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Case No: 2009/05720/C3

COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CENTRAL CRIMINAL COURT
HIS HONOUR JUDGE HONE QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/11/2010

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE OWEN
and
MR JUSTICE UNDERHILL

Between :

R
- v -
SARAH ANDERSON

Mr C H Blaxland QC and Mr P Rowlands for the Appellant
Mr B Kelly QC and Mr W Elwyn Jones for the Respondent

Hearing date : 12th October 2010

Approved Judgment

The Lord Chief Justice of England and Wales:

1. This is an appeal by Sarah Anderson against her conviction for murder before His Honour Judge Hone QC and a jury on the 25th March 2009 at the Central Criminal Court. She was sentenced to imprisonment for life with a minimum prescribed terms of 15 years, less the time already spent on remand.

2. Shortly before midnight on 1st July 2008 a woman called Dee Willis suffered a fatal injury in Bellenden Road, Peckham. She was stabbed once in the neck, to a depth of approximately 11 centimetres, with bruising to the skin in the area of the wound consistent with a knife having penetrated to the hilt.

3. The Crown's case was simple. After an altercation in a public house the appellant returned home and armed herself with a knife. On her way back to the public house she was confronted in the street by the deceased who behaved aggressively towards her. The tussle between them ended when the appellant was seen to "punch" her. What was witnessed as a "punch" was a blow with a knife. The appellant was responsible for inflicting the fatal injury, and she did so with murderous intent. It is not in dispute that the evidence in support of the case was very powerful.

4. The main ground of appeal involves criticism of the appellant's representation by counsel and solicitors both before and during the trial itself. It is said that the trial strategy was flawed because the defendant's case was presented on a basis which was different from her instructions. Her actual defence was not argued before the jury, and the way in which the defence was conducted meant that her conviction was inevitable. To the extent that the appellant consented to this strategy she was inadequately advised about the possible consequences of not putting her positive case before the jury, or the forensic significance of the decision that she should not give evidence.

5. One significant feature about the professional relationship between the appellant and her legal advisers must be addressed immediately. At the time when the deceased was killed the appellant was on bail awaiting trial for an offence of violence. Her solicitor, Mr Tosswill, and her counsel, Mr Montgomery, acted for her throughout these proceedings. The first trial took place in September 2008. It ended prematurely, and the re-trial took place in January 2009. The appellant did not give evidence. She was convicted. In short, after her arrest for the murder of Dee Willis until the conclusion of her trial for the unconnected offence of assault occasioning actual bodily harm, the appellant was in regular contact both with her solicitor and her counsel, and by the date of the PCMH before Judge Rook QC she was very well aware of the quality and character of the legal team instructed to conduct her defence at the murder trial. Moreover by that time she had already received advice from the same legal advisers, and had direct experience of the sometimes very difficult dilemma facing every defendant, whether or not to give evidence.

6. It is obvious from the timetable of events prepared by Mr Henry Blaxland QC on her behalf that there were many meetings between solicitor and client, and between counsel, solicitor and client before the murder trial began. There were regular meetings during the trial for assault, and again when the trial for murder was under way. Given the dispute that has arisen between the appellant and her legal representatives, it is most unfortunate that no notes of these meetings were made

either by Mr Tosswill or by Mr Montgomery, or indeed by anyone. In the result, we felt that we should hear the evidence of the appellant herself, Mr Montgomery, and Mr Tosswill. We shall comment further on the absence of any notes at the end of the judgment.

7. There is a further ground of appeal, based on the failure to deploy information adverse to the deceased's character. For present purposes the question how the information came to be overlooked is irrelevant. There is no doubt that it was, and it never played any part in the considerations which led the appellant's counsel and solicitors to advise her or to adopt the forensic strategy that they did.

8. A further, quite separate argument is advanced that the conviction for murder was unsafe on the basis that the judge failed to leave the issue of provocation to the jury. In fairness to the judge no one at trial suggested that on the evidence before the jury provocation might constitute an arguable defence. We shall return to the provocation issue later in the judgment.

