[2001–02 Gib LR 335]

CORNELIO v. R.

COURT OF APPEAL (Neill, P., Clough and Staughton, JJ.A.):
September 26th, 2002

Criminal Procedure—prosecution case—disclosure of relevant information—non-disclosure of principal witnesses' claim to and receipt of reward for information not improper if jury clearly aware of it by contradiction of witnesses in cross-examination

Evidence—hearsay—inadmissibility—non-disclosure to defence of alternative confession not justified even if inadmissible as hearsay—inadmissible statement may enable defence to make further enquiries and obtain useful admissible evidence

Evidence—previous convictions—direction to jury—to be directed that accused's similar previous convictions go to credibility and not to indicating propensity to commit crime of specific nature

Criminal Procedure—appeals—appeal against conviction—"safe and satisfactory verdict" test—whether, assuming wrong direction or other misdirection not given and trial otherwise free of legal error, only reasonable and proper verdict would be guilty

The appellant was charged in the Supreme Court with arson and five counts of threatening others with intent to pervert the course of justice.

Arson was committed at a police officer's house and the two principal prosecution witnesses alleged that the appellant had confessed to them that he was responsible. A substantial reward was offered by the Government for information leading to the identification of the offender. The two witnesses then informed the police of the appellant's confession to them but the police were also informed by a prison officer that a prisoner had told him of a confession by someone else. The appellant was arrested and charged with arson and later allegedly threatened the two witnesses on a number of occasions.

The witnesses' solicitors then pressed for the payment of the reward and it was paid in part before the appellant's trial began. The Crown did not at first inform the court of the reward and the witnesses denied any interest in it; in cross-examination, however, it was revealed that they had accepted it. Similarly, the Crown did not disclose to the defence the other confession known to the police. The appellant revealed in cross-

examination that he had previous convictions, including one on a guilty plea of threatening to burn down a police officer's house, but no direction was given to the jury that this went only to credibility. The appellant was convicted of the arson and on four of the other counts.

On appeal, the appellant submitted that the conviction was unsafe *inter alia* because (a) the Crown had failed to disclose the witnesses' request for and acceptance of the reward, and the judge had not given an adequate direction on this non-disclosure and its impact on their motives in giving evidence; (b) the Crown had not disclosed to the defence the confession to the arson by someone other than the appellant; (c) the judge had failed to direct the jury properly on the evidence of the principal witnesses, since he had assumed that the details they had given from the appellant's confession could not have been known to them unless they were telling the truth, since those details were not in the public domain at the time, whereas this chronology was incorrect; and (d) he had also failed to direct the jury that the appellant's previous convictions only went to the question of his credibility and did not indicate a propensity to commit offences of the sort with which he was charged.

The Crown submitted in reply that (a) it was unnecessary for the judge to give any emphatic direction on the motives of the witnesses or that their evidence should be regarded with caution, since it was clear from an early stage that the jury was fully aware of these matters; (b) it had not disclosed the other confession because it had not been informed of it by the police (though it accepted that the prosecution was indivisible and the knowledge of the police was equivalent to knowledge of the Crown), because it had relied on fingerprint evidence from the scene of the crime to eliminate the other suspect from the enquiry, but also because the evidence of the other confession was hearsay and inadmissible; and (c) it accepted that the direction on the appellant's previous convictions was inadequate and that neither counsel had pointed this out at the time, but nevertheless submitted that the conviction was safe and satisfactory.

Held, allowing the appeal:

(1) The Crown's failure to disclose their witnesses' claim to the reward and its subsequent payment did not render the convictions unsafe or call for any special direction by the judge. It had become abundantly clear to the jury that the witnesses had not been telling the truth as soon as they retracted their original denial of an interest in the reward and admitted having received it, yet it still believed their evidence and convicted the appellant. Indeed, in one respect the non-disclosure assisted the defence, as it enabled the jury to discover that the prosecution's witnesses were not wholly trustworthy (paras. 11–20).

(2) The non-disclosure of the alternative confession made to the prison officer was, however, a more serious matter. It may well have been the case that the police had already decided that the alternative suspect should be eliminated from the enquiry on the basis of fingerprint evidence—but that evidence may not have been related to the arson and

would, if it had been, also have eliminated the appellant and should have been disclosed to the defence. Further, although the evidence would itself have been inadmissible as hearsay, it might well have enabled the defence to make further enquiries and obtain useful and admissible evidence. The failure to disclose it was therefore an error of some significance (paras. 21–27).

