) New material placed before us

In addition to the case papers, we have had placed before us for the purposes of this hearing a substantial body of material which falls under six heads:-

(i) Educational and medical records of the appellant, supplemented by a statement from Dennis Bentley, the appellants brother.

(ii) Reports from three psychiatrists (Dr Fenwick, Dr Joseph and Dr Holland) and reports from a psychologist (Dr Gudjonsson), all of which comment upon the records, the case papers and information which the experts have gleaned from members of the appellants family.

(iii) Reports from Professor Coulthard, Professor of English Language and Linguistics in the University of Birmingham, and from Dr French, which comment upon the statement taken from the appellant, and the likelihood or otherwise of its having been obtained in answer to questions, having regard to its structure and having regard to what is known about the appellant and those who were with him at the time when the statement came into existence.

(iv) A statement from Graham Seaby, formerly a Detective Superintendent in the Metropolitan Police, exhibiting a report which he made in 1991 to the Assistant Commissioner following a request from the Home Office. The report contains many comments about the 1952 investigation, and raises the question whether a bullet fired from about six feet in the circumstances described by D C Fairfax could have caused the injury which that officer sustained, and ended up where he said that it was found. That point is also addressed in a report by a pathologist, Dr West.

(v) A statement taken last month from Christopher Craig, and a statement from Douglas Barlow, who in November 1952 was company secretary of the company which owned the premises on the roof of which P.C. Miles was murdered.

(vi) A statement dated 1st June 1996 from John Parris, now deceased, who appeared as counsel for Craig at the trial, and a statement and some letters written by Sir Charles Hardie in the period 1991- 1993. Sir Charles had been present at lunch with the trial judge on the first day of the trial, and thereafter was in court for part of the hearing.

(2) Power to receive fresh evidence

The power of this court to receive any evidence not adduced in the proceedings from which the appeal lies (i.e. The trial in December 1952) is to be found in section 23(1) of the Criminal Appeal Act 1968 as amended. We may receive the evidence if we think it necessary or expedient in the interests of justice to do so, but section 23(2) provides:-

> The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to-
>
> > (a) whether the evidence appears to the Court to be capable of belief;
> > (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
> > (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
> > (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

(3) Material we exclude

We deal first with those matters identified as items (iv), (v) and (vi) in paragraph (1) above. In response to the material emanating from Mr Seaby and Dr West the Crown located the gun which Craig used on the night of the murder, and had available a ballistics expert who could

conduct further tests with that weapon, but in the absence of the cartridge and the bullet used when DC Fairfax was wounded those tests would yield no information of any real value, and the cartridge and the bullet are (we understand) no longer available. Mr Fitzgerald recognised the force of the proposition that without further tests the evidence from Mr Seaby and Dr West could do little in reality to cast doubt on the evidence of DC Fairfax and Mr Nickolls the forensic scientist called at the trial, and Mr Fitzgerald therefore did not ask us to hear evidence from either of the two new potential witnesses whose statements and reports the Crown at this stage did not accept. Accordingly, although we have read those documents we do not receive them and they play no part in our conclusions.

The same applies to the statement from Christopher Craig and the statement from Douglas Barlow. Mr Fitzgerald did not apply to call Craig or ask the court to do so, and we therefore pay no attention to what he might have said. Mr Barlow was not mentioned before us, no doubt because his statement does not contain anything of relevance. We were invited by Mr Fitzgerald to read the statement made by Mr Parris, and the material emanating from Sir Charles Hardie, and we have done so, but we are not prepared formally to receive either. Mr Parris in his statement relates what his client Craig said to him, and Mr Fitzgerald has decided not to ask us to hear Craig. The rest of what Mr Parris says, in so far as it has any relevance to our decision, could be said by way of submission without reference to the statement of Mr Parris, which incidentally betrays some significant internal inconsistencies. Clearly, as it seems to us, the relevant evidence in the statement of Mr Parris would not have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal- see section 23(2)(c) of the 1968 Act- because that evidence, if it is to come from anyone, should come from Craig. As we indicated during the course of the hearing, we have some anecdotal background knowledge of matters which would cause us to approach the testimony of Mr Parris with some reserve. Our decision in relation to his statement is not in any way related to these matters, but it might well be of some relevance if we had to consider whether what he says is capable of belief.

