Neutral Citation Number: [2014] EWCA Crim 102

Case No: 201001241 C1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON A REFERRAL BY THE CRIMINAL CASES REVIEW COMMISSION PURSUANT TO SECTION 9 OF THE CRIMINAL APPEAL ACT 1995**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2014

**Before:**

**LADY JUSTICE RAFFERTY DBE**
**MR JUSTICE IRWIN**
and
**MR JUSTICE JEREMY BAKER**

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**Between :**

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| **REGINA** | **Appellant** |
| **- and -** | |
| **ERROL CLIVE HEIBNER** | **Respondent** |

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**Sarah Whitehouse** (instructed by **Crown Prosecution Service**) for the **Appellant**
**Henry Blaxland QC and Rebecca Trowler QC** (instructed by **Bindmans LLP**) for the **Respondent**

Hearing date: 10th December 2013

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# Approved Judgment

## Lady Justice Rafferty:

1. Errol Clive Heibner now 68 on 18 Nove mber 1976 in the Central Criminal Court was convicted by a majority of 10 to 2 of murder and sentenced to life imprisonment. On 1 December 1978 the Full Court refused his app lication for leave to app eal against conviction. His co-accused Robert Rossi was acquitted of murder.

2. He appeals against conviction upon a refe rence by the Crim inal Cases Review Commission ('the CCRC") under s.9 Crim inal Appeal Act 1995 on the followin g grounds:

   i) His confession statem ent was incorrectly admitted and/or in adequately dealt with.

   ii) New evidence relating to DC Tyers had th e jury been aware of it m ight have affected Tyers' credibility and led to a different verdict.

3. The CCRC thought potentially relevant to the safety of the conviction:

   i) the direc tion that the jury shou ld c onsider the "tru th" of the confession statement;

   ii) an im balance in the ran ge of examples the Jud ge gave for any absen ce of instruction to his legal advisors;

   iii) discrepancies in contemporaneous inte rview notes, going to allegations of oppression;

   iv) Detective Superintendent O'Brien's bad character;

   v) disclosure.

4. He seeks leave to argue further Grounds, going to non-disclosure and to the bad character of police officers.

5. On 8 September 1975 Mr Gold left his fa mily textile busine ss in Goswell Rd, Islington a t 5pm with Sheila Bro wn, the company secretary, leav ing Mrs Beatrice Gold in the building. Between 5-5.30pm she was shot 3 times with a .32 revolver.

6. On the day of the murder the Appellant Heibner was on bail awaiting trial for robberies. He was later sentenced to 15 years imprisonment, which he was serving when tried for the murder of Mrs Gold. Before and after the murder he was, in respect of the robberies, under surveillance headed by DCI Adams.

7. The Crown's case was a contract killing by Heibner acting alone as gunman at the request of persons it could not name. Rossi it suggested was the middle-man.

8. It led evidence that Charles Fagan said Heibner tried to recruit him to injure someone. At the murder Fagan was in custody awaiting trial for armed robbery. He blamed Heibner for his arrest and candidly admitted that his evidence against the Appellant was driven by malice but claimed it was true evidence. Heibner confessed in a written statement of 22nd October 1975 (exhibit 32, the confession statement) albeit the Crown suggested he had labelled himself as the look-out so as to trivialise his involvement. DC Tyers shortly before the shooting saw him near Angel underground. He lied in his interviews. He changed his alibi notice. He was short of money before the killing and in funds afterwards. He agreed he had burned some of his clothes shortly after the murder.

9. His case was that he had not been involved in any way. He told the jury his treatment over two days in custody coerced his confession that he had been look-out for the gunman. Although he had signed the confession statement he had not said all it recorded.

Pre-murder

10. Fagan said that at the beginning of September Heibner suggested Fagan for £1,000 should hurt someone but gave no name. At a public house in Haringey Heibner said he was going to meet someone to find out who was the victim and if not back in 15 minutes Fagan should go to the Trafalgar in Southgate. Fagan saw Heibner outside talking for a couple of minutes to a man before the pair walked towards Manor House underground. Fagan went to the Trafalgar but did not see Heibner.

11. Fagan said on Saturday 6th September Heibner rang saying everything was all right. At 8.30pm the two went to a pub where Heibner explained that he had seen the victim who was to be murdered on Monday 8th September at a Clerkenwell clothing firm. Fagan told the jury that once he realised this was to be a murder he told H he did not want to get involved.

Day of the murder 8 September

12. Heibner, watched by police who were interested in possible robberies, met Rossi. Each man told the jury the meeting was linked to Heibner's attempts to sell stolen jewellery, Rossi the go-between. Heibner was driven by Parker to the Strand Palace Hotel where he got into a car driven by Rossi. Rossi gave Heibner a box and dropped him near Angel at about 2pm. PC Tyers said that by chance he saw Heibner outside Angel underground station at about 5pm, the time he came off duty.

Post murder

13. Parker told Fagan on the day after the murder that he had helped Heibner burn some clothes. On 10 September Fagan saw Heibner give Parker £50 from a roll of bank notes. Joy Heibner Heibner's step-mother said he arranged that if asked where he were that week she should say he was with her. Elaine Smith his sister said Heibner told her, "I've done something nice, and you need not know anything more about it". Later he said he had "done a jewellers".

Arrest and interviews

14. On 12th September when arrested for robbery Heibner seemed very frightened. He gave a series of explanations for possession of £600. He said he spent 8th September painting his mother's house. He breathed a sigh of relief when told police were investigating a robbery. On 13th September he made a short statement admitting he had lied to avoid revealing his negotiations about selling the jewellery. He said the truth was that on 8th September he met a man in Gray's Inn Road at 12.30pm and £600 was repayment of a loan.

15. On 20th October Heibner was arrested again. DS Stimpson interrupted a conversation between Heibner and DCI Adams to say he was investigating something far more serious than robbery. Heibner said, "Oh my God", shook and trembled violently.

16. On 22nd October he was interviewed four times. From 10.40 to 11.59 and 3.05 to 4pm by Det Supt O'Brien, between 4.15 to 6.15 by DCI Dixon and between 7.30 and 10.35 by Det Supt O'Brien. At the final interview he signed his witness statement, the confession, exhibit 32.