(3) Similarly, the failure to give a full direction on the weight to be given to the appellant's admitted previous convictions was a serious deficiency. His bad character was only to be regarded as going to his credibility and not as indicating that he had a propensity to commit an offence such as the one charged and the jury should have been given an express direction accordingly. It had to be contrasted with the position in relation to good character, which required the judge to direct the jury that it went to the likelihood of his not committing the offence charged and not merely to his credibility (paras. 42–46).

(4) The test then to be applied in deciding whether the convictions were safe and satisfactory was whether, assuming the wrong direction on the law or the misdirection had not occurred and the trial had been free of legal error, the only reasonable proper verdict would have been one of guilty. This was not the case here and the appeal would therefore be allowed and the convictions quashed (paras. 47–48).

Cases cited:
(1) *R.* v. *Beck*, [1982] 1 W.L.R. 461; [1982] 1 All E.R. 807, referred to.
(2) *R.* v. *Blastland*, [1986] A.C. 41; [1985] 2 All E.R. 1095, referred to.
(3) *R.* v. *Davis*, [2001] 1 Cr. App. R. 115, applied.
(4) *R.* v. *McLeod*, [1994] 1 W.L.R. 1500; [1995] 1 Cr. App. R. 591, *dicta* of Stuart-Smith, L.J. applied.
(5) *R.* v. *Preston*, [1994] 2 A.C. 130; [1993] 4 All E.R. 638, *dicta* of Lord Mustill applied.

G.C. Stagnetto. for the appellant;
Ms. K.K. Khubchand, Crown Counsel, for the Crown.

1 **STAUGHTON, J.A.,** delivering the judgment of the court: Lee Cornelio was tried before Pizzarello, A.J. and a jury in May of this year on an indictment containing six counts. These were (1) arson; (2) threatening Ajessa Edwards with intent to pervert the course of public justice, on May 12th, 2001; (3) a like offence in threatening Davinia Baglietto on May 12th, 2001; (4) a second offence of threatening Davinia Baglietto on May 16th; (5) a second offence of threatening Ajessa Edwards on November 23rd, 2001; and (6) a third offence of threatening Davinia Baglietto on November 23rd, 2001.

2 On May 17th, 2002 Cornelio was convicted by a unanimous jury on five out of the six counts. The judge directed the jury to acquit on the

count which we have numbered (3), that is to say threatening Davinia Baglietto on May 12th, 2001. Cornelio was sentenced to $2\frac{1}{2}$ years' imprisonment for arson, and one year's imprisonment on each of the four counts of doing an act tending and intended to pervert the course of public justice, concurrent with each other but consecutive to the sentence for arson. There was thus a sentence of $3\frac{1}{2}$ years in all.

3 The appellant's counsel have prepared a chronology which is helpful, and we set out some extracts from it:

September 2nd, 2000	Some person set fire to property in and outside the house of Insp. Alcantara of the RGP. (On the evidence, this happened between 8.30 p.m. and 1.45 a.m. on the next day.)
September 3rd, 2000	It is said by Mrs. Edwards and Miss Baglietto that Cornelio confessed to them that he had committed the offence of arson at Insp. Alcantara's house.
September 19th, 2000	An award of £25,000 was announced by the Government for information which would enable the police to identify the person or persons responsible for the arson attack. (This was reported in the press, and is said to have been widely known.)
October–November 2000	Prison Officer Martin informed the police that a prisoner had informed him that the offence was committed by a person who was not Cornelio.
December16th–18th, 2000	Mrs. Edwards tells the police that Cornelio has confessed to the offence; she and Miss Baglietto give statements to the police.
January 3rd, 2001	Cornelio was arrested, and on the next day charged with arson.
May 12th, 2001	Mrs. Edwards and Miss Baglietto claim that they were threatened by Cornelio.
May 14th (or 16th), 2001	Miss Baglietto claims that she was threatened again.
November 23rd, 2001	Mrs. Edwards and Miss Baglietto say that they were again threatened.
January 7th, 2002	Messrs. Phillips on their behalf request payment of the reward in a letter to the police.
February 7th, 2002	Messrs. Phillips copy letters to the Attorney-

