No. 96/3833/Z5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Monday 16 December 1996

B e f o r e:

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

MR JUSTICE SACHS

and

MR JUSTICE TOULSON

R E G I N A

- v -

BRIAN ARGENT

Computer Aided Transcription by
Smith Bernal, 180 Fleet Street, London EC4
Telephone 0171-831 3183
(Official Shorthand Writers to the Court)

MR WILLIAM CLEGG QC and MR THOMAS DERBYSHIRE appeared on behalf of
THE APPELLANT

MR ORLANDO POWNALL and MR JONATHAN LAIDLAW appeared on behalf of
THE CROWN

J U D G M E N T
(As Approved by the Court)

Monday 16 December 1996

THE LORD CHIEF JUSTICE: On 10 May 1996, in the Central Criminal Court before the Recorder of London, the appellant was convicted of manslaughter, having been indicted for murder. He was sentenced to 10 years' imprisonment. He now appeals against conviction and sentence by leave of the single judge.

The facts giving rise to this appeal are in brief as follows. A gentleman named Tony Sullivan was stabbed to death with a knife in the early hours of 19 August 1995 outside an East London nightclub, the Lotus Club. The appellant was arrested following an anonymous telephone call to the police which named him as the attacker. The prosecution case was that the appellant became aware that the deceased (who was unknown to him) had asked the appellant's wife to dance in the club and had later attacked him outside. At the time of the attack the deceased was, as the evidence showed, very drunk.

There were eye witnesses to the fight between the deceased and another man. One witness who knew the appellant named him and two others picked him out on an identity parade.

The defence case was that there had been no contact between the deceased and the appellant or his wife in the club. They had left the nightclub before the deceased was attacked.

At the trial there were five eye witnesses who gave evidence. The most significant of those, in the judge's estimation, was Susan Whitnell whose evidence the judge summarised to the jury at pages 8G to 10D of the transcript of his summing-up. The judge pointed out that Susan Whitnell was known both to the appellant and his wife and had been so for a very long time: in the case of the wife for some 20 years and in the case of the appellant for 15. It was not suggested that she could have been mistaken about her recognition of both the appellant and his wife. While they were not close friends, they were long-standing acquaintances. It was suggested in the course of the trial that Susan Whitnell had a particular hatred of the appellant which she had had for some time. It was not, however, suggested that she entertained the same feelings towards the appellant's wife.

At the nightclub on the evening of 18/19 August Susan Whitnell had brought as a guest the 17-year-old girlfriend of her son, Sarah Guest.

The evidence given by Susan Whitnell was to the effect that a group of seven ladies who had been together all evening left the Lotus nightclub virtually simultaneously together with one man, the appellant. She gave evidence of an incident which occurred outside the nightclub which culminated in Mr Sullivan walking up to the appellant and tapping him on the shoulder. Susan Whitnell claimed that she had an unobstructed view of what followed. She described how the appellant pulled Tony Sullivan towards him and appeared to punch him four, five or six times with an upward movement of his right hand. She saw nothing in the appellant's hand at that stage and saw Tony Sullivan do nothing to retaliate. She then saw Tony Sullivan turn back and saw blood on his chin and on his chest. Susan Whitnell said that she followed the appellant round the corner towards Romford Road. She then saw a knife in his hand and saw that there was blood on both his hands. She gave a description of the knife and told the jury that she had not wished to be involved in giving evidence but had done so because what she had seen was wrong. She denied the suggestion put to her that she and Sarah Guest had put their heads together to concoct a false story. She accepted that she had had a lot to drink, but insisted that she was not drunk.

Having summarised her evidence the learned trial judge said to the jury:

> "You have seen and you have heard her. You decide whether she is reliable. If she is, her evidence clearly identifies the [appellant] as the man who struck Tony Sullivan and shows that Tony Sullivan was bleeding immediately thereafter."

There were four other eye witnesses who gave evidence. One of them was Sarah Guest whom we have already mentioned. She saw the fight and identified the appellant on an identification parade. The second was a gentleman named John Tinton, who also saw the fight and also identified the appellant at a different identity parade. The third was Jane Edwards who saw the fight and was fairly sure it was the appellant who struck the fatal blow, but was not one hundred per cent certain.

There was a fourth additional eye witness, Siobhan Cadden, who saw the fight but could give no details.