The position in relation to Sir Charles Hardie is similar, namely that on examination his statement and letters contain nothing relevant which can assist. His comments in relation to the conduct of the trial, if sound, can be made by reference to the transcript, and the only additional information he provides is that at lunch the trial judge said that at all costs Craig and Bentley were to be found guilty. If that was said, it was an inappropriate and injudicious remark, but it is perfectly possible for a defendant to have a fair trial before a judge who has strong views as to what the verdict should be, and the material from Sir Charles Hardie can therefore contribute nothing to the outcome of this appeal. What matters for our purposes is what happened in court, or should have happened there, not what the trial judge personally thought about it.

(4) Educational and medical history

We turn now to the educational and medical records, which we receive, from which the educational and medical history of the appellant emerges. The appellant was born on 30 June 1933, and on 3 March 1948, when he was 14 ½ years of age and had been at Norbury Manor School for 2 ½ years, he was described by the head teacher as the most irregular boy I have had in my career. His conduct was said to be meek, indifferent, sheeplike and as to character the school record reads-

> Deceitful, lies easily and plausibly, avoids work, is a leader in matters unworthy, has been detected in dishonesty on many occasions.

The report continues in similar vein, noting that his parents have, on several occasions, confessed that the boy is out of hand and out of their control. It is also observed that this boy is harming several other boys in my school by persuading them to live his sort of life. The school report seems to have been prepared because the appellant was due to appear before a court in March 1948, and he was then put on probation and moved to another school. His response was not good. In October 1948, as a result of a storebreaking, an order was made committing him to an approved school. In the school record which was prepared at that time he was recorded as being practically illiterate, though not unintelligent and it was said that he was able to talk intelligently on some scientific subjects. In a medical report dated 1 October 1948 the question Is there any history of fits? Is answered in the negative, and his mental ability is recorded as normal having regard to age. In a probation report prepared at that time the appellant is said to be known to associate with other boys who have been before the court. There is reference to the family having been bombed out three times in London, but there is no reference to the appellant having any injury in childhood or suffering from any fits.

At Beechfield Remand Home, where the appellant spent some time in October 1948, he was found to be mentally backward, and is unable to read or write. It was said that his lack of intelligence prevents him from joining in many of the indoor games and he is by no means a sportsman.

The appellant was then transferred to Kingswood Training School, near Bristol, on 27 October 1948, and a medical examination on admission revealed no abnormality, but his medical card at the school contains a reference to pre-admission fits. Furthermore, in a short statement dated 30 October 1948 the appellants parents say that the appellant had a fall when he was young and broke his nose. I reset it for him after that he had three fits one he nearly lost his life with as he choked. There is also a reference to the appellant being buried under debris in an air raid when a roof collapsed on him when he was in bed, and the statement continues since then he has had no fits.

In December 1948 (when he was 15 ½) the appellants mental age was said to be 10 years 4 months, and his reading age was four and a half years which, as Dr Gudjonsson said in evidence, meant that the appellant was illiterate. His I.Q. Was tested and the score was 66, which put him in the bottom 1% of the general population at that time. The schoolmaster in charge of the appellant in December 1948 found him virtually impossible to teach, and suggested that he might be transferred to a school for subnormals as far away from London (his home) as possible. Those in charge at Kingswood formed the clear impression that the appellant's parents had allowed him to become what he is: Lazy, indifferent, voluble and of the wise guy type. In the carpentry shop he was observed to have a practical side, in that he was able to follow an operation and anticipate what would be done and wanted next, but generally he was seen to be indifferent, smug, self-satisfied and ready to tell tales.

On 25 January 1949 the Principal of Kingswood School was suggesting examination by an educational psychologist as the possibility of borderline or high grade mental defectiveness has not entirely been eliminated so far.