	General asking for the reward, and asking whether he will accept service of proceedings by the two witnesses.
February 19th, 2002	Letter from the defence to the Attorney-General asking for any unused material.
March 1st, 2002	Messrs. Phillips threaten to issue a claim form and seek interest and costs.
March 7th, 2002	Letter from Mr. Colombo of the Attorney-General's Chambers to Messrs. Phillips confirming that the reward had been authorized and would be paid shortly.
March 22nd, 2002	The reward is paid to Mrs. Edwards and Miss Baglietto. Mr. Colombo writes to the defence that the prosecution is not in possession of unused material.
May 8th, 2002	Trial begins.
May 9th, 2002	Mrs. Edwards gives evidence. She denies wanting a reward or having any interest in claiming it.
May 10th, 2002	Miss Baglietto gives evidence. She denies wanting a reward or having any interest in claiming it.
May 13th, 2002	Mr. Colombo (having learnt that the reward was paid) informs the court. Miss Baglietto in further cross-examination accepts that the reward has been paid.
May 14th–15th, 2002	The defence write to the Attorney-General asking for copies of all correspondence relating to request and payment of the reward. The defence submit that there is no case to answer, which is rejected by the judge. He offers to allow further cross-examination of the two witnesses, but this is not accepted.
May 17th, 2002	Cornelio convicted on five out of six counts.
May 30th, 2002	Prison Officer Martin gives a statement to the defence.
August 28th, 2002	Mr. Colombo writes to the defence providing correspondence between Messrs. Phillips and the Attorney-General's Chambers.

The case for the prosecution

4 The forensic evidence can have left the jury in little doubt that somebody deliberately set fire to Insp. Alcantara's property both inside and outside the house, with intent to cause damage. The question is whether that person was Mr. Cornelio. As to that, the principal and critical witnesses were Mrs. Edwards and Miss Baglietto. They gave evidence that Cornelio had, in effect, confessed to them that he set fire to the property and was given a million pesetas for doing so.

5 The evidence that tended to support those witnesses was that of two other young women, Miss Martinez and Miss M'Souri. They spoke of the occasion on May 12th, 2001 when Cornelio is said to have threatened Mrs. Edwards and Miss Baglietto. As part of their evidence, they said that Cornelio shouted: "Te voy a quemar tu casa con los ninos como le hice a Alcantara." There was some slight discrepancy as to what they heard Cornelio say; but the judge (who speaks Spanish) translated it as: "I am going to burn your house with the children like I did to Alcantara."

6 As to the five counts of doing an act tending and intended to pervert the course of justice, these too depended for the most part on the evidence of Mrs. Edwards and Miss Baglietto, who said that they had been threatened by Cornelio. In respect of the two counts relating to May 12th, 2001, Miss Martinez and Miss M'Souri were also witnesses as we have said. Miss M'Souri was a friend of Mrs. Edwards and Miss Baglietto, but Miss Martinez may not have been. (In parenthesis, the judge withdrew the charge of threatening Miss Baglietto on that occasion from the jury because there was no evidence that the threat was directed at her.)

7 Only Miss Baglietto gave evidence about being threatened on May 16th, 2001. Both Mrs. Edwards and Miss Baglietto spoke of being threatened on November 23rd, 2001.

The case for the defence

8 Mr. Cornelio gave evidence that he was not involved in the damage to Insp. Alcantara's house. At the time he was at a fair and then he went home. He also denied, or at any rate could not remember, that he had threatened Mrs. Edwards and Miss Baglietto.

9 Other witnesses called by the defence were Mrs. Ferro, who is the mother of Mr. Cornelio; she spoke of his movements on September 2nd; Karl Santos, who described himself as an acquaintance of Cornelio, spoke of leaving court with Lee Cornelio on November 23rd, 2001 in a car, and denied that there was shouting or threatening. Sean Peralta said he was "quite friend" of Cornelio. He too was at court on November 23rd, 2001, with Karl Santos. In the car with the two of them, he heard no shouting or threatening. Jane Ochello also gave evidence; at the time of

the trial she lived with Lee Cornelio. She said that on November 23rd, 2001 she met him under his block after 12 noon, something like that. They went to his house, watched a DVD, had a roll for lunch.

Grounds of appeal

10 The grounds that were argued before the court were as follows:

(a) There was a failure to disclose that the reward had been both requested and paid to the witnesses.

(b) There was a failure to disclose the information that a prison officer had been told by an inmate that another person had admitted to committing the offence of arson.

