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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

OWEN CORRIGAN

_____

Mr Desmond Fahy KC with Mr McCann (instructed by Fahy Corrigan Solicitors) for the Appellant
Mr Simon Reid BL (instructed by the Public Prosecution Service) for the Prosecution

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Before: Keegan LCJ, Treacy LJ and Kinney J

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KINNEY J (*delivering the judgment of the court*)

Introduction

[1] The appellant was convicted by majority verdict of the jury of a single count of unlawful wounding, contrary to section 20 of the Offences Against the Person Act 1861. He was subsequently sentenced by the learned trial judge ("judge") to 12 months' imprisonment suspended for two years.

[2] The appellant makes 4 grounds of appeal:

(i) That the judge erred in not acceding to the defence application for a direction at the conclusion of the Crown case that the appellant had no case to answer.

(ii) That the judge erred in law in the manner in which he directed the jury on the law of self-defence. In particular the judge did not specifically tell the jury that there was no requirement on the defendant to retreat nor that he was entitled to strike the complainant pre-emptively if he believed an assault on him was imminent.

(iii) That the judge erred in law in the manner in which he dealt with the issues of (a) the investigative failings of the PSNI and (b) the inconsistencies in the evidence of the complainant in his charge to the jury.

(iv) The judge erred in law in the manner in which he dealt with a requisition from defence counsel at the end of his charge to the jury.

[3] The single judge granted leave on ground two only. The appellant pursued all four grounds before this court.

[4] The test to be applied by this court is one of the safety of the conviction. In *R v Pollock* [2004] NICA 34 Kerr LCJ said:

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

Background facts

[5] On 8 October 2016 the complainant was at his mother's 60th birthday party in the British Legion bar in Enniskillen. He said that at the end of the night his aunt called him over and said that the appellant had taken her brush from her and had started dancing around the floor with the brush. The complainant demonstrated how the appellant was holding the brush for the jury. The complainant tried to grab the brush, but the appellant wouldn't give it to him, so the complainant walked away. The complainant did not recall anyone else near him and the appellant when the incident with the brush was happening. He did not recall anyone else speaking to the appellant. He said he went to the bar area where he was talking to his aunt, uncle and wife. The next thing he recalled was turning his head and being punched. He remembered his face hitting the ground.

[6] In the course of his evidence the complainant was shown CCTV footage taken from the British Legion bar on that night. The footage did not show the appellant taking the brush from the complainant's aunt and did not show the appellant dancing

with the brush. The footage showed another man, X, beside the complainant when he was talking to the appellant. The footage showed X grabbing the brush from the appellant. The footage then showed the appellant walking first in the direction of the bar with the complainant walking behind him. The footage also showed the complainant raising his right arm in the vicinity of the appellant at the bar. The complainant could not recall putting his arm out or why he put his arm out.

[7] The appellant had been invited to a birthday party in the British Legion bar by his friend. At the end of the night the appellant's account was that he started to sweep the floor and lift tables. Two men approached him and wanted the brush. The appellant thought they were joking. One of the men was the complainant. The other man, X, then made a derogatory comment of a sectarian nature and told the appellant to get out. The appellant said he just dropped the brush and walked away immediately. He returned to the bar where he then stood with two others. He became aware that the complainant was in the vicinity of the bar. The appellant felt very threatened and heard the complainant make a sectarian comment and turn towards him. The appellant said he felt like a rabbit in headlights and thought he was going to get assaulted. He then struck the complainant who fell to the ground. The appellant was dragged outside from the bar. He alleged that X grabbed him in the groin and that a police officer removed X from him.

[8] The investigating officer in his evidence accepted that there were investigative failures both in respect of the assaults that the appellant sustained after he had struck the complainant and in the appellant's defence of self-defence advanced in relation to that strike. Police did not speak to anyone inside the British Legion and no specific steps were taken to investigate the assault on the appellant. No steps were taken to speak to X. Police only looked at the alleged assault on the complainant, not at the self defence case made by the appellant and the police did not look for any evidence of negligent or provocative behaviour on the part of the complainant. In his evidence before the jury, the investigating officer accepted that there had been a total investigative failure in the case and that these may have been to the appellant's detriment. X may have admitted the sectarian slur was made by him on the dancefloor and other witnesses identified by police at the scene may have heard either or both of the alleged sectarian slurs the appellant said were directed at him.