17. **Interview 1** – O'Brien said he was with Stimpson who took down a contemporaneous note. He told a shaking Heibner that police thought him the gunman who had been seen in Goswell Road at Angel at 5pm. Heibner said he had not been there. Asked whom he had met outside Haringey dog track on 4th September Heibner said, "Fucking bastard" and added, "I can see it all now. That fucking Fagan has done this because I set him up. That's it isn't it". He admitted meeting Fagan on 5th September. Asked whether he had told Fagan the job involved hurting someone he said "I'll kill that fucking Fagan. He's doing this out of spite" and "It's not a wise thing Fagan's done to grass me. These people will have him". Asked whom he said "You'll see". He claimed he did not remember giving clothes to Parker to burn. He did not tell Parker to burn his shoes, he gave them to Parker who needed a pair.

18. **Interview 2** O'Brien said Heibner denied meeting Rossi in the Strand on 8th September and said " I know I am in the shit but I can't put other people in it…I'll never shop that man. If I do I'm dead. If I tell you everything I am dead. What do you think my chances are on this? ". He asked to speak to DCI Dixon as he did not trust O'Brien.

19. **Interview 3** as recorded shows DCI Dixon told Heibner just to tell the truth. Heibner said "It's a big step. Do you realise what I face? " and asked to see his wife. Statements by Fagan and Parker were read to him and he said they had "done him in good", but he would deny it. He said, "I'll tell you the truth but I can't mention any names. I trust you because you were fair to me before….I want to tell you all about it but life's a long time and then there's the other people. If I go on remand I'll never go for trial. I'll be dead". His wife was brought in and Dixon recorded her saying "Just tell the truth. That's all I want you to do".

20. **Interview 4** as recorded shows that when his wife had left Heibner said, "How can I admit it? I think I might take my chance. Look I can't put my hands up to the shooting. I'll never come out". "Did anyone see me go inside the place, or was I just seen outside?" He was asking because he could say he was minding a bloke's back. He said he would make a written statement.

21. Exhibit 32 was his statement under caution. In it Heibner said he had been given a photo of a man, "the face", by the man who set up the murder and who told him to meet the face outside Angel underground at 5pm on Monday. H did, and kept watch while the face, whom he had not seen before, did the shooting, gave him the gun at the bus stop as earlier arranged and walked off. Heibner got just under £4,000.

22. Rossi's interview was on 27 October . O'Brien said Rossi admitted he gave a gun to Heibner.

The defence case

23. Heibner told the jury he met Fagan and with another discussed a wages snatch of 17th September in Catford. He had not invited Fagan to hurt someone, rather he had explained that someone might get hurt. If he rang Fagan on Saturday 6th September and said everything was all right it referred to the Catford job. Their only discussions were about robberies, not a murder.

24. He asked Rossi to drive him to Fagan's flat as Fagan knew a fence for the jewellery. Rossi played no part in the jewellery deal. He took from Rossi in the car a box of jewellery, not a gun. He and Rossi separated at about 2pm . Heibner reached his home in the East End at 6pm.

25. On the afternoon of the murder he was at Angel underground at about 4.35pm having used nearby public conveniences. Then from a stop in Upper Street he caught a bus home. He was on it at the time Tyers said he was outside Angel. The £600 he had on arrest on 12th September was the proceeds of the sale of the stolen jewellery. Suspecting he was under surveillance he burned his clothes to destroy incriminating evidence from the robbery. He told his step-mother to say he was with her for the week because he was planning another robbery.

26. He was in custody for 42 hours before interview. He was left in a lighted cell, one officer in it, another outside. Dixon said he had an obligation to keep his family (some of whom Heibner knew had been interviewed) out of it. Jewellery had been found and he was the only one who could get them out of trouble. Once they had his statement he would get whatever he wanted, as opposed to only cups of tea. When he started the statement he was knackered and just wanted to get out of the room. Stimpson frightened him by saying " Whatever happens, we'll get it out of you, if we have to kick you from one end of the room to the other". When he saw the statement in court he couldn't even remember it.

27. Rossi told the jury he collected a parcel of, he understood, jewellery and went to the Strand Palace where he met Heibner who asked for a lift home and got into Rossi's car. He denied saying in interview that there was a gun in the parcel. He denied agreeing that he gave Heibner the gun to carry out the shooting. During a third interview, tape-recorded, he said he might make a statement in return for protection. When he asked for a solicitor his request was brushed aside. Leslie Joyce told the jury that in prison he had heard Fagan apologise to Heibner for telling lies about him. Fagan said that DCI Adams and his "little firm" had engineered the situation.

28. In April 1976 Heibner said in an alibi notice that at 4.45-5pm he was in a lavatory in Upper St and at 5pm on a bus. In October 1976 he served an amended notice saying that he got a lift in a car for the first part of the journey.

Submissions on this appeal

29. For Heibner Mr Blaxland QC put nine grounds within three categories: the confession, evidence of which the Crown knew but H did not, and evidence post-trial of the bad character of three police officers.

**Ground 1: the confession and preceding interviews should have been excluded.**

i) Length of custody

30. Heibner was held for 42 hours before interviews began. Although the Judges' Rules, which then governed the topic, did not prohibit detention for such a period, under the subsequently enacted Police and Criminal Evidence Act 1984 ("PACE") the approval of a Superintendent would be required for anything exceeding 36 hours. No explanation was provided for the delay. Even leaving aside Heibner's complaints about sleeping, approaching 50 hours detention by the time exhibit 32 was written is likely to be relevant to its reliability.

31. In our view it is important to see this submission in context. That Heibner had been at the police station for a considerable period by the time of his statement was explored both on the *voir dire* and in front of the Jury. Heibner had previous convictions for serious offences, including armed robbery. He was no stranger to police stations or to the routine of arrest and interview. Custody for him was unlikely to have been as challenging as for a detainee unfamiliar with the system or familiar only with criminal allegations lower on the ladder of seriousness. We do not attach importance to this complaint.

ii) Access to a solicitor

32. No solicitor was present. DCI Dixon said that he at one stage said: "What you need is a brief" and Heibner replied, "I don't want a brief". Heibner denied the exchange. In evidence-in-chief, asked, "Did you ask for Reg Dixon to come?" Heibner said "No I didn't. I asked for a solicitor." He claimed he wanted but was not allowed one throughout. Rossi made a like claim. He told the jury "My wife got in touch with my solicitor and they phoned up Bow Road police station, where I was…" at which point the Judge prevented any more being said since it was hearsay. Nothing indicates that O'Brien was cross-examined about it. Nothing suggests it was raised on the *voir dire*.