On 19 August, at about midday, the appellant was arrested and was first interviewed by the police. On that occasion he was in receipt of legal advice and declined to answer questions. There was during the trial a voir dire to determine the admissibility of the evidence of that interview. The judge held that the arrest had been lawful, but nonetheless excluded the police officer's evidence of the interview. He gave his reasons at page 3F of the transcript of that ruling when he said:

> "I do not myself take the view that at that stage on one anonymous telephone call there were any circumstances existing at the time which required the accused to mention anything. I think Mr Mackintosh [the solicitor] gave the right advice.
>
> Nothing transpired in the course of the interview, except an assertion of not guilty, and if the Crown seek to rely upon the negative answers or absence of answers to other questions I, as at present advised, would tell the jury that no inference should be drawn."

It appears to us that in that brief ruling the judge may have overstepped the bounds of his judicial function, but it is plain that the ruling was not unfavourable to the defence and it gives rise to no complaint.

A second interview conducted by Detective Constable Armstrong took place on 16 November 1995 after an identification parade at which the appellant had been identified. The appellant was accompanied by an experienced solicitor, Mr Ryan, who gave the appellant certain advice. The advice had essentially three limbs: first, that in all the circumstances the appellant was well-advised to remain silent; secondly, that if he declined to answer questions there was a risk that inferences adverse to him might be drawn at the trial; and thirdly, that the decision whether or not to answer any questions was that of the appellant. In the light of this advice the appellant elected to say nothing and he accordingly replied "No comment" to a series of questions put to him by the officer.

At the voir dire a challenge was raised to the admissibility of this evidence also, the defence

seeking a ruling that evidence of the questions asked and of the appellant's negative response to them should be excluded from consideration by the jury. In relation to this interview the judge ruled as follows:

> "The situation is quite different in regard to the second interview. This was preceded by an identification parade with a positive identification and Mr Ryan knew that. He was concerned that the police on this occasion were not showing the usual co-operative attitude and were not disclosing to him such evidence as they had, as would normally be the case. As far as he was concerned there was a [feeling] of tension at the police station and that seems to have affected his own attitude to the problem of advice. In the situation which existed at that time the accused could reasonably have been expected to mention facts which were relevant or might be relevant. I cannot at this stage say what those facts are because I do not at this stage know precisely what the defence is. But I think the Act provides that I do not need to know at this point and if a fact were to arise upon which the defendant wished to rely, his failure to mention it at the second interview does seem to me something upon which comment can properly be made and something from which inferences can properly be drawn. I do not think I can go further at this point. I can only indicate that [this] is my preliminary view. I do not make a ruling until a ruling is required to a fact."

The trial proceeded and Detective Constable Armstrong gave evidence on 8 May. In the course of his evidence he testified to the second interview which took place on 16 November and retailed certain of the questions which he had asked and the appellant's negative responses to them.

The appellant himself gave evidence at the trial and a very brief summary of the effect of that evidence was given by the trial judge to the jury in the course of his summing-up at page 15A where he said:

> "Yesterday he gave you his account of what had happened on 19 August. He said that he, like others in the case, had had a good drink that evening but was not drunk. He did dance with his wife and believed that no one else did so. He was unaware that any other man sought to dance with her.
>
> By about three o'clock in the morning his wife had agreed with him that they should leave and try to get a meal at the local Cantonese restaurant. They duly left. They went to that restaurant but were too late to be

> served. On the way he was concerned in no act of violence. They passed Walter Lee by the bus stop, and you can see on the plan where that is. They had a word with him. They then walked home -- a distance of about a mile. They saw their baby sitter and the [appellant] returned to bed. He said he knew nothing about injury to or death of anyone at the Lotus Club until the police arrived at his house at about one o'clock that afternoon."

That takes us to ground 1 of the perfected grounds of appeal which is that:

> "The learned trial judge erred in law and/or in the exercise of his discretion in failing to exclude the evidence of the appellant's interview with the police on 16 November 1995."

That challenge is made under section 78 of the Police and Criminal Evidence Act 1984, which entitles a judge to exclude evidence which has an unfair effect on the conduct of a trial. In this instance the interview itself was properly conducted; the appellant's solicitor was present and in a position to advise him; he was duly cautioned on two occasions; and the appellant chose to act on the solicitor's advice.

We can readily accept that there will be some situations in which a judge should rule against the admissibility of evidence such as this. For example (and only by way of example), the judge might so rule in the case of an unlawful arrest where a breach of the Codes had occurred, or if the situation were one in which a jury properly directed could not properly draw an inference adverse to a defendant. Again such a situation might arise if, in application of section 78, the judge concluded that the prejudicial effect of evidence outweighed any probative value it might reasonably have. However, save in a case of such a kind the proper course in our judgment is ordinarily for a trial judge to allow evidence to be given and direct a jury carefully concerning the drawing of inferences. In our judgment the ruling which the learned judge gave in this case was not wrong and it is relevant to note that at the time when he gave the ruling he did not know what the facts were upon which the appellant might rely in his defence.