(c) The judge had not given the jury any direction on the effect of non-disclosure in connection with the reward. In particular, the lies direction was applied to prosecution but not to defence witnesses. There should have been a direction on the evidence of a witness with an improper motive.

(d) The judge referred the jury to hearsay evidence of Miss Baglietto as to what was the belief of Mrs. Edwards.

(e) The judge wrongly emphasized the argument that the two witnesses had spoken of facts which they would not have known if they had not been telling the truth.

(f) On two occasions in his summing-up, the judge in effect referred to contested evidence as if it were true.

(g) The evidence of Miss Martinez and Miss M'Souri was incorrectly recorded by the judge, or else wrongly translated.

(h) There was no direction that previous convictions went only to credibility.

We consider those grounds individually.

(a) *Failure to disclose the reward*

11 As we have already said, a reward was offered on September 19th, 2000 of £25,000 to anyone providing information to the police enabling them to identify the person or persons responsible for the arson attack. This was published in the *Chronicle* on September 19th and 21st and was widely known. If the jury had not heard of it already, they learnt of it in this passage of the cross-examination of Mrs. Edwards:

> "*Q*. Do you stand to receive any money, do you know, from giving evidence in this case?
>
> *A*. There was a poster saying, for the money, yes."

12 She went on to say that she had asked Det.-Sgt. Barton about the money and she knew it was £25,000. But when asked if she had received it she answered, No. That was not true. Both in re-examination and in answer to a question from the foreman of the jury, she said that she had come to court—

> "because I wanted to state that my statement is what I was told what happened, what came from his mouth to me . . . I'm coming here to give my evidence and to state for the crime he committed."

13 Miss Baglietto, in cross-examination, said of the £25,000:

> "If it comes, well and good. If it doesn't, I'm not interested in that.
>
> *Q*. Have you asked anyone about the reward?
>
> *A*. No.
>
> *Q*. Any police officer?
>
> *A*. No. Well, we talked to Frank Barton about it, but it's not something I'm taking into consideration . . . I haven't taken it.
>
> *Q*. But you didn't want it?
>
> *A*. No."

14 At that stage, prosecuting counsel was aware that Messrs. Phillips on behalf of Mrs. Edwards and Miss Baglietto had been pressing for payment, but not that the reward had been paid, although that was known in the Attorney-General's Chambers. During the interruption of Miss Baglietto's evidence over the weekend, it was revealed to the defence.

15 In the further cross-examination of Miss Baglietto, which was lengthy and repetitive and may well have made the jury feel sympathy for the witness, she said that she had denied receiving the reward for two reasons: first, it had been said in the poster that it was private and confidential; secondly, she was asked if she had received £25,000 and in fact she had received £12,500. The first reason may have had more force than the second; she said or implied repeatedly that she faced risks in Gibraltar if she was known to have accepted the reward.

16 At the close of the prosecution evidence, there was a submission of no case to answer. The first ground was that the two principal witnesses had told lies. The judge ruled that this was a matter for the jury, and in our judgment he was entitled to do that.

17 Secondly, there had been a failure of disclosure. That was true; the defence of course knew that a reward had been offered, and might reasonably have concluded that the witnesses may have asked for it. Questions to that effect were asked in cross-examination at an early stage.

But it was argued that the defence had not been provided with any details of the payment of a reward, even at the end of the trial. This too was true. For some reason the Attorney-General's Chambers did not make full disclosure of the correspondence until August 28th, 2002. Mr. Stagnetto argued that it would have assisted the defence to know that the two witnesses had instructed Messrs. Phillips to act on their behalf and to press for payment of the reward with interest and costs. This might be thought inconsistent with the assertion by the witnesses that they were not interested in the reward.

18 However, the renewed cross-examination of Miss Baglietto did raise that point, in this passage:

> "*Q*. You became very interested in the reward, did you not?
>
> *A*. Not particularly interested. Mr. Barton said it belonged to us, so why not contact my lawyer and try to figure out what would happen with it.
>
> *Q*. Right. So, you weren't interested, but then you got legal advice about your reward?
>
> *A*. Yes."

Later:

> "*Q*. And did you not instruct him to pursue the police for the reward?
>
> *A*. Yes, we did, after a time. Yes, we did."

There was no further cross-examination of Mrs. Edwards, although the judge offered to allow it.

19 Whilst disclosure of the correspondence between Messrs. Phillips and the Attorney-General's Chambers at that stage might have supported the view that the two witnesses were not as uninterested as they claimed, the point was clearly made. The jury must have recognized not only that the witnesses had lied about receiving the reward, but also in saying that they were not interested in it. Yet they still believed them.