In April 1949 the appellant went on home leave and did not return for three months. During that period, on 28 May 1949, his father wrote to the principal of Kingswood School saying

that the appellant was due to see a specialist as one of his eyes was weak due to a fall on his head he had at home due to the stair railings giving way with him two years ago. His general practitioner, Dr Reynolds, recorded complaints of severe headaches which, she said, sound rather like petit mal. She also noted that he is very backward in several ways.

On 9 August 1949 Dr Munro, physician in psychological medicine, saw the appellant with his parents and with Mr Collinson (a representative of Kingswood School) at Guys Hospital, London. Dr Munro was told of three attacks of unconsciousness which the appellant had had at the age of 8 or 9 and he concluded that they were probably epileptic fits which might have been the result of a head injury sustained at about the age of 5, when the appellant was said to have fallen 15 feet on to his head and been rendered unconscious. Dr Munro then wrote to the Principal of Kingswood School saying that:-

> There is no doubt that Derek is very backward intellectually, and that most of this is the result of congenital lack of intelligence, but some of it is due to lack of education.

On the same day Mr Collinson saw the appellant with his parents at their home. He observed the appellants conduct towards his parents and his elder sister, and recorded-

> He orders them about and expects them to wait upon him hand and foot. Unfortunately they do so. He is completely spoiled. The toys they have provided for him consist mostly of guns. He has several, and he has quite a lot of ammunition. He fires these around the room, also in the back garden.

Mr Collinson's note also records the appellant making it clear that he did not want to read or write. All he wanted to do was electrical work.

After the appellant's return to Kingswood School he was referred to the Child Guidance Clinic at Bristol where his I.Q. was recorded as 77, and in his report of 3 September 1949 the psychologist, Mr Good, noted that the test showed a fairly wide scatter, although not unusual for a boy of this type. Mr Good's overall assessment of the appellant was that he was of borderline subnormal intelligence but educationally very retarded being unable to read (and unwilling to try), although he can do a little very simple arithmetic when coerced. Mr Good also observed that-

> His insight and judgment are better developed than one would expect, but faced with a practical problem, he failed to find a satisfactory solution. He seems to have a fairly strong bent on the practical side.

Later in September 1949 Dr Barbour, who was the Director of the Child Guidance Clinic, saw the appellant and concluded that continued training at Kingswood School was preferable to certification under the Mental Deficiency Act 1913. In November 1949 an electro-encephalograph examination at the Burden Neurological Institute yielded findings diagnostic of petit mal and medication began to be administered. The diagnosis was ideopathic (not traumatic) epilepsy. In December 1949 there were strong suggestions that the appellant may be having minor epileptic attacks and in July 1950 the appellant was allowed to go home

from Kingswood School on licence. Since the conclusion of the oral hearing we have had our attention drawn by Mr Fitzgerald to two unsolicited letters written recently by persons who were on the staff at Kingswood when the appellant was there, and who were struck by his low intelligence and physical timidity. At home the appellant was under the supervision of Mr Towes, a welfare officer at Banstead Hall School, who called to see him from time to time. For about a year from March 1951 the appellant worked as a furniture remover. On 11 February 1952 the appellant was medically examined with a view to National Service. He brought with him a certificate from his general practitioner that he was subject to petit mal, and when tested was considered to be mentally sub- standard, so he was placed in Grade 4. In June 1952 Mr Towes saw the appellant and found him to be truculent and arrogant. In the opinion of Mr Towes there was something radically wrong with the appellant from a medical point of view. He was causing considerable anxiety to his parents, but would not visit his doctor.

After his arrest on 2 November 1952 the appellant was held at Brixton Prison, and Dr Matheson, the Principal Medical Officer or his representative, took a detailed history from the appellant. Further I.Q. Tests revealed a verbal score of 71, a performance I.Q. of 87, and a full scale I.Q. of 77, which was recorded as borderline feeble-minded. He was said to be quite illiterate, cannot even recognise or write down all the letters of the alphabet. The examiner noted that in conversation the appellant verbalises quite successfully, but certain solecisms betray his illiteracy. His personality was described as rather fatuous with little moral sense but with a highly inflated opinion of himself.