Ground one

[9] The defence made an application at the close of the prosecution case that the matter should be withdrawn from the jury on the basis of no case to answer. The defence relied on the second limb of the test set out in *R v Galbraith* [1981] 73 Cr App R 124. In summary, the test provides that where the judge comes to the conclusion that the prosecution evidence, taken at its height, is such that a jury properly directed could not properly convict upon it, it is his duty, upon submission being made, to stop the case. The court in *Galbraith* went on to say:

> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[10] Mr Fahy KC accepted in submissions to this court that the credibility of the complainant would not be sufficient to ground his application for no case to answer. However, in this case there was an additional strand of argument arising from the investigative failures by the police. It was for the prosecution to disprove the appellant's assertion of self-defence and Mr Fahy argued that the prosecution was aided in that task by the police failure to carry out even the most basic of enquiries.

[11] The judge heard submissions from prosecution and defence and declined to withdraw the case from the jury. In his ruling the judge referred to the actions of the appellant and the offence he was charged with. He said:

> "There is clearly a prima facie case that the ingredients of that offence are met and made out at this particular stage. I also have taken into account the clear inconsistencies that there may well be in this case between the complainant's evidence and the CCTV footage.
>
> Secondly, I have also considered the position regarding the investigation as carried out by the police of the facts relating to the events on that night in question. I have come to the conclusion that despite the clear investigative failings in this case, the trial process is adequately equipped to deal with the assertions as made by the defence at this particular juncture. Accordingly, I intend to charge the jury upon these clear investigative failings which are indeed fully accepted by Detective Constable McMeekin and invite them to fully consider same in determining whether the prosecution has proved the case against the defendant to the requisite standard required under the criminal law.
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> The jury will also be told, clearly, about the fact that evidence which might have supported the defendant's contention that he was acting in self-defence, has clearly not been investigated by the authorities."

Consideration of Ground 1

[12] When considering an application under the second limb of *Galbraith* the court is not concerned with considering the quality and reliability of the evidence but rather whether it is sufficient in terms of weakness or vagueness for any sensible person to rely on it. In this case the judge considered that there was evidence of the essential elements of the offence with which the appellant was charged. The judge had a broad discretion in dealing with the application and of course was in a central position to assess the prosecution's case. In this case the judge acted entirely within his discretion in determining that the assessment of the inconsistencies should be left to the jury. He also correctly identified his role in providing the jury with appropriate directions to assist them to deal with both the inconsistencies and the investigative failures. This ground of appeal is dismissed.

Ground 2

[13] The second ground of appeal concerns the manner in which the judge directed the jury on the law of self-defence.

[14] In this case the judge delivered a split charge. He addressed the jury on the legal issues and gave directions on the charges facing the appellant. Prosecution counsel and defence counsel then made their submissions to the jury. After this the judge delivered the remainder of his charge to the jury. In the initial part of the split charge the judge addressed the law on self-defence. Having set out that the burden was on the prosecution to show the appellant was not acting in self-defence, the judge went on to say:

> "Firstly, this defence, that's the defence of self-defence, only comes into play when you have come to the conclusion that the defendant was in fact defending himself. That would only be the case if the defendant, Mr Corrigan, was being attacked or threatened with attack and it was, in your judgement, necessary for him to defend himself against that attack or threatened attack. If the injuries inflicted upon Mr Boyd were not caused when the defendant was defending himself, then he would not be acting in self-defence. You must therefore consider all the circumstances of this case and decide whether at the time he inflicted the injury sustained it was or may have been necessary for him to use some force against Mr Boyd to defend himself or, indeed, that he honestly believed that it was such.
>
> The second matter which arises, members of the jury, is if you do decide that the defendant was in fact entitled to defend himself by using some force against Mr Boyd, you must bear in mind that the law provides that he is entitled

to be found not guilty only if the amount of force used in self-defence was reasonable in the circumstances. If the amount of force used was unreasonable it would not be lawful. Force used in self-defence would be unreasonable if it was out of proportion to the nature of the attack or the threatened attack or if it was in excess of what was really required of the defendant to defend himself. It is for you members of the jury to decide whether the defendant was or may have been acting in lawful self-defence and your judgement about that must depend upon your view of the facts of this case.