33. Although the law in relation to the significance of refusal of access to a solicitor has developed, the right privately to consult a solicitor pre-dated PACE where it was restated in S.58. That said, even a breach of the principle was not determinative of the admissibility of a confession At the time of this trial the focus of challenges to the admissibility of confessions was, necessarily, on voluntariness: *Prager* (1972) 1 WLR 260 where the court rejected a submission that a breach of Rule II should itself have led to the exclusion of the confession and stated:

> "Its acceptance would exalt the Judges' Rules into rules of law. That they do not purport to be, and there is abundant authority for saying that they are not hing of the kind. Their non-observance may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge's decision whether, breach or no breach, it has been shown to have been made voluntarily."

34. A judge's discretion is not now so confined: *Peart* 14/02/2006 (2006) UKPC 5. The Board said the criterion for admission of a statement is fairness. If a statement is voluntary, that is strongly in favour of admitting it, notwithstanding a breach of the Judges' Rules, but the court may rule that it would be unfair to admit it even were it voluntary.

35. *Peart* aligns the approach to admissibility under the Judges's Rules to that under PACE, in which the court has to consider the question of voluntariness under S.76 and fairness under S.78. Applying current standards the denial of access to a solicitor, one of the most important and fundamental rights of a citizen, Mr Blaxland argues should

without more prompt us to conclude that the entirety of the interviews should have been excluded.

36. He relied on the prevailing winds at the time of the trial. It was, he thought, probably conventional wisdom that were a challenged police officer to explain his fear that a solicitor would alert others the court would accept his anxiety as justification. Additionally, for a suspect, saying one wanted a solicitor was a sign of weakness or seen as such.

37. He invited us to reach a firm conclusion that Heibner was denied access to a solicitor for whom he had asked. He suggested it would be fanciful to think Heibner would have decided he did not need one. His proposed route was that we should find breaches of standards then in place, apply modern approaches, and be led inexorably to the conclusion that the conviction is not safe.

38. Invited to relate that philosophy to these facts he submitted that we should not ask ourselves what Heibner would be likely to have done or said, rather we should address the reality: had proper procedures been followed it is very likely a solicitor would, as Mr Blaxland put it, have "got in the way of a confession".

39. As to what account we should take of the likely mindset of this particular suspect, a man experienced in the ways of arrest, detention, serious crime, trial, and long-term imprisonment, he argued that we cannot know what Heibner would have said had that cast of mind and experience been put to him. His evidence to the jury (that he wanted but was refused access to a solicitor) is on record but beyond that lies speculation.

40. For the Crown the submission is that it is asserted, as if fact, that Heibner was denied access to a solicitor. The Crown does not accept that he was. It argues that this is one of several examples within the submissions of the dangers of speculating, after 38 years, about what happened during the investigation.

41. It is not possible for us, now, to be confident whether the absence of a solicitor were or were not raised on the *voir dire* or explored before the jury. There is no evidence that it was. True, Heibner told the jury he had asked for a solicitor. However, it was common ground that, for example in evidence Heibner challenged more of DCI Dixon's evidence than was put. His evidence on at least that topic, a matter to which we shall return, may have been inconsistent with his instructions. It is impossible now to test the plausible contention that the first his counsel knew of his claim to have asked for a solicitor was when Heibner gave evidence. It would be an unwary court which assumed that all he claimed in his evidence was true. On the other hand we can be confident that at trial parties put their minds to this issue. The submission is at this distance so clouded by conjecture that we are not persuaded that it achieves the power for which Mr Blaxland argued. If we sought fortification for our rejection of it we should find it in the equally plausible possibility that Heibner had indeed given instructions on the topic, but they were that the Crown's evidence was correct and he had not sought a solicitor. To that extent too, his counsel might, for all this court

knows, have heard the contrary assertion for the first time when the jury heard it. We reject these first two aspects of the submissions on Ground 1.

iii) Failure to caution during the Dixon interview, a breach of Rule II Judges' Rules.

42. The Judges' Rules in a preamble read where relevant:

> "These Rules do not affect the principles
>
> (a)…
>
> (b)…
>
> (c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so;
>
> (d)…
>
> (e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

The principle set out in paragraph (e) is overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

43. Rule II where relevant read:

> "As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence."

44. Rule IV (e), all written statements made after caution, read:

> "When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any

> corrections, alterations or addi tions he wishes. W hen he has finished reading it h e shall be asked to write and sign or m ake his m ark on the following Certificate at th e end of t he statement: -
>
> "I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statem ent is true. I have made it of my own free will.""

45. Mr Blaxland placed great emphasis – "it leaps from the page" - on the ab sence of the Dixon caution, a point not taken at trial a nd a Ground not advanced by the CCRC. It was he argues a significant and substantia l breach of the Judges' Rules and should have led to the exclusion of the Dixon interview and of the statement under caution.

46. Since the requirem ent to adm inister a cau tion under Rule II applied to all questions and further questions Mr Blaxland submitted that a caution was require d at the outs et of the Dixon intervew, particularly so that Heibner did not think it a confiden tial talk with an officer with whom he had a relationship.

47. It was agreed that Dixon did not rem ind Heibner of the caution. The Crown's case was that he had already been cautio ned at the beginning of the two earlier O'Brien interviews and was onc e m ore at the subs equent O'Brien and Stim pson interview. Heibner's case was that he was not. He also disputed m uch of Dixon's evidence, denying he had asked to speak to him.

48. Examination of what if any inculpatory m aterial emerged from the Dixon interview is revealing. According to Dixon it started with Heibner saying, "I'm in the shit, can you help me out?" and Dixon's "Well you'd better tell me what it's all about."

49. As we have already rehearse d, the jury heard that Dixon to ld Heibner to tell the truth, Heibner described doing that as a big st ep, said he would deny the dam aging Fagan and Parker statem ents, and that though he wa nted to and w ould te ll police the truth, names could not be m entioned, since [were he to identify individuals] he would be killed.

50. Mr Blaxland argued that the Dixon dialogue set the scene for the confession m ade after caution as O'Brien entered. He conceded th ere wa s to Dixon no overt confession but submitted that the con tent of that interv iew could not be ignored when assessing what happened in the confession interview with O'Brien.