We therefore turn to the second ground, which is closely linked with the first, and which is in

these terms:

> "The learned trial judge erred in law and/or in the exercise of his discretion in directing the jury that it was open to them to draw an inference from the appellant's silence in interview in accordance with section 34 of the Criminal Justice and Public Order Act 1994."

It is in our judgment important to bear in mind the detailed terms of section 34. It is convenient to begin by considering subsection (2)(d) which reads:

> "Where this subsection applies -- (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper."

The failure there referred to is a failure to mention at an earlier stage a fact relied on by the appellant in his defence, as is made plain by subsection (1)(a).

Subsection (2)(d) empowers a jury in prescribed circumstances to draw such inferences as appear proper. That must mean as appear proper to a jury because the jury is the tribunal of fact and the drawing of appropriate inferences from the facts is the task of the tribunal of fact. The trial judge is of course responsible for the overall fairness of the trial and it is open to him to give the jury guidance on the approach to the evidence. There will undoubtedly be circumstances in which a judge should warn a jury against drawing inferences, but the judge must always bear in mind that the jury is the tribunal of fact and that Parliament in its wisdom has seen fit to enact this section.

What then are the formal conditions to be met before the jury may draw such an inference? In our judgment there are six such conditions. The first is that there must be proceedings against a person for an offence; that condition must necessarily be satisfied before section 34(2)(d) can bite and plainly it was satisfied here. The second condition is that the alleged failure must occur before a defendant is charged. That condition also was satisfied here. The third condition is that the alleged failure must occur during questioning under caution by a constable. The requirement that the questioning should be by a constable is not strictly a condition, as is evident from section 34(4), but

here the alleged failure did occur during questioning by a constable, DC Armstrong, and the appellant had been properly cautioned. The fourth condition is that the constable's questioning must be directed to trying to discover whether or by whom the alleged offence had been committed. Here it is not in doubt that Mr Sullivan was killed by someone. The Detective Constable was trying to discover who inflicted the fatal wound and whether the killing was murder or manslaughter, it being fairly clear that the offence must have been one or the other (unless the killer struck the fatal blow in the course of defending himself). The fifth condition is that the alleged failure by the defendant must be to mention any fact relied on in his defence in those proceedings. That raises two questions of fact: first, is there some fact which the defendant has relied on in his defence; and second, did the defendant fail to mention it to the constable when he was being questioned in accordance with the section? Being questions of fact these questions are for the jury as the tribunal of fact to resolve. Here it would seem fairly clear that there were matters which the appellant relied on in his defence which he had not mentioned. These included the fact that he had had no quarrel with Mr Sullivan in the club; that he and his wife had left the club before the rest of the party; that he had not at any stage of the evening carried a knife; that he had not been involved in any altercation in the street in which Mr Sullivan was stabbed; that he saw and was a witness of no such altercation; that he saw Mr Lee in the street waiting for a cab; that he went to a restaurant for a meal but found that he was too late and that the restaurant was closed; and that he returned home and saw his baby-sitter. The sixth condition is that the appellant failed to mention a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned. The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at that time. The courts should not construe the expression "in the circumstances" restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to "the accused" attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with

such qualities, apprehensions, knowledge and advice as he is shown to have had at the time. It is for the jury to decide whether the fact (or facts) which the defendant has relied on in his defence in the criminal trial, but which he had not mentioned when questioned under caution before charge by the constable investigating the alleged offence for which the defendant is being tried, is (or are) a fact (or facts) which in the circumstances as they actually existed the actual defendant could reasonably have been expected to mention.

Like so many other questions in criminal trials this is a question to be resolved by the jury in the exercise of their collective common sense, experience and understanding of human nature. Sometimes they may conclude that it was reasonable for the defendant to have held his peace for a host of reasons, such as that he was tired, ill, frightened, drunk, drugged, unable to understand what was going on, suspicious of the police, afraid that his answer would not be fairly recorded, worried at committing himself without legal advice, acting on legal advice, or some other reason accepted by the jury.