In considering these matters you should have regard to all the circumstances of the case. Some of the considerations which you may well have in mind are these: what was the nature of the attack or the threatened attack by Mr Boyd? Was for example a weapon used in the threat of attack or the attack? If so, what kind of weapon was it? How was it used? Was the attacker on his own or was the defendant being attacked or in fear of an attack potentially by maybe two or more persons? Effectively I've outlined that members of the jury because you will see that every case which comes before the courts is different in relation to this particular aspect. There are so many possibilities that the law does not attempt to provide a scale of answers to you, members of the jury. All of these matters are, in effect, left to your good common sense, your experience, your knowledge of human nature and, of course, an assessment of what actually happened in this particular case.

Having said all that, when considering whether the defendant's conduct was reasonable, please bear in mind that a person who is defending himself cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action which is necessary, and in this regard, the more serious the attack or the threatened attack upon him the more difficult the situation will be. If, in your judgement, the defendant was or may have been in a situation in which he found it necessary to defend himself and he did no more than what he honestly and instinctively thought was necessary to defend himself, that would indeed be very strong evidence that the amount of force used by him was reasonable in the circumstances."

[15] In the second part of his charge the judge reminded the jury of the evidence provided by the defendant:

> "He recalls the complainant, the alleged injured party in this case, Mr Boyd, being in the vicinity of the bar. He said, "you're still here you little Fenian you." He tells you that he came towards him. "In my mind I felt like a rabbit in the headlights. I thought I was going to get a bad beating here." He told you that he struck Boyd with his right hand, he was scared and frightened, and that he had no other option."

Consideration of Ground 2

[16] The judge quite properly addressed counsel on the elements of his charge to the jury. The appellant submits that in those discussions the judge indicated he would give the standard bench book direction in relation to the law of self-defence. When the judge delivered his charge to the jury, he did not expressly say to the jury either:

(a) that there was no requirement on the appellant to retreat;

(b) that the appellant was entitled to strike pre-emptively if he believed an assault on him was imminent. A person is not obliged to wait until he is attacked before acting in self-defence and he is entitled to get his blow in first if it is reasonably necessary to do so in self-defence.

[17] It is clear that the judge followed the format of the specimen direction on self-defence in the NI bench book. However any specimen direction is simply an aid for the trial judge in composing the appropriate charge in the circumstances of the instant trial. Specimen directions should not be slavishly followed but should be adapted as appropriate. It cannot be a criticism of a judge that they have departed from the precise wording of a specimen direction. What must be considered is the content of the direction actually provided to the jury and whether it causes any sense of unease or a concern that a jury could be misled.

[18] In *Hayes* [2010] EWCA Crim 773, Hughes LJ said in respect of a similar submission that the trial judge's direction did not conform to a Judicial Studies Board model direction:

> "That … it needs to be said as clearly as possible, is not and never can be by itself a ground of appeal. The Judicial Studies Board does not issue directions or orders to judges. It is a forum within which they can compare their practices. The so-called model directions which are in any event about to be supplemented by additional sample directions are no more than that. They are examples which may be helpful to judges in framing a direction which is tailored to the individual case. It is fundamentally to misunderstand

> the nature of the Judicial Studies Board and the materials provided by it to treat any of its materials as carrying any force of law at all … It is important that it should be understood what the significance is and more importantly what the significance is not of model directions issued by the Board."

[19] In *R v Dorrian* [2022] NICA 47 this court also considered the issue of the trial judge's directions in self-defence. The Lady Chief Justice, delivering the judgment of the court said at para [5]:

> "We reiterate the point that emerges from the above that each case has to be considered in the light of its own facts. This appeal also highlights the importance of fashioning jury directions to the issues in the case."

[20] Mr Fahy argued that the judge did not make it explicit that there was no requirement for the appellant to retreat and secondly that there could be a pre-emptive strike which could constitute self-defence. However, he did not raise any requisition during the trial either at the end of the portion of the judge's charge which contained the direction in self-defence or at the conclusion of the charge to the jury which occurred after the defence and prosecution had both addressed the jury with their closing submissions. This court was not given any clear or adequate explanation for this omission. Whilst the failure to raise a matter by way of requisition so that it can be dealt with appropriately within the trial process is not fatal to an appeal, that failure is a factor in the examination of the matter in this court. There was not a requisition raised in relation to ground three of the appeal either and we will come to that shortly. However, there was a requisition raised in relation to the matters which found ground four of appeal. As the Court of Appeal commented in *Dorrian* at para [76]:

> "In addition, we must observe that if the impugned directions were so objectionable as to potentially undermine the safety of the conviction and if it is such a serious error, it is, indeed, surprising to put it mildly, that the defence lawyers and the PPS did not address the matter head on in detailed submissions with appropriate citation of authorities. We appreciate that there was some email correspondence discussed above but that did not categorically address the issue. A matter such as this cannot be left hanging in the air if it is seen to be so fundamental."