51. There are in surmountable difficulties in the wa y of this submission. First, at the start of the confession s tatement Heibner's signature app ears after "I have been told that I need not say anything unless I wish to do so and that whatever I say m ay be given in evidence". Heibner was cautioned three tim es during 22nd October and signed a note recording that he was awar e of his rights under the cauti on. Nothing w e have heard

persuades us that this aspect of the evidence is so called into question as to make us uneasy about it. Yet more compellingly, however, the content of the Dixon dialogue is of limited inculpatory weight, if inculpatory it be. The damage done to Heibner's defence is done in the O'Brien interview when the confession statement emerges. Heibner was not naïve about police interviews or about mixing with experienced criminals who played for high stakes. We approach this submission with an eye to context. Though Mr Blaxland positioned it as his strongest card, we are not persuaded that it undermines the safety of the conviction, seen as a freestanding argument or, as we shall see, taken together with the balance of the submissions.

iv) The meeting with Heibner's wife

52. It was agreed that Heibner asked to be and was allowed to speak to his wife June Westburgh. At some point she was detained for questioning and at the time Heibner was making the confession statement so too was his girlfriend Gloria Priestaff (Miss Westburgh's sister) and his sister Elaine Smith. Heibner told the jury his decision to confess was clinched when he understood it would mean they were released.

53. Mr Blaxland submits the meeting would have affected Heibner's state of mind and the reliability of his confession. The police, who allowed the visit, made a contribution to that unreliability. They let him talk to his wife because it was likely to break his resolve, and so it proved. Mr Blaxland argues that even though Heibner made the request it should have been rejected.

54. Once again it is important to see this issue in context. Such meetings were common in the 1970s. There is no suggestion of bad faith in allowing it, and we remind ourselves that Miss Westburgh was not, without warning, brought in to see Heibner, rather he had asked to see her. He told the jury he confessed because he had been led to believe he alone "could get [his family] out of the situation". The jury had all the evidence necessary to reach a conclusion, if it thought it necessary on this topic, so as to reach a verdict and we see nothing in the point to challenge the safety of the conviction.

v) Breach of Judges' Rule IV (e)

55. Mr Blaxland accepted that even were we with him this was not as important a breach as the failure to caution or the denial of solicitor. The requirement for the Certificate at the end of the statement under caution to be written by the suspect acted as a safeguard against a police officer simply placing a statement before him and saying "sign that". Here, absent a solicitor, to ensure the confession was voluntary the submission is that the Rules provided a minimum protection against oppression in a police interview.

56. The original handwritten statement was available at trial, seen by counsel, and Heibner had it with him in the witness box. It would be astonishing if, given its importance, counsel did not ask to see it. Though defence counsel were aware that in

apparent breach of the Judges' Rules questions were asked by O'Brien in the course of taking the statement no point seems to have been taken on it. We remind ourselves that Heibner conceded having uttered the most inculpatory words, those upon which the Crown confidently relied. If, on these facts, any difference were made by the manuscript being that of a police officer not of Heibner, it was not great. We are not persuaded that the safety of this conviction is called into question by the words at the top of the confession not being in Heibner's hand.

**Ground 2: The evidence of the officers who interviewed Heibner was so lacking in credibility that no jury could safely rely on it.**

57. The first two interviews lasted in total 2 hours and 14 minutes. Mr Blaxland submits that the record of the interviews takes less than 10 minutes to read at normal conversational speed and Dixon's witness statement significantly less time to repeat than the 2 hours the interview was said to last. There is a stark difference between the length of the transcript of Rossi's taped interview and the length of the transcript of the other interviews with him.

58. However, there is no indication in the summing-up that these points were made. In *Maynard and Dudley* No.200003731 S1 C.A. 31/07/02 the Court of Appeal quashed a conviction from 1977 on the basis of fresh evidence that an allegedly contemporaneous interview with Dudley could not have been recorded in the time alleged. Mr Blaxland is obliged to concede that such analysis has not been conducted in this case. Additionally, during the interview, statements were read to Heibner. That said, Mr Blaxland relies on the apparent discrepancy as raising serious doubts about the veracity of the police evidence.

59. We do not agree. Experience teaches that dialogue is as likely to include pauses impossible to reduce to writing, repetition not necessarily included in the record etc etc as it is to be an automaton-like, measurable progress through exchanges. The notes of interview were described as contemporaneous but no-one suggested they were a verbatim record. There is no evidence before us of, for example, the speed at which Stimpson wrote and whether Heibner spoke slowly, or quickly, or at dictation speed for his benefit. There is recorded Heibner sitting nodding and wringing his hands. He went to the lavatory, deducting a minimum of four minutes from the time spent with the officers.

60. In any event, this material was available to be used had defence counsel thought it useful, important, relevant, or any combination thereof. The mores of the time are likely to have been familiar to counsel, who was well placed to make his own assessment of the overarching conditions surrounding recordings such as this. Finally, counsel would have been likely to ask himself whether, given that it is difficult to identify inculpatory remarks, challenge on the basis set out here was worth the candle.

61. There is nothing in this point.

## The Dixon attendance point

62. The evidence about the attendance of Dixon at Kings Cross police station is said by Mr Blaxland to defy credibility. According to O'Brien, towards the end of the 3.05 p.m interview Heibner asked to see Dixon of the Regional Crime Squad ("RCS") whom he trusted. O'Brien said he would arrange it and the interview is shown as ending at 4 p.m. The dialogue with Dixon began 15 minutes later.

63. Dixon told the jury that about midday, angry because interrupted, he got a message to go to the police station. He had no involvement in the murder investigation and simply by chance was in the area when called. This timing did not fit with O'Brien's evidence. The Judge in summing up described Dixon, who had been cross-examined on the point, as slightly imprecise and not positively saying that he got the call at 12 o'clock.

64. On O'Brien's account Dixon had fewer than fifteen minutes to master what Mr Blaxland described as detail. Asked "Is it true about the others shopping me?" Dixon could say "Yes they are telling the truth, your relations have made statements and so have other people." He said he had read Fagan's and Parker's statements.

65. That Dixon had mastered the facts and had with him some important documents Mr Blaxland asserts completely destroys his and O'Brien's account of how Dixon came to be present at Kings Cross police station and to interview Heibner.

66. The summing-up does not reveal whether the speedy grasp of detail point were taken. The discrepancy between O'Brien's timing and Dixon's reference to midday was explored, as the summing-up shows.