20 We are satisfied that failure to disclose the payment of the reward, and the circumstances that led up to it, did not render the convictions unsafe. Indeed, as the Attorney-General pointed out, it assisted the defence, by showing that the witnesses had been at least in one respect untruthful, which might not have happened if there had been disclosure.

(b) *Failure to disclose the information from a prison officer*

21 In October or November 2000, Prison Officer Martin was told by a prisoner that another person, who was not Cornelio, had admitted setting

fire to Insp. Alcantara's property. (We refer to the prisoner as "the informer" and the other person as "the suspect.") This was not known to the Attorney-General's Chambers and so not disclosed to the defence. But the Attorney-General accepts that the prosecution is indivisible. The information was known to the police and should have been disclosed if it was material.

22 The reason why it was not disclosed appears to be that the police had eliminated the suspect from their enquiries. That came about in this way. The scene of crime people had examined a hammer found in Insp. Alcantara's house, apparently thrown into the house and breaking window glass on the way. It was bound with layers of tape, the woodwork having become split in the past. When some layers of tape were removed, part of a fingerprint was found. It had a whorl which was visible.

23 The police used that finding as a reason for eliminating from the enquiry the suspect and three others, all of whom are named, because none of them had such a whorl. The evidence included that reasoning. The Attorney-General relied on that evidence as a ground for concluding that the supposed confession of the suspect was not material; he had been eliminated from the enquiry by the police.

24 However, that reasoning would also have eliminated Mr. Cornelio. He too had no whorl on any of his 10 digits. The reason why he was not eliminated was, we assume, because the police had or acquired other information relating to Cornelio. But it follows that the information of Mr. Martin must be regarded as material. The fingerprint on the hammer may well not have belonged to the person who threw it into Insp. Alcantara's house; it was below two layers of tape. It was therefore no ground for eliminating the suspect or anyone else.

25 Secondly, the Attorney-General argued that the evidence of Mr. Martin, or for that matter of the informer, would have been of no assistance to the defence. The evidence of what some other person—not the defendant—has said is hearsay and inadmissible, even if it is a confession by the third person to the offence with which the defendant is charged: *R.* v. *Blastland* (2).

26 Nevertheless, it is possible that the defence might have made further enquiries, and might even have thereby acquired some useful information, if they had known what the suspect said to the informer and the informer to Mr. Martin. As Lord Mustill said in *R.* v. *Preston* (5) ([1993] 4 All E.R. at 664):

> ". . . [T]he fact that an item of information cannot be put in evidence by a party does not mean that it is worthless. Often, the train of enquiry which leads to the discovery of evidence which is admissible at a trial may include an item which is not admissible,

> and this may apply, although less frequently, to the defence as well as to the prosecution . . . In my opinion the test is materiality, not admissibility."

27 In addition, the Attorney-General was prepared to concede that Det.-Sgt. Barton, the officer in charge of the case, could have been asked in cross-examination whether there was information that another person had confessed to the offence with which Cornelio was charged. Once that stage was reached, the jury might well have been of the same mind as Lord Mustill, rather than of Lord Bridge in *Blastland's case* (2).

We have to conclude that the failure to disclose Mr. Martin's evidence was an error of some significance.

(c) ***No direction to the jury on the effect of non-disclosure in connection with the reward***

28 Mr. Stagnetto referred to this passage in the judge's summing-up:

> "There is something I have to tell on this, and it is this, that the defence has erred on the question of a non-disclosure. The law is that Mr. Cornelio should have disclosed that he was alleging that he was at the fair at the time and that would have enabled the prosecution to seek evidence that he in turn might have been lying. The prosecution have therefore been put at a disadvantage because they have not had time to provide evidence to disprove his account, and you will consider that."

29 It is not clear what conclusion the jury might reach after they had considered that. But Mr. Stagnetto does not raise that point. Instead he contrasted it with other passages:

> "You will want to bear in mind the fact that the payment of the reward was not disclosed to the defence.
>
> These are all matters for you, and you will look at them in the round, not overlooking the matter of the reward money."

That was said to be an insufficient comment compared with that about the alibi.