[21] The trial process is designed to allow any potential errors or omissions in a charge to the jury to be properly addressed by way of requisition within the trial process. This allows the judge to consider any such requisition and if they think it appropriate to amend or correct the charge given to the jury so that there is no

question that the jury does not have the correct information before them in arriving at their decision. To leave questions such as those in this case to be first raised on an appeal to this court is not a practice which should occur other than in the most exceptional circumstances.

[22] When self-defence is raised by a defendant, it falls to the prosecution to prove to the criminal standard that self-defence has not been established. The defence is recognised as a commonsense concept. The appellant said that he acted in self-defence. Two basic questions then follow. First is whether the facts as the appellant believed them to be meant that his use of force was necessary for the purpose of self-defence. Second is whether the degree of force then used was reasonable on those perceived facts. In this case the appellant admitted that he struck the complainant causing him injuries. It is for the jury to decide whether the appellant's reaction to his perceived situation was a matter of self-defence. The judge must direct the jury on the applicable law.

[23] This was a short trial. The issues before the jury were clear and evidence had been recently heard and summarised by the judge for the jury. The judge in his charge clearly referred not only to the defendant defending himself against attack but also against the threat of attack and the fear of attack. He invited the jury to consider the circumstances of this particular case. He invited the jury to consider the nature of the attack or threat of attack faced by the defendant.

[24] The judge's comments must be seen in context and how they relate to the evidence given at trial. We are satisfied that the comments of the judge were tailored to the facts and issues in this case. He property left the factual determination of this matter to the jury. We do not consider that the judge erred in his direction on self-defence. We dismiss this ground of appeal.

Ground 3

[25] The third ground of appeal is that the judge erred in law in the manner in which he dealt with the issues of the inconsistencies of the evidence of the complainant and also the investigative feelings of the PSNI.

[26] When dealing with the application made by the defence at the close of the prosecution case to have the matter withdrawn from the jury, the judge considered both of these issues. He determined that the trial should continue, and the issues be placed before the jury. In his ruling he acknowledged the clear inconsistencies between the complainant's evidence and the CCTV footage. He also acknowledged the clear investigative failings in the case. He said the trial process was adequately equipped to deal with the points raised by the defence. He stated:

> "Accordingly, I do intend to charge the jury upon these clear investigative feelings, which are indeed fully accepted by Detective Constable McMeekin, and invite

> them to fully consider same in determining if the prosecution has proved the case against the defendant to the requisite standard required under the criminal law.
>
> The jury will also be told clearly about the fact that evidence which might have supported the defendant's contention that he was acting in self-defence has clearly not been investigated by the authorities."

[27] At an earlier stage in the application before the court the judge said:

> "Is it not incumbent upon me, which I would intend to do, to direct the jury in respect of the potential inconsistencies which clearly there are in the CCTV footage as opposed to the defendant, or the complainant's account."

[28] At the close of the evidence the judge quite properly discussed with counsel the content of aspects of his charge. In the course of this discussion there was mention of the potential of a Makanjuola direction. This is a direction which would warn the jury to be cautious in accepting the evidence of the complainant. However, no such direction was in fact sought in this case. The judge did ask defence counsel to provide a written note of the inconsistencies from the appellant's perspective in the evidence provided by the complainant and also a written note of the investigative failures of the PSNI.

[29] The judge did not address the issues relating to the evidence until the second part of his split charge. This was after both the prosecution and the defence had made their closing speeches to the jury.

[30] In his charge the judge told the jury that it was a matter for them as to the appropriate weight they should give to any inconsistent account that may have been given by the complainant and in particular when compared with the CCTV footage. The judge said:

> "Mr Fahy has outlined in his address to you the inconsistencies that he and the defence rely upon in relation to these particular matters and I don't intend to reiterate those again. He has really divided the evidence into four separate categories. The position regarding the use of the brush by Mr Corrigan in this case, what potentially was said by (X) at the time when the encounter between him and Mr Corrigan, then the position regarding where the respective parties and by the respective parties I mean in this case Mr Boyd and Mr Corrigan, ended up after the issue regarding the brush took place.