67. The Judge absent the jury raised with counsel for Heibner what he described as a small matter. He said:

> "…you were making a point very forcibly this morning….about Mr Dixon having been called to the police station. ……it did not altogether agree with my recollection…….I have checked with the shorthand writer….it seemed to me [ her note] was not as positive as you were able to suggest……"

And later, to the jury, he said:

> "Heibner says he never asked for Dixon who came uninvited by him and the suggestion made in Heibner's defence is that O'Brien brought in Dixon because he thought Dixon would have more success in getting a statement of confession of Heibner than he had had…….[ Counsel] ……put before you the point that O'Brien's evidence as regards Dixon could not be

> right because……Heibner…..must have asked about Dixon….if he did, shortly before four o'clock, whereas Dixon himself said that he had received a message to go somewhere about midday….."

68. Mr Blaxland conceded that on this issue he was inviting us, on an evidential matter, to venture in to the role of the jury. That in our view is but one of the difficulties attaching to the argument. Nevertheless Mr Blaxland argued that confronted with such palpable evidence of dishonesty no reasonable jury would have relied on the evidence of either O'Brien or Dixon. He contends that we are entitled to consider whether, had these matters been properly explored, they might have affected the jury's confidence in the confession and so prompt us to doubt the safety of the conviction

69. Dixon was less than precise about the timing of his summons. Assuming first, since it is of greater advantage to Heibner, that he was called during the later part of the day, arriving at the police station at about 4 o'clock and beginning to talk to Heibner by 4.15, we are not persuaded of a suspicious mastery of detail. The point amounts to no more than how quickly an experienced officer absorbed enough to behave as the record shows. There is no evidence of what he was told over the telephone when summoned. There is no evidence of the detail in which he had mastered the statements he mentioned, the record simply shows that they were read to Heibner. The preponderance of Dixon's part in the antiphony is on one reading more generalised than Mr Blaxland suggested. Even were Dixon summoned later in the day we are not persuaded that the time available to him to put himself in the position to conduct the conversation as he did must have been beyond what was achievable by an officer of his experience. It follows that were he summoned earlier, as the summing-up shows on the evidence might have been the case, the point dies away.

**Ground 3. The judge failed to direct the jury that if the confession might have been a result of oppression or other improper conduct, it should disregard it**

70. The Judge gave two directions on the correct approach to the confession.

> "That statement, members of the jury, is of the utmost importance. If it is true and recites accurately what happened you may think it virtually fatal. If it is false, the prosecution's case against Heibner is undermined virtually to the point of collapse, isn't it? In considering whether it is true, you must have regard as to how it came into existence and how it fits with the rest of the evidence in the case.
>
> It contains a great deal of detail. Some of the detail, of course, he denies saying, but he does not suggest that in general all the detail was put in his mouth by the police. He says he was inventing as he went along, fabricating a story in order to get out of the room where he was being questioned. You may want to ask yourselves the question: is such fertility of imagination the act of an exhausted, as he describes himself as being, or can it only have come from a person who knew what he was talking

> about, and knew because he was there at the scene he was describing then? That is a very important question in this case."

And later:

> "With regard to Heibner, exhibit 32 [the confession] is vital. You must decide whether it is genuine or not, or whether it might have come into existence because he was so worn down by the treatment he received from the police and by anxiety for his family, worn down to the extent that he indulged in fantasy and invention, although on the face of it you may think the things he admitted inventing would get him into far greater trouble rather than get him out of trouble."

71. Though the CCRC considered it a misdirection to invite the jury to consider its truth, Mr Blaxland sensibly accepted that the jury would have known the Crown's case was that it was true only to a limited extent – Heibner admitted participation as lookout, its case was that he was the gunman. Mr Blaxland criticized the first direction as misleadingly suggesting that reliability could be tested by consideration of the statement's detail. He suggests absence of significant detail or special knowledge on the one hand and inclusion of details the Crown suggested were false on the other. The Judge should have directed the jury to take into account the false details in assessing reliability.

72. More importantly he suggests that since the trial the law on the required direction when voluntariness is in issue has been clarified in *R v Mushtaq* (2005) 1 WLR 1513. The House of Lords considered both S.76 PACE and the privilege against self-incrimination protected within Article 6 ECHR. The majority decided that a direction was required that if the jury found the confession obtained by oppression or other improper conduct it should disregard it. It follows that although the direction conformed with the then jurisprudence, to modern eyes it was a misdirection. A Mushtaq direction Mr Blaxland argued would have focused the jury's attention on the real issue, whether Heibner provided a partially dishonest confession because of pressure. What was necessary was a clear separate direction on voluntariness. For this reason alone, he argued, the conviction is unsafe.

73. We have decided that without close analysis of the merits of the submission we shall adopt the position for which Mr Blaxland argued, since that approach extends maximum advantage to Heibner. The Crown conceded that a Mushtaq direction would have directed disregard of any confession obtained by oppression or by improper conduct even were a jury sure it was true.

74. The position is not complicated. If the jury thought Heibner's partial confession consequent upon oppression we should be astonished were it to give it any weight. Nothing the Judge said in his directions undermines that position. His words told the jury that either the confession were genuine or it was a fabrication because of oppression and anxiety. There was no third option of a conclusion that it was true but

born of oppression. Consequently, loyal to the direction if the jury found it consequent upon oppression we think it highly unlikely it w ould have relied on it as true. We remind ourselves that even the Crown did not suggest it was wholly true.

75. Additionally, examination of what is said to amount to oppression reveals m ore than 42 hours in custody before beginning to conf ess, tiredness, and anxiety about his family. Those factors must be viewed w ith a sense of reality. Heibner had been committing crimes for fifteen years. Som e offences were se rious, and he was at tr ial serving fifteen years for armed robberies. He knew the system, indeed told the jury he had just been sitting there relaxing "I've been in that situation like hundreds of times". He knew Dixon. Dixon was easy to talk to. There is evidence that Heibner was at some points during his interrogation extrem ely anxious, but that the anxiety was triggered by the allegation he faced and by his sense of the net closin g in. He is recorded more than on ce as expres sing words to that ef fect. Addition ally, his ow n case was that the confession was untrue and not what the po lice wanted to hear. The inference is that he r ealized the po tential for advantage at sentence w ere his to be thought an ancillary role.

76. We do not accept that even if all Mr Blax land's com plaints were made out it is established that they would so have oppressed this experienced crim inal as to prom pt him to make the confession recorded. We reject this Ground.

**Ground 4: The direction on adverse consequences for Heibner's credibility of his evidence about matters not put in cross-examination was unfair**.