In passing, it is interesting to see that the ward note of 4 November 1952 recorded the appellant as saying that he didn't know Chris had a gun until he fired the first shot. Three days later he was still insisting he didn't know Craig was armed.

Dr Matheson gathered information from Kingswood School, from Mr Towes, and, via the appellants solicitor, from Dr Munro. By way of the appellant's father he got information from the National Service medical examiner. He then referred the appellant to Dr Denis Hill at the Institute of Psychiatry at the Maudsley Hospital with a full letter of reference setting out what he had ascertained. Dr Hill examined the appellant on 27 November 1952 when a further EEG examination was performed, the results of which, read together with the results obtained in Bristol, were described by Dr Hill as compatible with and suggestive of a diagnosis of epilepsy. Dr Hill found no focal abnormality to suggest acquired brain damage. The appellants solicitor had expressly agreed to the EEG examination at the Maudsley Hospital and on 4 December 1952 a copy of the results of that examination was sent to him.

The first return of information from Kingswood School (Form 730) was not as detailed as it should have been, so a further return was sought and in due course provided. Whether that second return was communicated to those appearing on behalf of the appellant is not clear.

On 5 December 1952, four days before the trial began, Dr Matheson wrote his report. He had promised to send a copy to the appellant's solicitor and there is no reason to doubt that he did so. The report fully and accurately set out the information which Dr Matheson had obtained. It recorded the appellants fathers description of the appellant having a fit in childhood, which Dr Matheson considered could have been a major epileptic fit but, according to the father, the last fit was when he was aged about 8 years. Thereafter there had been headaches. Dealing with his examination of the appellant Dr Matheson recorded that at all times he said that he did not know that his co-defendant was armed. Dr Matheson's finding was of a youth of low

intelligence, shown by testing to be just above the level of a feeble-minded person, illiterate, unable to read or write, and when tested in a way which did not involve scholastic knowledge shown to have a mental age between 11 and 12 years. Dr Matheson ascribed the appellants problems to his poor upbringing rather than any innate defect, and he concluded as follows:

> The picture he now presents is of an immature youth who has never been subjected to any discipline and has been allowed, most of his life, to have his own way, whether good or bad. Although there is a history suggestive of epilepsy which is supported by the electro-encephalographic findings, I have failed, from my personal observation to find any evidence of epilepsy. If he did, in fact, suffer from epilepsy, I am of the opinion that, at the time of the alleged offence, he was not suffering any form of epilepsy. His conduct before, during and after the alleged offence was always purposive. I have been unable to find any genuine loss of memory or degree of mental confusion which occurs during an epileptic manifestation. I do not consider that he is a feeble- minded person under the Mental Deficiency Acts. I am of the opinion that he is:
>
> (1) sane;
> (2) fit to plead to the indictment;
> (3) fit to stand his trial.

(5) Police antecedent history

The Police antecedent history of the appellant was signed by Detective Chief Inspector Smith and it looks as though it was probably also prepared by him. Mr Fitzgerald submits that it was not disclosed to the defence. We have no information about that, but although none of us was practising law in 1952 no member of this court can recall a time when police antecedent histories were not available to those acting for the defence. The only relevant information in the antecedent history which is not in Dr Matheson's report was acquired by D.C.I. Smith on 20 November 1952 when he saw the appellants general practitioner, Dr Reynolds, who told him that the last occasion on which she had treated the appellant for headaches was in June 1952. She attributed them to petit mal or a mild form of epilepsy which she treated with pheno-barbitone. She described the appellant as mentally backward but, according to D.C.I. Smith, she would not go any further than that.