9. To understand the issues raised in the appeal we shall set out the appellant's case as it emerged. Privilege has been waived. In discussion with her solicitor before she was interviewed by the police after her arrest, the appellant described a fairly lengthy build up to her encounter with the deceased. On the crucial aspect of the case the notes read:

> "All of a sudden as client was crossing the road, two cyclists on the road, first bike rode past, and the person a male on second bike shouted something at the client, client didn't pay any attention to the comment, although it was obviously directed at her, as she was the only person in the vicinity. The first cyclist rode back, client still on the phone...and someone grabbed her by the hair from behind, at this point just before, a bike crashed into her legs from behind, and the bike crashed to the ground. Client still holding phone to her ear...client turned round, and white male still on his back, and a white female directly in front of client, client knows this female as Dee, who is a friend of one of the persons from the pub who does not like client. Passing acquaintance who is a drug user from the area. Client said to Dee, "What are you doing" and Dee shouted "Come on then", client saw something in her right hand, which was shining and looked like a small knife or tool, she still was holding client by hair, when they were facing each other with one hand. Client grabbed her right hand pushing it away from her to defend herself, shouting "What are you doing". Client broke away and came back home. Before this she had shouted to Dee "Get off me, let go". Had pushed her away in a defensive motion and then saw (a friend) as she ran off and she shouted "Don't let them get me" to (him). Client did not look back but had run home, went indoors, and then realised she had blood on her clothes, and had no idea where blood had come from – client uninjured."

10. The statement goes on to record how the client disposed of the bloodstained clothing she was wearing and then how she bumped into the friend to whom she had been talking on the phone:

> "And told him about incident, telling him she had been attacked for no reason..."

11. When the appellant was interviewed by the police in the presence of her solicitor, on advice, she provided what can fairly be described as a "no comment" interview.

12. Thereafter an identification parade took place. It was properly conducted. The witness Billy Mold observed:

> "Only person rings a bell, number 5, but I can't say it's her definitely."

And shortly afterwards he repeated "can't be 100% sure, number 5 rings a bell, face looks familiar for some reason". The appellant was standing at number 5 in the parade. Thereafter she was interviewed again. Again on legal advice, she had "no comment" to make.

13. The appellant's proof of evidence, prepared for trial, read:

> "I told them all to "fuck off". Then, at about 10 or 11 pm, I left the pub and went home. I do not remember making any threats as I left. I left the pub because I was upset at the row that had taken place. Also, I wanted to change from the dress I was wearing into something warmer. I intended to return to the pub later. Another reason for changing my clothes was because I thought that, when I returned to the pub, there might be a fight. If there was to be a fight, I did not want to be wearing my dress...I carried on walking and speaking on the phone. The other person who had not yet stopped then rode into me from behind. This made me turn round. I saw the person who had ridden into me was a woman who I knew as "Dee". She was someone I knew by sight, but she was not a friend or even an acquaintance. I had seen her previously that day, or in fact for several weeks.
>
> After riding into me Dee dropped her bicycle to the ground and grabbed my hair. I asked her what she was doing. There was no reason for her to do this.
>
> I turned round to retaliate and hit her. I saw she had something in her hand, but I could not see what it was.
>
> I grabbed her arm and tried to push her away from me. She was still holding my hair. Then she let go of my hair and I ran off, intending to go home.

> I wanted to get away before the man became involved, as he had started the incident. I did not realise at this time that Dee had been injured."

Later, when a friend pointed out to her that her clothing was blood stained, she thought at first that she had been injured, but when she discovered that she had not been injured she "realised that Dee must have been injured".

14. In due course, and after much delay, the defence statement drafted by counsel was served. It reads:

> "1. The defendant is charged with the murder of Dee Willis. The allegation is denied.
>
> 2. In this defence statement the defendant does not depart from the "no comment" stance adopted in interview save to confirm that she was in the SE15 area on the day in question at the relevant time, that is to say that at about 11pm on the 1st July 2008."