77. The Judge told the jury:

> " W hen a prosecution witness g ives evidence it is the du ty of the defence counsel to put to him …the accused m an's case…….[Counsel] …did that very painstakingly …but when Heibner gave evidence himself….he said a num ber of things which were never put to the witnesses at all…….Y ou remember at one stage of the tr ial I checked with [counsel] that had happened and he agreed it had. .
>
> When that sort of thing does happen it m ay mean that counsel, if he is inexperienced, has forgotten to put the things he should. That does not happen with skille d and com petent counsel such as we have had in this case. It may m ean the accused… has failed to instruct his advisors properly and Counsel did not know what was to be c hallenged, and it m ay m ean that the accused…has changed his story, say ing things h is counsel w as not aware of, or im provising or making it up as he goes along, or perhaps he has forgotten what he told his advisors."

78. Paul Garlick QC expressed hi s concern about the 'real im balance' between Heibner's defence team and both the Crown's team and that for Rossi. Heibner's leading counsel had to return the brief at short notice, junior counsel who took over was seven

years call and Mr. Garlick, two years call, came into the case the night before the trial. The suggestion by Mr Blaxland is that the defence was disadvantaged by inexperience and that for the Judge to invite adverse conclusions gave a false impression of the experience of counsel. There was a mass of detail. The difficulties of preparation were significant.

79. Further, the direction failed to introduce the consideration that Heibner might simply have misremembered what had been said and when in the interviews. Without such a qualification the direction was unbalanced. Heibner, Mr Blaxland told us confidently, more than once struggled to recall what was said and often could not recall his instructions.

80. For the Crown the submission is that the supposed inequality, assumed 37 years later, may not have been as marked to those involved in the trial as it might seem today. The Judge commented that leading counsel had taken the appellant through his evidence carefully and skilfully. In any event, Miss Whitehouse argues, the factual and legal issues were not complex.

81. In our view if this Ground goes to anything it is to an uncomplicated question of professional ethics. The presentation of Heibner's defence was certain to have been a considerable responsibility for junior counsel to assume at short notice. That said, the justification for two counsel includes just this eventuality. The jury was likely to have been less sensitive to this aspect than were counsel, since, in our view, a professional task was properly done. The Judge said as much. Had counsel for Heibner realised that an omission needed attention, his duty was to invite the court to permit him to remedy it so as to protect the position of the defendant. After dialogue there might have been an application for the recall of a witness, or counsel might have made a judgment call that it was best to avoid concentrating the mind of the jury on something particular and might have elected to make a closing speech in cautious terms.

82. Counsel took Heibner through his confession statement line by line. It was always open to Heibner to say, of any topic, that he could not recall and his counsel could have made that submission to the jury. In our view the trial process is well equipped to deal with situations like this, which are familiar to members of the profession and are very far from unusual. Advocates and judges deal with them with a sense on the one hand of judgment and on the other of grounded reality.

83. We do not accept that hindsight perfected over the intervening thirty-eight years shows this an error by the Judge. He did no more than set out possibilities. Juries, as the Crown reminded us, live in the real world and can work out how hard it is to remember detail. There is nothing in this Ground.

**Ground 5 New evidence**.

84. Since the CCRC considered this case, two witness statements from the original police investigation have been disclosed, which it is asserted had not been disclosed at trial.

H seeks leave to argue that they should have been disclosed in accordance with the then disclosure regime set out in *Bryant & Dickson (31 Cr. App. R 146)* and that once disclosed, no competent counsel would have failed to call those witnesses as the effect of their evidence would have been to exclude Heibner from participation in the murder. Consequently the conviction is unsafe.

85. Douglas Cobb and Patricia Strachen made statements to the police on 11th and 23rd September 1975 respectively. Cobb said that at about 5.25pm on the day of the murder he was driving along Goswell Road when, paused outside number 364, he saw a young male run from his right across the front of his car, turn left and disappear back down the road. The male was blond, slim and about 20 years old, wearing a shirt and dark drainpipe trousers. He had an unidentified object in his left hand. Miss Curran said that at some time after 5.25pm on the day of the murder, standing at the Angel she saw a young male run up Goswell Road and disappear down St John's Street. He was slim about 20 years old with fairish hair wearing a jacket and faded jeans. She could not see whether he carried anything.

86. On 9th April 1976 the Director of Public Prosecutions wrote to solicitors for Heibner disclosing the names and addresses of material witnesses not be relied upon by the Crown. Neither of the two witness's names was on the list. A letter of 28th May 1976 advised Solicitors that various documents, including the statement of persons not tendered at committal, could be inspected on a counsel-to-counsel basis by arrangement with counsel for the Crown.

87. It is at least possible that these statements were included within those offered for inspection. However in a recent witness statement dated 1st May 2013 Paul Garlick QC, junior defence counsel at trial, states that the existence of those witnesses had not been disclosed to trial counsel. Had they been they would have played a part in the defence case, undermining the Crown's case that Heibner was the gunman. On the basis that these statements had not been seen by trial counsel, the question is whether this is sufficient to provide Heibner with an arguable ground of appeal.

88. As to the timing of when Mrs Gold was shot, although there is no direct reference in the summing up to the witnesses Elaine Tibbetts and Alice Campbell who were walking past 364 Goswell Road on the day of the murder and heard bangs between 5.10 and 5.20pm, the Judge reminded the jury that the shooting was at about 5.15pm. It is argued that not only are the two witnesses likely to be describing one and the same man but also that there is a real possibility that he, whose description did not match that of Heibner, participated in the murder, undermining the Crown's case that Heibner was the gunman.

89. Because of the first witness's likely direction of travel, north from work to home, there is doubt as to whether the two were describing one and the same man. Moreover there must be real doubt as to whether, given the timings, the man could realistically be put forward as the gunman. It would be odd were a gunman to remain at the scene rather than flee it immediately after the killing.

90. However of even greater difficulty for Heibner is that, as he argues in relation to the previous grounds, one, if not the central, piece of evidence was his voluntary statement, exhibit 32, in which, whilst admitting aiding and abetting the killing, he denied being the gun man. Thus, although possible these statements could have been used to suggest that he was telling the truth about that, their effect may have been more likely to support the veracity of the voluntary statement.

91. We refuse leave on this ground.

92. **Ground 6 -** The CCRC reviewed witnesses statements of Richard Reeves and John Galvin dated respectively the 17th and 24th of September 1975. Neither prompted the CCRC to identify arguable grounds of appeal against conviction. However suggests that this evidence tended to undermine the Crown's case and should have been deployed at trial. Unlike the witness statements relied upon under ground 5, the existence of evidence from Reeves and Galvin was disclosed in a 9th of April 1976 letter from the Director of Public Prosecutions. Although Paul Garlick has no recollection of the existence of these statements, he is sure his leader would have inspected the unused material.