(6) At the trial

At the trial Craigs father, who was a chief cashier at a bank, was called as a prosecution witness to prove the age of his son. In answer to questions from counsel for Craig the father said that his son was illiterate suffering from word blindness and was a young man who, save for once being in unlawful possession of a weapon, had never been in trouble prior to the night of the murder. He was also described as a very gentle boy.

Later, when D.C.I. Smith was called, he was cross- examined by counsel for the appellant as follows:-

> Q. Mr Smith, you have made enquiries, no doubt, with regard to the accused Bentley?
> A. Yes, sir.
> Q. Do you agree with me that he is below average intelligence for his age?
> A. Oh yes, sir.
> Q. Well below it?
> A. Below sir. I cannot say well below.
> Q. So far as you can ascertain, is he capable of reading and writing anything else but his own name?

A. He can. His schoolmaster said he could, but with difficulty.
Q. With difficulty?
A. Yes, sir.

(7) Non- disclosure?
In his Grounds of Appeal and in his submissions to us Mr Fitzgerald was critical of the extent to which medical and educational information available to the prosecution was disclosed to the defence, and of the answers given by D.C.I. Smith in the passage which we have just set out. Mr Fitzgerald described those answers as deliberately unhelpful and misleading. As should be apparent from our detailed explanation of the educational and medical history and of the disclosure which was made, including in particular the disclosure of Dr Matheson's report, the first of those criticisms seems to us to be without foundation. In our judgment there is no substance in the second criticism either. D.C.I. Smith was not an expert medical witness. The answers which he gave were precisely those to be expected from a cautious police officer and his position seems to have reflected what Dr Reynolds had said to him. If D.C.I. Smith had been asked (as D.S. Shepherd was) whether from the enquiries that had been made he knew that the appellant was close to being a feeble-minded person, no doubt he would have answered in the affirmative. If those acting for the appellant wanted to adduce evidence as to the level of the appellants intelligence and literacy they were free to do so. They could, for example, have called Dr Matheson as a witness, but forensically there were dangers in doing so. If the evidence was intended to show that the appellant would have been easily led it might have been difficult if not impossible for the defence to exclude those parts of the medical history which suggested that the appellant could at times lead others astray, that he bullied his family, that he was idle, self- satisfied and arrogant, and that he had an unhealthy interest in guns. Furthermore, any attempt to cast the appellant in a subordinate role could well have provoked a reaction from counsel for Craig. So those representing the appellant had to proceed with care.

(8) Fresh psychiatric and psychological evidence
We turn now to the reports of the psychiatrists and of the psychologist which have been produced for the purposes of this hearing, and to the evidence given by Dr Gudjonsson from the witness box. The overall effect of that evidence seems to be as follows:

(i) On balance it seems probable that the appellant did suffer from epilepsy. That may have been as a result of an accident in childhood which caused brain damage, but the history is unreliable. There is nothing to suggest that he was directly affected by his epilepsy or by any medication he may have been taking for of it at any material time.

(ii) There is clear evidence of serious educational and behavioural problems, and of impairment of intellectual and cognitive function. That would affect the appellants understanding, his judgment and his memory.

(iii) He may or may not have satisfied the criteria for classification as feeble minded under the 1913 Act: He was close to the borderline.

It is no disrespect to the doctors who have prepared careful reports to say that they add nothing of significance from a legal point of view to material which was available at the time of trial. Mr Sweeney accepted, and for present purposes we are prepared to accept (without

deciding) that it would have been right for the jury to know more than they did about the appellant so as to be able better to assess his role in the expedition, his conduct in relation to Craig, and the evidence on how his statement came into existence, but almost all the relevant material was available and its existence was known to the defence. On the other hand, we do not believe that the importance of the missing material should be over-emphasised. If the jury had known more than they did about the appellant they would still have been likely to conclude that he was perfectly well aware of the nature of the expedition upon which he was engaged before he and Craig climbed on to the warehouse roof- see the compelling evidence of Mrs Ware- and if the appellant knew in advance that Craig had a gun and ammunition there is nothing to suggest that he could not, despite his handicaps, have understood the purpose for which that gun might well be used.