The statement is signed by the appellant and dated 28th December 2008.

15. Unsurprisingly, given the very limited information in the defence statement, at a PCMH hearing on 2 March 2009 Mr Montgomery was asked by Judge Rook QC:

> "What are the issues in your case?"

He replied:

> "Well, whether the Crown have a case that identifies the defendant as being the culprit is altogether questionable...There is one witness who makes a query whether it is a positive identification and then there is a quantity of circumstantial evidence and we are saying that the Crown simply are not able on the available evidence to demonstrate the defendant's guilt. It was a no comment stance at interview and I have to say that obviously it is not cast in stone but it may well be a case where although there is a degree of cross examination in store of certain prosecution witnesses, it is questionable whether the defendant does give evidence. Of course, as I say, it is not cast in stone but..."

16. When the judge intervened to ask about the defence statement counsel replied that the statement had been considered after it had been "conscientiously considered and ...kept to the briefest. It effectively indicates we are not departing from the no comment stance." The judge then asked whether any positive defence would be advanced, and counsel effectively confirmed that none would, and added that he had to say "it is unlikely to change".

17. The appellant was present in court throughout this exchange.

18. In summary, therefore, the strategy for the trial had effectively been decided, although obviously it was open to change as events unfolded. No positive case would be advanced by the appellant herself. Rather, the question of identity of the assailant, and the possibility that whoever was responsible for the deceased's fatal injury may have been acting in self defence would be examined before the jury. This undoubtedly difficult strategy was then adopted in the trial before Judge Hone which began shortly afterwards.

19. At the close of the prosecution case it was not submitted that the case should be withdrawn from the jury. That was obviously sensible. There was, and always had been, ample evidence for the jury to consider. Counsel was granted an adjournment to see his client. The appellant signed a short note which has now been lost, probably in the course of a chamber's move, to the effect that she had decided not to give evidence. After the judge made the appropriate inquiry arising from this decision, the appellant did not give evidence in her own defence.

20. Thereafter the question whether the Crown had proved that the appellant was correctly identified as the person responsible for the fatal injury was examined in depth, both by counsel for the appellant and by Judge Hone in his summing up. The evidence of self-defence was similarly addressed. It would have been, unless disproved, as the judge put it "a complete defence". Finally the judge left to the jury the possibility of a verdict of manslaughter on the basis that even if the jury was sure that the appellant was responsible for the fatal injury and not acting in self-defence, the necessary intent for murder was not proved. The jury retired and convicted the appellant of murder.

21. We return to the appellant's instructions. Based on those instructions the situation facing any competent counsel was singularly unpromising. The appellant accepted that she was directly involved in a violent altercation in the place and at the time when the deceased suffered the fatal injury. There was nothing to suggest that anyone else had been involved in any such incident before the protagonists engaged in their fight, or indeed the slightest evidence that anyone else was ever involved in a violent altercation with the deceased on that night. At the end of the incident the victim was injured with a single blow from a knife which penetrated deep into her neck. Yet the appellant was apparently quite unaware of how this had happened. The knife was never found at the scene. By the end of the incident it had apparently disappeared: so that if the knife had indeed been carried to the scene by the deceased it was no longer there after the incident. The appellant herself gave differing accounts of her movements afterwards, and in particular the identity of those she had contacted. She then fled London, somewhere disposing of her blood stained clothes.

22. No alibi defence could properly have been advanced. That would have been inconsistent with the appellant's instructions. So what was left? Self defence involves an element of proportionality in the response to proffered or anticipated violence. In the context of the incident no jury would have regarded the deep wound in the deceased's neck as constituting reasonable self defence, and indeed, as we know, this jury did not. If, on the other hand, the appellant had never handled the knife and therefore was not responsible for the injury, the deceased must somehow, accidentally or otherwise, have inflicted it on herself. If however the injury was sustained in the struggle, and not, for example, as the result of a fall to the ground, the injury itself, as well as the failure to discover the knife at the scene, wholly

undermined any possibility of accident, and contradicted the appellant's case that she was quite unaware of how the fatal injury had occurred, and had never handled the knife.