In other cases the jury may conclude, after hearing all that the defendant and his witnesses may have to say about the reasons for failing to mention the fact or facts in issue, that he could reasonably have been expected to do so. This is an issue on which the judge may, and usually should, give appropriate directions. But he should ordinarily leave the issue to the jury to decide. Only rarely would it be right for the judge to direct the jury that they should, or should not, draw the appropriate inference.

In this particular case the trial judge directed the jury in the course of his summing-up in these terms, beginning at page 16D of the transcript:

> "There is, however, another matter of law to which I must now turn. As you may be aware there has been a change which came into effect last year. It is not a change which requires the defendant to say anything which he does not wish to say. He is still entitled to do what this defendant did and to decline to answer questions put to him by the police in interview but now if he chooses that course certain consequences may follow. When he was cautioned before the interview he was warned about this and you may be satisfied that he

understood that warning which was repeated more than once in the course of the interview.

In this case as part of his defence the defendant relies upon certain facts, namely that when he left the Lotus Club he did not encounter Tony Sullivan, he did not have a knife in his possession and did not inflict any knife wound upon Mr Sullivan and that he had no blood on his hands, that he met a friend Walter Lee on the way home who was able to confirm some of his account, there was a baby sitter at his home who can give further confirmation and throughout his journey from the club to his home he was accompanied by his wife who can support the entirety of his account.

There is no dispute that when he was questioned under caution before he was charged he failed to mention any of those facts. That he failed to do so cannot by itself prove guilt. However, if you are sure that the defendant did fail to mention those facts and that in all the circumstances existing at the time he could reasonably have been expected to mention them, you are entitled to draw such inferences from this failure as you think proper. In judging this matter, as indeed throughout your consideration of the evidence, you apply your ordinary common sense. Always remembering that any conclusion you draw from the defendant's failure to mention facts must be a conclusion about which you are sure before you can act upon it.

You are entitled to consider whether the reason for failure was because the defendant had not thought out all the facts by 16 November or that he then had no innocent explanation to offer or none which he believed would then stand up to scrutiny and that may cast doubt upon the truthfulness of his account now, but you are not obliged to draw any inference against a defendant. He has told you why he chose to be silent. That was the advice which he received at the time from his solicitor. You will consider whether or not he is able to decide for himself what he should do or whether having asked for a solicitor to advise him he would not challenge that advice.

Was this a situation where you are sure that it is proper to draw an inference against the defendant for his failure to mention the facts on which he now relies? The law in these circumstances permits you to do so but does not for a moment oblige you to do so.

The inference which the prosecution invite you to draw is that the account put forward in the defendant's evidence has been tailored to meet the case which the prosecution has supported by evidence and had not been thought out on 16 November.

Let me add this, which I hope simplifies this aspect: if you are satisfied that the evidence called by the prosecution has proved to your satisfaction that it was the [appellant] who stabbed Tony Sullivan, in reaching that conclusion you will inevitably have rejected the evidence put forward for the defence and no inferences will be necessary. If, on the other hand, you consider that the prosecution evidence does not

> make you sure of the identity of the stabber, you must not draw any inferences of guilt from the [appellant's] failure to answer questions on 16 November. If there was no case to answer the [appellant] cannot be blamed for not answering it."

The appellant's criticism of the judge's ruling in this case rests on two main grounds. First, it is said that the police had failed to make such full disclosure of the case against the appellant as they could and should have made; and secondly, that in the absence of such full disclosure the appellant's solicitor was right to advise him not to answer questions and that advice was in strict compliance with guidance given by the Law Society to solicitors acting in such a situation. As counsel succinctly summarised his submission, the crucial question is whether the police gave sufficient information to enable the solicitor to advise his client. If not, the solicitor was entitled to advise his client to say nothing and the judge should have excluded evidence of the interview on the voir dire.

As to the first of the points made, it appears to us that the police may have made more limited disclosure than is normal in such circumstances. Under the Codes they had no obligation to make disclosure and they may well have had reasons for limiting the disclosure which they made. It is, however, relevant to note that by 16 November the firm to which the appellant's solicitor belonged had been advising him for a period of three months. The material given to the appellant and his solicitor made it plain that several witnesses had identified the appellant as having been present in the Lotus Club on the night of the killing, that the fatal stabbing had occurred at about 3.25 am on 19 August outside the Lotus Club, that persons at the club had identified the appellant as the person responsible for the stabbing and that a description communicated to the appellant and his solicitor had been given.

This was not, on any showing, a very complex case to which to respond. There is an obvious contrast with cases perhaps of fraud or conspiracy which depend on a complex web of interlocking facts. It would, one might think, have been very easy to say, if it were true, that the appellant had left the club before there was any trouble and that he never was involved in or even saw any violence of any kind.