> And then of course the position which took place at the bar itself. What the defendant effectively told you was that he thought, rather, not the defendant what the complainant, what the injured party told you was that he turned his head to the right, he got a thump, his head hit the ground, he can't remember anything else. When he was cross-examined about this, he indicated that he thinks the blow came from his right. He never saw his assailant; there was no initial mentioning by him, that's Mr Boyd, of raising his right arm.
>
> Having been shown the CCTV footage, he said that he thought the blow had come from the right, but does not know if that in fact is correct. He agreed that at that time he was looking at Bob Weir and he could see the defendant. The alleged injured party, Mr Boyd accepted, in cross-examination that he raised his right arm but did not accept that he touched the defendant. He then said he didn't know why he put his arm out. He did not remember putting his hand out. He accepted that had it not been on the CCTV footage that you, the jury, would not have heard anything about this."

[31] The judge went on to remind the jury of some of the evidence they heard from the complainant. He said:

> "At the end of the night, at about 1:10 he came out of the toilets, his auntie Anne called him over. A fella had taken the brush and was up on the dancefloor. She asked him effectively to take the brush off this person and Mr Boyd told you that this male person was dancing with the brush. 'I tried to grab the brush. He wouldn't give it to me' is what he said. 'I couldn't get the brush and effectively I didn't bother any more with this.'"

[32] The judge then went on to remind the jury of what the complainant said in his evidence in chief. He did not refer to what was shown on the CCTV footage which contradicted the complainant's account.

[33] This summary to the jury did not match the information provided in the table of inconsistencies provided by the defence. That table was not challenged by the prosecution. The table included, for example, the fact that the CCTV footage showed that the appellant did not take the brush off the complainant's aunt and that the appellant did not dance with the brush on the dancefloor. The judge did not address the fact that there was a man beside the complainant, X, when the appellant was approached about the brush and that the complainant could not remember whether X

spoke to the appellant or could have made a derogatory remark. It did not address the discrepancies in the complainant's account about the way in which the individuals left the dancefloor and went to the bar area.

[34] The judge also reminded the jury of what the appellant said in his evidence in chief. However, he did not address the fact that the CCTV footage largely corroborated the appellant's account. He did refer to the CCTV footage but only in respect of the prosecution challenge to the appellant's account of what happened when he was at the bar area. The judge reminded the jury that the appellant said that the complainant was talking to "a couple of boys" at the bar but that the CCTV footage did not show a couple of boys at the bar with the complainant in the circumstances as described by the appellant. This point is related to ground 4 of the appeal which we deal with later.

[35] The approach taken regarding the investigative failures of the police was in a similar fashion. Again, a document had been provided to the judge by the defence setting out in detail it's position on investigative failures. The judge did not address those issues in accordance with the document. The judge said:

> "Now, the next issue that I want to deal with relates to the – what Mr Fahy has referred to as the investigative failures by the police in this particular case. And this clearly relates to the evidence of Detective Constable McMeekin and what he has said in cross-examination. The effective submissions as made by Mr Fahy clearly relate to the fact that Constable McMeekin has accepted that he only looked at this particular matter effectively in one direction as such, and that was based upon the alleged assault of Daniel Boyd and not the self defence case as made by Mr Corrigan, or indeed the case made by Mr Corrigan that he was assaulted that particular evening.
>
> Detective Constable McMeekin accepted also that the police had not looked for any evidence of neglect or indeed provocative behaviour on the part of Daniel Boyd that evening. Constable McMeekin accepted that if he was investigating this case now, he would have given more time to it and consideration to the whole incident rather than just Daniel Boyd's account, and the injuries which he sustained. He accepted that he felt that the supervision given to him at this time by his superiors could have been more effective. And the final position was that he accepted that there was a total investigative failure on his part …
>
> So I don't intend to repeat any further what Mr Fahy has said about these potential investigative failures in this case.

> Those again are a matter for you to consider members of the jury and if you so determine that there were investigative failures what is the effect of that however?"

[36] The judge followed these remarks by providing a direction regarding the investigative failures in the formulation as suggested by the defence. The judge did not provide the detail regarding the failures as proposed by the defence. There is no requirement for the trial judge to follow the wishes of the defence in this regard or repeat every detail contained in documents provided to the court at its request. However, in this case it appears that relevant matters were not mentioned by the judge to the jury in his charge. These included in particular the detail of the steps that should have been taken to obtain relevant evidence from various potential witnesses at the British Legion Hall. It also did not address the potential role of the third man, X, or the police failure to speak to him. It did not address whether X could have made the initial sectarian remark or had heard the complainant make any sectarian remarks.