We have considered the provisions of section 23(2)(d) of the 1968 Act, and we have been unable to discover any reasonable explanation for the failure to adduce in the trial in 1952 the evidence now reflected in the psychiatric and psychological reports. In this context tactical considerations are not normally regarded as a reasonable explanation. As we have already indicated, we accept that there may have been problems forensically and we recognise that in those days courts were less receptive to evidence of this kind. We also take note that the Crown in this very unusual case raises no objection to our receiving the evidence which is now being placed before us, and we do so.

(9) The appellant's statement
In our judgment the primary impact on the trial of the evidence to which we have just referred is in relation to the issue whether or not the appellant was asked questions when his statement was obtained. The police officers who were there said that no questions were asked. D.C.I. Smith said in evidence that the appellant was asked no questions except to clear up, I think, a date in the early part of the statement. The statement is quite short. In typescript it is only about one page long, and it is not well structured, but in the light of the psychiatric and psychological evidence which we have received, coupled with the difficulty most people have in dictating a succinct and relevant narrative, we find it difficult to accept that it was obtained in the way the officers described.

That tentative conclusion is fortified when we turn to the reports from Professor Coulthard and Dr French, and the evidence given by Professor Coulthard in the witness box. Their linguistic evidence is of a type which was not (to our knowledge) available in 1952, and in our judgment it satisfies all of the criteria set out in section 23(2) of the 1968 Act. We therefore receive it. Considered as a whole that evidence can be summarised as follows:-

(1) People endeavouring to write down what is said to them do not always record entirely accurately, even when they believe that they are doing so.

(2) Nevertheless it can be seen that the appellants patterns of speech, discernible in the transcript of his evidence, are on occasions in contrast with what appears in the statement, where there are phrases which both experts describe as redolent of police usage- for example "I now know......"

(3) More significantly, the frequent use of the word then is suggestive of a police officer encouraging an interviewee to tell him what happened next, and the proportion of negatives in the statement is such as to render it unlikely that it was produced without questions from the police officers.

We cannot without hearing from D.C.I. Smith and DS Shepherd in the light of the fresh evidence reach a firm conclusion how the statement was obtained, and it is worth noting that in parts it is very helpful to the appellant, even to the extent of being apparently self-contradictory. Having earlier given some indication of knowledge of the gun at the time when the police arrived on the scene the appellant is recorded as later saying I did not know Chris had one [a gun] Until he shot, which does rather suggest that the officers were attempting to record faithfully what the appellant wanted to say. But in the light of the evidence now available we think it likely that a significant number of questions were asked, and we cannot therefore exclude the possibility that the sentence to which the trial judge attached special significance in his summing- up (I did not know he was going to use the gun) was in fact no more than the officers record of the appellants negative answer to the question Did you know he was going to use the gun? It is true that the trial judge did then point out the inconsistency of the statement, and go on to invite the jury to focus on the question whether as a matter of common sense the appellant had gone on the expedition with the boastful Craig without the latter revealing the existence of the gun, but the presence in the statement of the sentence suggesting that the appellant knew that Craig had the gun was damaging, especially if in reality what the appellant was trying to say, consistently at that stage, was precisely the opposite.

Mr Fitzgerald submitted that if the jury had been persuaded to accept that questions were asked when the statement was obtained that would have affected the credibility of the officers. To some extent that is right, but the effect would have been marginal if the jury accepted, as they well might, that the officers were genuinely trying to record what the appellant wanted to say. Prosecuting counsel appeared willing to accept at the trial that questions may have been asked; and it seems regrettably possible that the officers felt driven to dissemble by the somewhat unrealistic rules which were at the time understood to govern the taking of statements.

If the potentially damaging effect of this sentence in the appellant's statement had been the only ground for questioning the safety of his conviction, we doubt if we should have thought it sufficient ground for disturbing the verdict of the jury. For reasons already given in section II, however, we have already held the appellant's conviction to be unsafe and quashed it. This ground provides additional support for that conclusion.