93. The evidence of John Galvin is that about 12 to 18 months pre-murder he was on two occasions approached by a man in a public house in Fulham and asked whether he would be interested in killing Mrs Gold on behalf of her husband for £5000.00. Despite telling the man that he was not interested, Galvin claimed he was provided with written details of the identity of Mrs Gold which, after the murder, was seen by Temporary Detective Constable Reeves.

94. The possibility that the murder was at the behest of her husband was clear from the known circumstances, namely the absence of himself and Mrs Brown from the premises at the time of the killing. Heibner's argument rests upon the description of Galvin's interlocutor not matching that of Rossi, something confirmed by Detective Chief Superintendent Lamont in his 25th of July 1979 report. This evidence deployed at trial would, it is contended, have undermined the Crown's case against Rossi and by implication against Heibner.

95. We see no force in this argument. Not only is it likely these witness statements were seen by Heibner's leading counsel, but also a decision not to rely upon them is wholly understandable. They were capable of supporting the evidence of Fagan that the murder was indeed a "contract killing." Furthermore, although the evidence could have been used to show that Galvin's interlocutor 12 to 18 months pre-murder was not Rossi, it is doubtful whether this would significantly have undermined the Crown's case against him, since the obvious point to be made was that an intermediary might have been used. We are even less persuaded this would have undermined the Crown's case against Heibner. We refuse leave on this ground.

**Ground 7 Evidence now available concerning the bad character of DCI Adams may have led to the defence exploring the significance of his involvement in the investigation and the consequent impact on the reliability of Heibner's confession**.

96. Adams retired in the rank of Commander in 1993. Between 1987 and 1989 he was the subject of an investigation by DAC W inship into allegations of corruption and misconduct. He faced neither crim inal ch arges nor d isciplinary pro ceedings as a result. However, the co re facts Mr B laxland argues provide cogent m aterial for cross-examination as to cred it. It is not a c ondition p recedent to the in troduction of such material that there sho uld have b een an adv erse dis ciplinary findin g or crim inal conviction.

97. A number of allegations reco rded by the MPS Departm ent for Professio nal Standards was not investigated because Adam s had by then retired. The picture which em erges is said to mean he could not now be put forward as a witness of truth.

98. We were ta ken to ex tracts f rom the W inship report which we summ arise. Some information about Adam s could have am ounted to a conspiracy, and an innocent explanation was difficult to identify. Ada ms' behaviour was at least unprofessional and unbecoming. He had close connection with King a former police officer who kept in contact not only with serving officers but also with a crim inal f amily. Adams employed him and took holidays with him . Alex Leighton another for mer officer worked for the notorious Ada ms (no rela tion to Comm ander Adam s) fa mily and Burrows family. Most significant, according to Mr Blaxland, was that a DS Coles had been investigated for corruption but Ada ms, disregarding orders, put Coles onto the RCS. Coles was an offi cer allowed anonym ity at the Lawrence Inquiry and Ada ms, giving evidence to it, deni ed knowing him . This, said Mr Blaxland, would be evidence of perjury, w ould fatally have underm ined Ada ms' credibility and have supported a submission on the dishonesty of the overall operation.

99. Whilst allegations subsequently m ade against Adam s should have been disclosed at trial, had the Crown known of them (i mpossible, as th ey were m ade post-trial) th at does not eq uate to th eir automatic admissibility. They were unsubstantia ted, some as to even ts m any m any years later. W e are conf ident, given Adam s' lim ited involvement in the m urder investigation a nd the lack of any evidence of collusion or conspiracy with other officers, that rigorous examination would ha ve been applied to whether, on these facts, they were relevant. It is not an invariable rule that evidence of misconduct post-trial in which the integrity of the officer was im pugned inevitably leads to a successful appeal. It depends on the facts.

100. The m aterial disclosed is unsubstantiated. Before it could be introduced any judge would be bound to consider the extent of satellite lit igation it would generate. Winship's conclusions would be inadm issible, so were th e material ruled appropriate for exploration the jury would have to he ar a ll allegations, tested f or th e first tim e. The satellite litigation would in ou r view ha ve been on a scale so enormous that any tribunal would have paused on this ground alone before admitting it.

101. We are far from convinced that this material would have been admitted. In any event, to what would it go?

102. The extent of Adams' involvement in this murder investigation is as follows: He ran RCS surveillance and had arrested Heibner for robberies. Despite intense interest in Heibner and though he was seen with Rossi on 4th and 5th Sept, on 8th he was seen to get into a car with Rossi which drove off and of which officers lost sight. Surveillance was called off, said Adams.

103. Mr Blaxland advanced this as possibly an inconsequential point or possibly of significance in connection to PC Tyers. At trial a deal of time and effort went into contesting his evidence. True, Heibner's case was that he had indeed been at the Angel but precise timing (he said he was there at 16.55) was disputed and his precise location disputed.

104. Supporting evidence for the Tyers account could have come from the confession. But Heibner's counsel used the attack on Tyers - not part of the surveillance team - to attack the credibility of the entire police body of evidence. It was open to the defence to say it cannot be true. Why would the surveillance be called off? This rhetoric question Mr Blaxland argued showed how ludicrous it was that it should have been, at least without ulterior motive. He confidently asserted that far from being abandoned it was continued. Officers would have seen Heibner at the Angel, just as Heibner told the jury he was. If he were at Angel, he was not at Goswell Road murdering Mrs Gold.

105. This complicated submission relied on a number of building blocks. Before the Dixon interview Dixon knew Heibner had been seen by Tyers at Angel. One explanation is that Adams, who had the Tyers information, knew from his own team that Heibner had been at Angel but needed to conceal the continuing surveillance operation. Adams thus needed someone to say Heibner had been at Angel. Had surveillance continued the team of observers would have known Heibner did not commit the murder. Tyers filled that gap. Tyers, Mr Blaxland suggested, only makes sense if someone knew Heibner had in fact been at Angel between 4.55- 5. Adams, he asserts, knew and specifically recruited Tyers to make a false statement. Tyers had to know about the surveillance operation because Tyers would have known that the defence case was that Heibner had not gone to Goswell Rd.