[37] We are satisfied that these were relevant matters which should have been dealt with by the judge and should have been included in his charge to the jury. He acknowledged when dealing with the defence application at the end of the prosecution case that there was a need to direct the jury on the areas of concern. He discussed the matter with counsel and requested written submissions on the inconsistencies and the investigative failures to be drawn to the attention of the jury. He did not do so, nor does he appear to have discussed these matters further with counsel prior to delivering his charge. It was clear to the judge that there were significant issues regarding both inconsistencies and investigative failure and a more detailed exposition on the matter for the jury was required. It is not appropriate for the judge to rely on what has been said by either the defence or prosecution counsel rather than provide his own balanced comments on the evidence the jury had heard.

[38] The charge to the jury by the judge is of an entirely different nature to the submissions made by counsel. Blackstone at D 18.15 states that the prosecution and defence have a right to a closing speech in which they may sum up their respective cases, criticise the opposition's case and comment upon the evidence. The judge's closing directions are to assist the jury to understand their task in relation to a particular case and to provide a summary of the evidence in order to assist the jury and ensure a fair trial.

[39] In *R v Amado-Taylor* [2000] 2 Cr App R 189 the judge told the jury that he was not going to review the evidence because they had heard the speeches of experienced and able counsel and for him to remind the jury of those facts would be simply "otiose repetition." The Court of Appeal said:

> "Of these reasons we have these comments. First, counsel's closing speeches are no substitute for a judicial and impartial review of the facts from the trial judge who is responsible for ensuring that the defendant has a fair

> trial. And the first step to such a trial is for the judge to focus the jury's attention on the issues he identifies. That responsibility should not be delegated (or more accurately here, abandoned) to counsel."

[40] There is no requirement for the judge to rehearse all of the evidence or all of the arguments. What is required, where there is a significant dispute as to material facts, is that the pieces of evidence which are in conflict are identified to the jury. By doing so the judge can focus the jury's attention on the factual issues they must resolve.

[41] We have noted that again in relation to this ground the defence did not raise any requisitions at the end of the charge. This is highly unsatisfactory given that counsel now make the case that a serious error was made by the judge. This court has consistently reminded counsel that they have a duty to raise any material omission in the judge's charge at the time rather than store up the matter for argument in the Court of Appeal.

[42] Regrettably, a feature of this case was a failure by the defence to raise appropriate requisitions during the trial process on matters which have now been brought before this court. We again remind practitioners of the guidance on this matter given in *Dorrian* at para [80]:

> "We also repeat our concern that neither experienced counsel in this case specifically raised or debated this point in court when now it is raised as a point of fundamental and critical importance. Criminal law practitioners should remember that they have an obligation, not just to their client but to the court. If they consider that there is a serious error in law, it should be properly raised in court with legal authority for the trial judge to consider rather than resurrected at an appeal before the Court of Appeal which is obviously at a remove from the immediacy of a trial. This should be the established practice going forward."

[43] However, in *Holden* [1991] Crim LR 478, the Court of Appeal in England and Wales made clear that that the dismissal of an appeal would not be automatic where defence counsel had failed to correct an error. That is undoubtedly so given the interests of justice.

[44] Having considered this case in the round we cannot be satisfied as to the safety of the conviction in light of the significant gaps identified above in the judge's charge to the jury regarding inconsistencies and investigative failures. We consider that these inconsistencies and investigative failures were a core feature of this case which needed to be spelled out by the judge. Therefore, notwithstanding the defence failure to alert the judge to this mistake at the time this ground of appeal succeeds.

Ground 4

[45] This ground of appeal was not actively pursued by Mr Fahy before this court. It alleged that the judge erred in law in the manner in which he dealt with the requisition from defence counsel at the end of his charge to the jury. It was submitted that the judge had placed undue attention on a portion of the evidence relating to an inconsistency between the CCTV evidence and the appellant's evidence. We have seen the transcript of the exchange between counsel and the judge in relation to this issue. It is clear that the judge gave thought to this requisition and invited further submissions relating to the matter. We have also considered his summary of the evidence in his charge to the jury in relation to this matter. The judge properly left the assessment of the factual issues to the jury. We do not consider that this ground of appeal is made out and we dismiss this ground of appeal.

Conclusion

[46] We allow this appeal on ground 3 and quash the conviction. We will hear from the parties as to whether a retrial should be ordered and in relation to the costs of this appeal.