The second observation we would make is that, under section 34, the jury is not concerned

with the correctness of the solicitor's advice, nor with whether it complies with the Law Society guidelines, but with the reasonableness of the appellant's conduct in all the circumstances which the jury have found to exist. One of those circumstances, and a very relevant one, is the advice given to a defendant. There is no reason to doubt that the advice given to the appellant is a matter for the jury to consider. But neither the Law Society by its guidance, nor the solicitor by his advice can preclude consideration by the jury of the issue which Parliament has left to the jury to determine. The judge's direction to the jury on this point, which we have recited, was as we think a model of succinctness and also, as it seems to us, of comprehensiveness. We see no ground for criticising it in any way. Even if there were grounds for criticism, such criticism would be largely academic since the judge concluded the passage by indicating that inferences would be unlikely to assist the jury in their task.

Ground 3 of the perfected grounds is that:

> "There was a material irregularity in the trial in that the Crown were permitted to cross-examine witnesses for the defence about the [appellant's] previous convictions and what he had told them about the circumstances thereof."

It is common ground that the nature or conduct of the appellant's defence in this case was such as to involve imputations on the character of Sarah Guest and Susan Whitnell. That admittedly made him vulnerable to exposure of his own criminal record under section 1(f)(ii) of the Criminal Evidence Act 1898. Recognising that, counsel on the appellant's behalf who proposed to call him as a witness invited the judge to exercise his discretion against permitting cross-examination by the Crown on his previous convictions. The learned judge gave a ruling on that application in which he said:

> "Mr Clegg concedes that an imputation has been made against the witnesses Whitnell and Guest which would prima facie allow the prosecution to take advantage of the rules permitting cross-examination as to previous convictions, but Mr Clegg invites me to exercise my discretion and to exclude such cross-examination.
>
> It is premature to make a firm decision at this stage, but Mr Clegg asks

> for a preliminary ruling so that if necessary he can incorporate in the [appellant's] evidence-in-chief the two convictions which would otherwise be the subject of cross-examination.
>
> I am quite satisfied that there has been conduct of the defence which would justify such cross-examination. The two convictions which are relevant, and the only two, are in 1991 and 1994. Certainly what happened in 1981 and 1982 is irrelevant and no one argues to the contrary.
>
> My own feelings at this moment is that the jury has to make a very clear decision as to the credibility of Whitnell and Guest on the one hand and the [appellant] on the other hand, and in those circumstances they ought to have in front of them the information which may help them on that issue and that issue alone.
>
> That cross-examination of Susan Whitnell did not include any reference to a previous conviction was a decision made by the defence, but the attack upon her credibility was very clear. I do not think it would be unfair at this stage to allow the prosecution to cross-examine but, as I have indicated, this can only be a preliminary view and I do not make it a firm ruling."

The learned judge having given that provisional ruling, counsel for the appellant adduced evidence of the appellant's previous convictions in-chief. He was duly cross-examined on those convictions and no complaint is made of that. But when the appellant called his wife and Mr Lee as witnesses, they were asked questions in cross- examination relevant to his convictions. Counsel for the appellant now objects that the questions about the appellant's convictions went to the credit of the appellant and he submits that this is illegitimate since the Crown was bound by his answers on questions of credit and the Crown was not entitled to pursue this matter by questioning other witnesses. The answer given to the Crown is that the questions which were asked of the appellant's wife and Mr Lee were asked not to investigate the facts underlying the convictions or the appellant's explanations of them, but simply to test the credibility of those witnesses. So far as Mr Lee is concerned, we understand it to be virtually accepted that that is so. In the case of Mrs Argent, we regard that answer as a good one also. The questions went to her alleged ignorance of her husband's conviction. Counsel for the Crown was in our judgment fully entitled to ask questions about this matter which threw doubt on her credibility and reliability as a witness.

Ground 4 of the perfected grounds, which is closely linked to ground 3, is in terms that:

> "The .... trial judge erred in law and/or in the exercise of his discretion in refusing an application by the defence to recall the witness Susan Whitnell so that her previous convictions could be put to her."

When Susan Whitnell was cross-examined on behalf of the appellant, no questions were asked concerning her previous convictions. The judge understood this to be the result of a conscious decision by the defence, as is apparent from his ruling to which we have already referred. In that understanding he was quite right. Counsel for the appellant confirms that the decision not to cross-examination Susan Whitnell on her convictions was a tactical decision made in the hope of avoiding the cross-examination of the applicant under proviso (f)(ii) to section 1 of the 1898 Act.