23. In essence, according to Mr Blaxland's argument, the appellant's case was simple. He submitted that the defence was not conducted in accordance with the appellant's instructions that although she was involved in the fight with the deceased at the time when the fatal wound was inflicted, she did not have a knife and did not inflict the fatal wound. It amounted to a positive case which should have been advanced at trial. The only way in which it could have been advanced was for the appellant herself to give evidence. If so she could not avoid cross-examination. The effect of cross-examination would have been devastating. In any event, we do not accept that she was offering a positive defence: she was denying responsibility, but offering no explanation at all for the fatal injury sustained by the deceased in the course of their fight. The reality was that, simple as her case may have been, the single forensic decision on which the entire conduct of the defence would turn was whether she should give evidence, or not, and in any event whichever of those two choices was made, neither offered much prospect of acquittal.

24. In these circumstances it was imperative that the true situation should be realistically and fully explained to the appellant so as to enable her to make a reasonably informed decision whether to give evidence at trial. It is elementary that, after considering legal advice, this decision had to be made by the appellant personally.

25. We now turn to the evidence we heard de bene esse from the appellant, and her legal advisers.

26. The appellant is an intelligent young woman. She told us that her account of events as given to her solicitors was truthful, and she accepted that from the outset it was explained to her that on her version of events it might be "tricky" to explain the fatal injury. On the other hand she was advised that identification might present a problem for the prosecution. As to the defence statement, it was brought to her in prison, but when she expressed concerns that it did not say very much, she was told not to worry because that was all that was needed at that stage. She said that she was not told that if she gave evidence she might be asked why her account was not set out in the statement, the significance of which she did not really appreciate.

27. At that stage there had been no discussion whether she would give evidence at trial, and she said that as the trial approached she expressed the wish to "take the stand". At trial, before the close of the prosecution case in a cell conference she asked about the submission of "no case to answer". She was advised that this would just provide the prosecution with a "dress rehearsal" and would not succeed. She was then concerned about her evidence and what she would say. When the prosecution case was concluded Mr Montgomery and Mr Tosswill saw her. She was strongly advised not to give evidence. This would only be "filling in the gaps". She was told that it would be very difficult for the jury to convict on the evidence. To give evidence would just damage her. She was advised about the possibility of adverse inferences, but the strong advice from Mr Montgomery was that she should not give evidence.

28. In cross-examination before us she asserted that she was not advised that she should not give evidence until the end of the prosecution case. That is how she remembered it. She was invited to reflect on the statement prepared for the purposes of this appeal. Describing the pre-trial exchanges, although she asserted that there was no real discussion about the difficulties of her defence, she said that her legal advisers had said that there were "problems" with it. The problems related to her version of how the altercation occurred, and what had happened in the pub before, but she did not remember them "really discussing the fact that a knife had not been found in any detail." The concern appeared to be focussed on the fact that having gone home she was intent on going back to the fight, having changed. She said that she was being told that there was no case to answer, and that on the basis of a partial identification the judge would be invited to stop the case. She assumed that if that submission failed she would then have the opportunity to explain her "case of self-defence". She had kept saying throughout their meetings that she wanted to say something because it would not look good for her if she just proceeded on the basis that the case should be tested.

29. She did however confirm that she had been advised about the risks of an adverse inference if she did not give evidence, and she was advised at trial about the way in which a failure to "take the stand" could be viewed, and that it could count against her.