30 In our judgment there was no impropriety in this aspect of the summing-up. In the evidence, and no doubt in the closing speech for the defence, the jury were told again and again about the reward. The judge was doing no more than redressing the balance to some slight extent when he mentioned that there had not been an alibi notice. It is said that he should have warned the jury that the witnesses' evidence might be tainted by an improper motive, which meant that they had to proceed with caution. We were referred to the judgment of Ackner and Dunn, L.JJ. and

Michael Davies, J. in *R.* v. *Beck* (1). But in our judgment it is beyond all reason in this case to hold that the judge was at fault in failing to tell the jury that Mrs. Edwards and Miss Baglietto might have had improper motives, or that their evidence should be regarded with caution. It was perfectly obvious. The jury's interest in such matters was apparent at an early stage, when the foreman asked Mrs. Edwards a question at the end of her evidence:

> "*Q.* So why are you coming to court? Are you coming for the money or are you coming to give your . . . ?
>
> *A.* I'm coming here to give my evidence and to state for the crime that he committed."

31 An unusual feature of this case, so far as our experience goes, is that the judge gave the lies direction mainly in connection with the prosecution witnesses. But if unusual, and probably unnecessary, it was not in our judgment wrong. We do not favour giving a lies direction in the abstract; it should be directed at the evidence of a particular witness or witnesses.

(d) ***The judge referred the jury to hearsay evidence of Miss Baglietto***

32 On the Monday, when payment of the reward had been revealed, Miss Baglietto was asked by Mr. Yeats for the defence if she had discussed the matter with Mrs. Edwards. At one point Miss Baglietto said: "She must have thought the same way I did." It is far from clear what thought(s) of Miss Baglietto were thereby attributed to Mrs. Edwards. The judge said to the jury: "Miss Baglietto retracted from the evidence that she first gave explaining her position which she says is the same as for Ajessa . . . "

33 That, in the context, was a reference to the evidence of the two about the reward. There had not, in fact, been any retraction by Mrs. Edwards; she was not given an opportunity to retract. The judge was not strictly accurate, as he altered "she must have thought" (an inference of Miss Baglietto) to saying that Ajessa did [in fact] hold the same view. But that was a trivial point, and we think nothing of it. That it was hearsay was the result of the defence's question.

(e) ***The witnesses related facts which they would not have known if they were not telling the truth***

34 As our abbreviated chronology shows, Mrs. Edwards and Miss Baglietto claimed that they received Mr. Cornelio's confession on September 3rd, 2000. As at that date, the jury may well have believed that it contained a number of details which were not at the time public knowledge. It would follow, as the prosecution argued, that the witnesses must have obtained the information from Cornelio himself. They might have regarded that as a powerful point.

35 The judge elaborated the details which were not in the public domain at some length. But there was a flaw in the argument, at any rate according to the defence, which was put forward in the course of the trial as we were told. The two witnesses did not put forward their story until December 16th, 2000. By that time more details may well have been known to the public. And Mrs. Edwards and Miss Baglietto may then have decided to incorporate those details into a story which, from start to finish, was untrue. The judge did not put that possibility to the jury. So far as we know, December 16th was the first occasion when the witnesses' accounts became known to anybody.

36 It is difficult for us to evaluate that argument. Might the jury have thought that there could be something in it? Might they then have considered it even though the judge did not remind them of it? How plainly was it put by defence counsel? Was there an answer to it from the prosecution? There, for the time being, we leave the point.

(f) ***The judge on two occasions referred to contested evidence as if it were true***

37 The judge said to the jury:

> "You will remember and keep in mind when considering these matters that it is of the nature of man that things which happen even to oneself are not recalled in their totality: one forgets. This case, let me remind you, deals with alleged offences which took place over a period of time. In the matter of the arson you are looking at an account which had been related by Mr. Cornelio, so that makes things even more difficult."

We can find nothing to criticize in that passage. The judge said that the jury were dealing with alleged offences. As the President said in the course of the argument, the judge was talking of the prosecution evidence and the discrepancies in it, and how they might have occurred.

38 The second occasion was when the judge said:

> "I am still uncertain how Mr. Cornelio told her how he started the fire, but you have heard the evidence and you will think about that. How much of what she reports is her own assumption rather than his words is for you to decide."

We find nothing to criticize in that passage either. The judge is again putting the prosecution case. There is a certain irony that he is reproached on that ground, for the judge corrected the foreman of the jury in the course of the evidence on the same point during a discussion of the number of seats of fire:

> "*Foreman*: If the defendant threw the hammer through the glass and . . .