106. Invited to take us to the evidence for all this, Mr Blaxland said it was an avenue which would have been explored. Its foundation is Adams' bad character, revealed in the Winship report. Adams took witness statements (in the robberies investigation) from Miss Priestaff and from Parker. Although not involved in the murder investigation he was involved in the arrest of Heibner for robberies. Finally Leslie Joyce, a fellow prisoner, lent support to the contention that Adams had an important orchestration background role.

107. The first of many difficulties in the way of such a bold submission is indeed the role Adams played in the murder investigation. We have set it out. He was investigating robberies and was in charge of the 8th September surveillance team which watched Heibner. He interviewed Heibner about the robberies on 12th and 13th September 1975. That was the extent of his involvement.

108. To make good the submission, the following would have been required. Adams had to frame a wholly innocent man, destroy records, and corrupt an entire team, unless we assume it was already corrupted. There is nothing to suggest Adams knew on 8th September that Heibner would be arrested on 20th October, so it was in October that he must have decided to frame Heibner. The conspiracy had to be complete before matters were put to Heibner in interview. Then, so the reasoning goes, Adams needed someone to say Heibner was seen at Angel. There is not the slightest evidential basis for any such proposition.

109. To suggest it is surprising the surveillance was called off is speculation 38 years after the event. The importance for Heibner of it being called off is that it deprived him of an alibi if he did not commit the murder. The implication seems to be that Adams knew the murder was going to happen and wanted to inculpate Heibner by depriving him of an alibi. This requires so much confidence in matters not canvassed, not put, and wholly unsupported by evidence that the argument is fanciful and we reject it.

110. There is nothing in this Ground and we refuse leave.

111. **Ground 8** O'Brien was suspended from duty in July 1977 on the basis of an allegation that he failed to report an accidental meeting at Royston Heath Sporting Club on 24 July 1977 with Alexander Eist, a former police officer then on bail. O'Brien had previously informed a superior officer that he was "liable to meet" Eist, and been told to report it if it happened.

112. Information on file was that O'Brien suggested to a junior officer that an allegation of corruption against another officer should not be reported. This suggestion was never the basis of a disciplinary charge.

113. Both these matters related to events after Heibner's trial. O'Brien retired on 22 April 1978 on medical grounds, and the Eist meeting allegation was never tested in disciplinary proceedings. O'Brien therefore had no disciplinary finding against him. He had no criminal conviction. There was no proven matter indicating bad character.

114. There was little challenge to the content of the interviews he conducted. He faced an attack on the timing and circumstances of the involvement of Dixon, and a suggestion that Heibner's treatment in custody before his confession amounted to oppression.

115. The first point was fully canvassed before the jury and we have dealt with it in detail above. Dixon was unsure when he got the call to the police station. O'Brien said Dixon was asked to attend at about 4pm. Heibner says that cannot be right, since Dixon was fully briefed and prepared with copy witness statements, on the basis of which he "broke the appellant's resolve", within too short a time.

116. The second point was also fully developed as relevant to the reliability of the confession.

117. Mr Blaxland submits that the evidence of bad character now available would be admissible and powerful evidence in favour of Heibner. We should conclude that it renders the conviction unsafe.

118. We reject this submission on both grounds. We consider it highly unlikely that unproven allegations of this kind, taking place (if they did take place) well after the trial, would be admitted. If admitted they would add little or nothing to the jury's thinking. The suggestion of lying and manipulation by police officers was fully explored, the attack on O'Brien forceful. Even if this material were before the jury, any judge would give the strongest possible warning about relying on such unproven allegations as providing safe support for an allegation of a major conspiracy to pervert justice. This material does not render the conviction unsafe.

119. **Ground 9** goes to bad character evidence now available in relation to Tyers. He was required to resign from the police in 1980 following proof of three breaches of discipline, in that he had three meetings in 1977 with John Goss, a man with serious previous convictions. Some thirty years later, Tyers was formally cautioned for theft of £240 cash from his employer.

120. Mr Blaxland argues that the jury aware of these matters would have viewed in a different light the attack on Tyers' and that the conviction is consequently unsafe.

121. We are content to assume it more likely than not that these matters would be admitted at trial today, and to a degree would damage his credibility. However that does not render the conviction unsafe, for a number of reasons.

122. The underlying disciplinary misconduct and the much later theft are very different in nature from and markedly less seriousness than a conspiracy to pervert the course of justice in a murder investigation. The caution came decades later. The jury would have to be warned to be very careful in drawing conclusions from these matters beyond the immediate question of the reliability of the witness.

123. In any event only the detail, not the substance, of Tyers's evidence was in issue. Heibner's case was that he was in the vicinity of the murder at the relevant time. Tyers's credibility was put firmly in issue, as is clear in the summing-up.

However, the Judge told the jury, in fairly strong terms, that even if it assumed Tyers had given honest evidence, such identification evidence was very unreliable. Hence, even if an honest witness, Tyers gave inherently unreliable evidence of facts which were not really in issue.

124. The matter does not end there. Were this bad character evidence admitted it might be deployed to support the suggestion that Tyers was giving dishonest evidence to support the Crown's case, and thus to support the general allegation of conspiracy. That would be followed by a clear direction that the jury should be careful about drawing such broad conclusions from this type of evidence, for the reasons we have given. In our view this evidence neither strikes away any important plank in the case, nor is capable of supporting a conspiracy by senior officers to the extent that the conviction is unsafe.

## General points

125. Miss Whitehouse made an overarching submission on the passage of time. Much material has been lost, some participants in the trial are dead and those who remain have an incomplete memory. On the other hand the Judge, jury and counsel had a complete record and familiarity with detail. Heibner now relies on speculative theories which give rise to a danger of usurping the trial process. We agree.

126. This case is about the safety of the conviction, no matter the label attached to any Ground. We have considered the Grounds advanced in consequence of the CCRC referral, singly and compendiously, and those for which leave was sought, also singly and compendiously. We took time to review the entirety of the arguments.

127. Were the trial conducted now its shape and its founding procedures would be different. Statute and developed jurisprudence have had as their aim the fortification of the likelihood that the interests of justice are served. It is almost inevitable, thirty-eight years on, that exhaustive examination, especially in skilled hands, will point up areas which in hindsight would or should have been approached differently. Miss Whitehouse put it well. One can find lots of holes but holes do not make a garment unwearable.

128. We repeat: we have applied tests advantageous to Heibner so as to extend to him the greatest available protection as he prosecutes his appeal.

129. We see nothing to make us doubt the safety of this conviction and this appeal is dismissed.