30. Mr Anthony Montgomery is an experienced practitioner, specialising in criminal work. He was called to the Bar in 1987. He has had a professional relationship with his instructing solicitor, Mr Tosswill, also a criminal specialist, for about 20 years. In addition to representing the appellant on her trial for murder, Mr Montgomery represented her in a trial at the Inner London Crown Court on charges of driving whilst disqualified and assault occasioning actual bodily harm. She was acquitted on the charge of driving whilst disqualified on the direction of the judge following a successful submission of no case to answer by Mr Montgomery, but the charge of assault occasioning bodily harm was the subject of a further trial in late January 2009, approximately 2 months before her trial for murder. Having elected not to give evidence she was convicted. Mr Montgomery's evidence to us was that he advised her as to the adverse inference that could be drawn were she not to give evidence, and that that was "checked by the trial judge in the standard way." He told us that he did not experience any difficulty in communicating with the appellant, and that she had no difficulty in understanding what he was saying to her. That was consistent with our view of the appellant who struck us as an intelligent and articulate young woman.

31. Mr Montgomery said that the appellant's defence to the charge of murder was the subject of regular and repeated discussions during the trials at Inner London Crown Court in September and January, in conference at Holloway on two or three occasions, on appearances at the Central Criminal Court and throughout the eight day trial. Prior to trial he saw her with Mr Tosswill. At trial he saw her both at the beginning and end of the day with his junior, and on occasions with Mr Tosswill. The difficulty with her version of events was that she did not see the knife or the resulting injury and that the knife had disappeared. He had unquestionably discussed that with her, and had "returned to it time and time again". He did not make any notes of the

conferences. Her proof had been referred to, but she gave no supplementary details – "no fresh things were being said – there was no change of tack."

32. As to the question of a submission of no case to answer, the appellant was not advised that there was no case to answer, nor that she would be acquitted. It was left open as to whether there would be scope for such a submission, but it was not held out to her that such a submission was going to be made. As the close of the prosecution case approached, he explained to her that such a submission had no prospect of success, that there was a case to answer on identification, adding that "it wasn't complicated."

33. As to the question of whether the appellant would give evidence, his advice was consistently in favour of her not doing so. That was the shared view of the legal team; but it was stressed that it was her decision. Such advice had featured throughout his conversations with her, and he didn't need to record it. It was not reduced to writing until the final decision was made at the close of the prosecution case. In cross-examination he said that the emphasis was very much on what the situation would be if she gave evidence and whether she would be able to meet the prosecution evidence. He pointed out the advantages and disadvantages. "It was not a perfect solution – it was not unfamiliar to her because of the Inner London trial." He strenuously denied embellishing his account of his meetings with the appellant to protect his professional reputation, saying that calling her to give evidence would have been doomed to failure as she couldn't sensibly explain how a woman could be stabbed in the street, and yet she had failed to see the knife, which had then disappeared.

34. He was also asked in cross-examination about her endorsement of the decision not to give evidence He explained that it had been on a sheet from his notebook, and that he had redoubled his efforts to find it after the leave hearing, but without success, probably because the sheet had been lost during Chambers moves.

35. As to the defence statement signed by the appellant on 28 December, Mr Montgomery said that he was its author and that he had drafted it knowing that the likelihood was that she would not give evidence. In cross-examination he said that it was not drafted before taking instructions. He had spoken to the appellant at the Inner London Crown Court, and was in contact with Mr Tosswill who was in contact with her in Holloway. He had discussed its content with her "without a shadow of doubt." The discussion was to the effect that it looked as though it would be sensible not to give evidence, and that the defence statement would be putting the prosecution to proof. In his view that was a legitimate position to adopt.

36. As to the hearing before HHJ Rook QC on 22 March 2009, the possibility of the appellant giving evidence was left open at that stage as she might have a change of heart. As appears from the transcript of the hearing he told HHJ Rook QC that "... obviously it is not cast in stone but it may well be a case where ...(it is) questionable whether the defendant does give evidence", adding that that was a situation that was unlikely to change. In evidence he said that that was the position, and was obviously said on instructions.