He does not criticise the learned judge's refusal, but points out that once the judge had rejected the defence application to exclude evidence of the appellant's convictions there was a discussion between counsel for the appellant and counsel for the Crown concerning the possible admission of Susan Whitnell's convictions or the recalling of a police officer to give evidence concerning them or the recall of Susan Whitnell. In the event no agreement was reached and no admission was made. The course of events consequently was that the appellant gave evidence. He called his wife as a witness, he called three other witnesses, and at this stage counsel for the appellant applied to the judge that Susan Whitnell should be recalled or that a police officer should be called to give evidence of these convictions. The learned judge rejected that submission. He said in a brief ruling as follows:

> "I am inclined to think that the expression 'have your cake and eat it' is a fair, if not a legal, description of what is being sought. The opportunity to ask these questions was available yesterday and was by a clear decision rejected. I am not prepared to order the recall of the witness, nor am I prepared to allow a police officer to give evidence that she could herself have given had she been asked."

The judge clearly felt that the appellant had made a decision and that he should therefore live with it.

He was not willing that the appellant should chop and change the conduct of his case on tactical grounds depending upon the rulings in the case.

Counsel for the appellant criticises that ruling as being a wholly unreasonable exercise of discretion which (he says) altered the whole balance of the case against the appellant. We, for our part, see it rather differently. Counsel made a judgment, which was no doubt a perfectly reasonably judgment, but it turned out to be wrong. It seems to us that it was very much a question for the exercise of the trial judge's discretion as to whether or not he granted the leave which was sought. Had he decided to grant leave there could be no possible ground for criticising his decision. Similarly, we regard his refusal of leave as a sustainable exercise of discretion, particularly having regard to the very late stage at which the application was made. Not all judges would have made the same decision, but in our view this was not one which could be stigmatised as wrong or unreasonable. Even if the proper conclusion was that the judge should have granted leave, we would not for our part regard this conviction as unsafe and we reach that conclusion irrespective of the stage at which the application was made. For all those reasons we dismiss this appeal against conviction.

(Counsel addressed the court in relation to the appeal against sentence)

THE LORD CHIEF JUSTICE: In passing sentence on the appellant the Recorder said:

> ".... you are convicted of the offence of manslaughter committed by the use of a knife. That you were carrying a knife upon you on the relevant occasion was inexcusable. The use of it was inexcusable. The unfortunate victim had done nothing wrong and he has lost his life in circumstances which were your fault.
>
> There was not just one blow, there were seven blows, and I think that this is a matter which has to be regarded as a serious case. Of course there is no alternative to imprisonment. The sentence upon you is one of 10 years' imprisonment."

Leave to appeal against that sentence was granted at a time when the normal range of sentences for this

kind of killing was at a level generally lower than the term which the Recorder imposed. However, since that time the question as to the proper level of sentence for manslaughter of this kind has been the subject of consideration by this court in Attorney General's reference No. 33 of 1996 (R v Latham) under section 36 of the Criminal Justice Act 1988. The facts of that case were different: there was a plea of guilty; there was an element of provocation; and the offender was a young man aged 22 at the time of the appeal. The court did, however, in the course of giving judgment in that case review the existing authorities on the level of sentence in manslaughter cases. At paragraph 8 of the judgment, under the heading 'What should the tariff be', it said:

> "Even when a particular type of manslaughter is isolated from the rest it has to be recognised that it covers a wide field, and if justice is to be done sentencers must not be put in strait- jackets, but for the reasons identified in this judgment it seems to us that where an offender deliberately goes out with a knife, carrying it as a weapon, and uses it to cause death, even if there is provocation he should expect to receive on conviction in a contested case a sentence in the region of 10 to 12 years. The alternative would be to say that although the tariff should remain the same the indictment should contain a separate count in relation to the carrying of the offensive weapon for which a separate and normally consecutive sentence should be imposed, but that seems to us to be a somewhat cumbersome approach."

With the last observation we respectfully agree.

The point is made by Mr Clegg that the case of Latham, from which we have quoted, was a case in which there was provocation and that in this case the situation is different. So it is, but the provocation was a mitigating factor there and this was, as the learned Recorder thought, a very serious case of manslaughter. He drew attention to the fact that there were seven blows, of which one was fatal. There was no evidence of provocation; there was no excuse which emerged from the evidence; there was no plea of guilty. In all the circumstances we consider that this sentence was entirely proper and we dismiss the appeal against sentence.