Judge: At this stage, Mr. Juryman, you have to say 'the person who caused the fire,' who may not be the defendant.

Foreman: I'm sorry, my Lord. If whoever threw the hammer through the window . . . "

We do not think there was any confusion for the jury as a consequence of what the judge said in those two passages in the summing-up.

(g) ***Wrong translation of the evidence of Miss Martinez***

39 This point did not feature in the memorandum of appeal or the appellant's written argument, but it was put forward at the hearing. The contest appears to be between "te voy a quemar la casa con los ninos dentro, como se hice al Alcantara" which was what Miss Martinez said at first, and "como le hice al Alcantara" as she said a little later. If we have understood it correctly, the first version means "as was done to Alcantara," and the second "as I did to Alcantara." There was a third version, "como al Alcantara," which was said to mean the same as the second.

40 Miss M'Souri also had two versions. The first was "como le hice a Alcantara", which the judge repeated as "como hice con la de Alcantara." When asked to put it in English she said "like I did to Alcantara."

41 There does not appear to have been any questioning of the translation at the time. In his summing-up the judge, dealing with the evidence of four witnesses, quotes "como le hice a Alcantara," "como la casa de Alcantara" and "como hice con la de Alcantara." We cannot find anything which was an error of consequence there.

(h) ***There was no direction that the previous convictions of Cornelio went solely to credibility***

42 Mr. Cornelio in examination-in-chief revealed that he had some previous convictions. That may have been done because it was known that they were to be raised by the prosecution, and he wished to say that on every occasion he had pleaded guilty, unlike the present case.

43 In cross-examination he admitted that on March 23rd, 2001 he pleaded guilty to an offence of threats to destroy or damage property of a policeman. The particulars were that at New Mole House Police Headquarters he threatened a police officer that he would burn down his house. This was on January 3rd, 2001, the day when he was arrested for the present offence of arson. Mr. Cornelio said: "I didn't get my medication on time there."

44 Anyone who was not a lawyer would have regarded that as showing that Mr. Cornelio was the sort of man who was liable to threaten damage

to a policeman's property, and even to carry out such a threat. But it has been the law for at least 30 years that the bad character of a defendant is, in the ordinary way, only to be regarded as going to his credibility and not as indicating that he has a propensity to commit an offence such as is now charged: see Archbold, *Criminal Pleading, Evidence & Practice* (2002 ed.), para. 4–410, at 491 and Stuart-Smith, L.J. in *R.* v. *McLeod* (4) ([1995] 1 Cr. App. R. at 605):

> "Where the accused has been cross-examined as to his character and previous offences, the judge must in the summing up tell the jury that the purpose of the questioning goes only to credit and that they should not consider that it shows a propensity to commit the offence they are considering."

45 The judge is required in his summing-up to give the jury an express direction to that effect. This provision in the law might be thought the more surprising, when evidence of a defendant's good character requires the judge to tell the jury that it goes to the likelihood of his committing the offence charged, and not merely to his credibility: *Archbold, op. cit.*, para. 4–407, at 488.

46 In this case, the judge omitted to tell the jury, as he should have done, that Cornelio's previous convictions went only to his credibility and not to the likelihood of his having committed the offences charged. It is not for us to speculate whether the jury would have ignored such a direction. Without it, there was in our judgment a serious risk that the jury would have regarded the conviction of March 23rd, 2001 as evidence that Cornelio was the sort of man who would destroy or damage the property of a police officer, which the law says it should not do.

47 The Attorney-General acknowledges that there was an error by the judge in not giving the required direction. Counsel on both sides should have pointed this out at the time, but neither did. The Crown now submits that we have to consider whether the convictions are safe and satisfactory, by reference to the test in *R.* v. *Davis* (3): Assuming the wrong decision on the law or the misdirection had not occurred and the trial had been free from legal error, would the only reasonable proper verdict have been one of guilty?

48 We have anxiously deliberated on our answer to that question. Ultimately we feel bound to answer it, No. The principal grounds that lead us to that conclusion are first, the non-disclosure of a confession by someone other than Cornelio and, secondly, the failure to give the direction required by law as to the effect of previous convictions. But we also take into account the failure to explain the public domain point (e), which was of minor significance in itself but can be put in the scale in favour of allowing the appeal. Accordingly, the appeal must be allowed

and the convictions quashed. In a case where credibility was so much at stake, all must stand or fall together.

Appeal allowed.