37. As to the bad character evidence of the deceased, Mr Montgomery said that he had no recollection of seeing the material. Finally with regard to provocation, he said that he did not discuss this with the appellant. He did not believe that there was any evidence that she was out of control or that she had lost control. So provocation "was not

something that occurred to me, either in discussion with her or when directions were discussed with HHJ Hone."

38. We heard evidence from Mr Stephen Tosswill which dealt, so far as he could, with the information about the character of the deceased. We were told that the Crown's case was that detailed information was sent to Mr Tosswill shortly before the trial, and indeed the information in question was found with the papers when they were passed to the appellant's present solicitors (Though they may have been in a file relating to the separate charges against the appellant's mother, arising from her alleged conduct in the context of the present case). Mr Tosswill was sure that had never seen this information, and various possibilities were canvassed about what might have occurred. In the end, this evidence did not take the issues arising in the appeal any further. The simple reality was that this information was not deployed at the trial. He did not give evidence about the advice given to the appellant whether to give evidence or not. This was a sensible forensic decision on both sides. By then the evidential issues arising in this appeal were clear.

39. Our conclusion can be briefly expressed. The appellant's evidence represented a recollection of events based on a number of things that were indeed said to her. We are sure that she fully appreciated the difficulties of her case. She understood that the prosecution would be put to proof on the identification question. She was shown and did sign the defence statement. She did understand the problems which might arise if she elected not to give evidence, and that it also meant that no positive case would be advanced on her behalf. Nevertheless there has been a degree of reconstructive memory, probably understandable in the aftermath of conviction. We have no difficulty in accepting the evidence of Mr Montgomery. He was plainly embarrassed at the situation in which he found himself, and from time to time his exasperation at the criticisms made after the event of his conduct of the trial could not be completely disguised. It was however clear that faced with a very unpromising situation, and a client who was pleading not guilty on the basis that she had never handled the knife which caused the fatal injury, he saw the appellant on numerous occasions both before and during the trial, and that he made her fully aware of the reasons for his advice about the decision she would have to make whether to give evidence or not, and the potential difficulties of whichever course she adopted.

40. We are satisfied that the appellant was given competent advice and that the decision that she should not give evidence was her own properly informed decision. This ground of appeal therefore fails.

The character of the deceased

41. The material before the appellant's legal advisers about the character of the deceased, and in particular before counsel at the beginning of and during the trial, was incomplete. The only question is the possible impact on the safety of the conviction of the relevant information.

42. The relevant facts begin in 2006, although the complainant himself refused to substantiate the allegation, the deceased admitted that during an argument with her cousin she had stabbed him twice with a fork. On her account he came home in an upset and angry mood, and when she tried to comfort him, he became aggressive and started to push her around. She then wanted him out of her home, and bit him, and

stabbed him twice with a fork. She had done so because she wanted him out of her house. No further action was taken.

43. In July 2007, after an altercation in the street the deceased ran towards her uncle with a small knife in her hand and stabbed him to the left side of the stomach. In interview she said that it was only a "little key ring" which she had thrown away under the boiler, adding that it was "hardly anything, he didn't need stitches". She was charged with wounding contrary to section 18 of the Offences Against the Person Act 1861. Her death brought proceedings to an end. The knife was found. When opened the blade is 2 inches in length.

44. The conviction of the appellant in January 2009 arose from an incident in a car park described as "road rage". The victim was sitting in her car recording the registration number. The appellant ran over, opened the car door, and punched her on the leg with what appeared to be a nail file. She suffered two puncture wounds to her leg and two to her left hand. When interviewed the appellant admitted punching the victim while holding her car keys, in retaliation for being head butted.

45. Pre-trial the Crown had sought to adduce the appellant's conviction in evidence. In a carefully structured written submission, no doubt supported by oral argument, Mr Montgomery had opposed the application. He was successful. The appellant's conviction, and its circumstances, were never before the jury. If Mr Montgomery had been in possession of all the information relating to the deceased's character and adduced it before the jury, the appellant's character would undoubtedly have been before them. Mr Montgomery would then have faced another difficult tactical decision. Plainly, if the evidence before the jury could have been confined to the bad character of the deceased without the jury being aware of the appellant's bad character, its deployment would have been obvious. That however was not the situation which would have arisen. There would have been some gain in undermining the character of the deceased, and then some disadvantage to the appellant if her full character had been disclosed to the jury.

46. In the context of the present case, we have asked ourselves whether the inclusion of the material before the jury of the characters of both protagonists might realistically have produced a different outcome. We do not think that it would. Although we are disturbed that this information did not form part of the material available to Mr Montgomery, we are satisfied that the safety of the conviction is not endangered.

Provocation

47. Finally we address Mr Blaxland's submission that the jury should have been invited to consider provocation as a possible defence to murder. In effect the evidence he relied on was the same material deployed before the jury by Mr Montgomery in the context of self-defence. A number of witnesses described the incident between these two women in terms which suggested that the deceased was the aggressor who had begun the incident in the street. In any broad sense this could be described as provocative conduct. However we can find no evidence which might lead to the conclusion that the appellant lost her control at any stage in the incident. On her own case she took sensible steps to defend herself, which went nowhere near involving the use of the knife. On the Crown's case her response to the conduct of the deceased was wholly disproportionate.

48. Mr Blaxland focused on the conduct of the deceased and in effect submits that because of the way in which the jury must have found that the appellant had behaved, the reasonable possibility that the appellant lost her self-control cannot be excluded. In our judgment it does not follow that a disproportionately violent response in self-defence provides evidence of loss of self-control: in some cases it will do so, but in others not. We do not believe that this issue is susceptible of decision on the basis of any other fact specific decisions in this court. We have examined the evidence. We can find nothing to suggest that at the time when, on the verdict of the jury, the appellant inflicted the fatal wound on the deceased, she had or may have lost her self control for the purposes of the defence of provocation. Unsurprisingly therefore the judge was not invited by either side to leave provocation to the jury. In our judgment he was right not to do so.

49. For these reasons this appeal is dismissed.

50. Before leaving this case we must return to the absence of any notes of the meetings between counsel and solicitor and client. We have asked counsel to identify any requirements stipulated by the codes of conduct governing barristers and solicitors engaged in criminal litigation to take and keep notes of conferences and discussions with their lay clients. The code of conduct for the Bar and the code of conduct for solicitors are, we are informed, virtually silent on the subject. So far as the code of conduct for the Bar is concerned, no explicit reference is made to the taking and keeping of notes of conferences in criminal cases, save in the one specific circumstance where the lay client insists on pleading guilty to a criminal charge notwithstanding his instructions that he is not in fact guilty. Guidance in relation to the preparation of defence statements is detailed and ends by advising that "a careful record should be kept of work done and advice given".

51. The solicitors' code of conduct suggests that the client's instructions "are appropriately recorded" and that it is an indicator of a "Below Competence" standard that information was not "being recorded or reported accurately". At first sight this suggests that all the information or instructions provided by the client should be noted in writing. But a closer reading of the text suggests that this is concerned with the taking of instructions for the preparation of a proof, rather than note-taking about discussions relating to strategy, or supplemental instructions, or the advice of the advocate.

52. Although not laid down in prescriptive form in the rules of conduct, we believe that it is the usual practice for solicitor or counsel to make a brief note of instructions on important issues as to the conduct of the defence given in conference. In any event we strongly recommend that such a note be made to record both the instructions, and the advice that has been given on the essential issues. Such a note will be to the benefit of the client, in that it will serve to ensure that he or she has been given the appropriate advice, and will also serve to protect the advocate and his instructing solicitors from criticism based on assertions made after the event by a dissatisfied client. If such a note had been kept in this case, the time of the court would not have been occupied in examining and assessing the allegation of professional incompetence, particularly in the context of the strategic decisions which were made in this case.