269. Those crime based witnesses who gave evidence on behalf of the Defence were adamant that

270. The Defence further relies on the evidence of the 1st Accused and those in support of his evidence that he was not in Kono District as alleged by the Prosecution. The Defence therefore submits that the Accused could not be guilty as alleged.

Koinadugu District

271. The Prosecution failed to adduce evidence of acts or omissions of Tamba Brima in relation to sexual violence in the Koinadugu District. Witness TF1-209 gave evidence of rapes including of herself by some men who had captured her. She did however say that of her two captors one belonged to the group of S.A.J. Musa and the other belonged to the group of Superman who has been established as belonging to the RUF. S.A.J. Musa was according to the Prosecution case at all times superior in rank and position to Tamba Brima and also from Prosecution evidence it is clear that Tamba Brima took orders from Musa.[315] The witness makes no mention of Tamba Brima having been present or that she heard his name being mentioned.[316] Indeed the evidence of Tamba Brima in Koinadugu District is that he went to S.A.J. Musa from whom he received orders to find a base in the north.[317] The Prosecution has therefore failed to adduce establish sufficient evidence to establish a case that Tamba Brima could have acted or that he omitted to act to prevent sexual violence in the Koinadugu District.

272. The Prosecution also led evidence from witness TF1-133 who gave evidence of abduction and sexual assault. This witness' evidence is about being abducted by soldiers belonging to Brigadier Mani's group in Koinadugu District where she eventually became 'Mami Queen' residing in Brigadier Mani's house.[318] Earlier, the Chamber had heard evidence from Witness TF1-334, who said that on going to SAJ Musa for instructions at

[315] Evidence given by witnesses TF1-334, TF1-167, TF1-188
[316] See evidence of 7th July 2005.
[317] Evidence of TF1 -167 on the 15th September 2005
[318] Evidence of 7th July 2005

Mongo Bendugu, Tamba Brima was advised by S.A.J. Musa to go to the North and join Brigadier Mani.[319] No evidence was adduced form which a conclusion can be drawn that Tamba Brima and Brigadier Mani ever met during the entire period after retreat from Freetown in February 1998. This further reinforces the Defence position that there is no evidence however slight that the 1st Accused could have acted to prevent sexual violence in the Koinadugu District.

Bombali District

273. Evidence of rape – Witness TF1-334 said he say soldiers raping women, but there is very little detail to what he claimed to have seen. Apart from saying that the fighters objected to seeing naked women, he failed to tell the court of the presence of any commander or whether they saw and failed to stop it.[320]

On the 14th July 2006, DBK 101 testifying on behalf of the Defence gave evidence of an attack on Kamagbengbeh including rape. The Prosecution challenged this. This was a curious decision, given that an attack for which they did not lead evidence had been given to the Prosecution on a plate by a Defence witness whose sole purpose for the Defence was to provide evidence of the names of the Commanders who were not the Accused persons. The Defence submits that the veracity if this evidence was challenged because the Prosecution know full well that there is no evidence of sexual violence in the Bombali District and if there is there is no nexus between any such crime and the Accused persons, but more particularly the first Accused.

Kailahun District

274. The Defence relies on its previous submissions as regards Kailahun District.

Freetown and the Western Area

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[319] Page 96-87 of the Transcript of 20th May 2005
[320] See evidence of the 23rd May 2005

275. Witness TF1-334 gave evidence of the 1st Accused acquiring a new woman at Statehouse where a lot of sexual violence was being committed.[321] Under cross examination he admitted that he had not seen the 1st Accused actually commit any such offence.

Port Loko District

276. The Defence has given a lengthy analysis of the evidence of TF1 – 256 above under unlawful killing and would not seek to repeat those observations here. However, this witness also gave evidence of rape of several women namely Yebu, Abie, Rugie and Kadija (Kadi Kadi). All of this was hearsay evidence. There is no first hand evidence of what happened to these ladies although the witness stated that Yebu and Rugie were in the village and that Rugie spoke to the Special Court.[322] In the case of Rugie the witness had said in examination in chief that the man continued raping her all the time and that he had been told this by Rugie. He further stated that when Kadi Kadi was captured she was raped, as was Abie when taken at night. We do not know how the witness knew this, whether he was present or whether he formed an impression for the recent events in the town. However he came to form this knowledge and/or opinion, the Defence objected to the admissibility of this evidence. The Trial Chamber ruled that the evidence was admissible in the absence of the person and that it is a matter of the weight to be attached to it. That being the case, the Defence submits that for the reasons stated above no weight should therefore be attached to this piece of evidence. This is even more so as it appears for the witness' own evidence that at least two of the people he named were alive and in the village and clearly available for interview.

277. By reason of the foregoing the Defence submits that a verdict of niot guilty be returned for Counts 6 to 9.

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[321] Evidence of 14th June 2005
[322] See Cross Examination of the witness by Counsel for the First Accused on the 14th April 2005

Counts 10-11 Physical Violence

278. In its Rule 98 Decision, the Trial Chamber indicated that in order prove the crime of "outrages upon personal dignity" as alleged, the Prosecution should lead evidence to prove the elements of the offence within the meaning of Article 3.e of the Statute as follows:

a. that *"the constitutive elements of violations of Article 3 common to the Geneva Conventions and of Additional Protocol II"* are present in the prohibited conduct,
b. that "*the accused caused an outrage upon the personal dignity of the victim*",
c. that "*the humiliation and degradation was so serious* as to be generally considered an outrage upon personal dignity",
d. that "*the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise to be a serious attack on human dignity*"; and
e. that "the accused knew that the act or omission could have such an effect".[323]

279. Count 10 alleges the crime of "violence to life, health and physical or mental well-being of persons, in particular *mutilation*", a form of "physical violence" and a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.a of the Statute. In its Rule 98 Decision, the Trial Chamber noted that in order prove the crime of "mutilation" as alleged, the Prosecution should lead evidence to prove the elements of the offence within the meaning of Article 3.a of the Statute as follows:

a. that *"the perpetrator subjected the victim to mutilation*, in particular by permanently disfiguring the victim, or by permanently disabling or removing an organ or appendage of the victim";
b. that "*the perpetrator's conduct caused death or seriously endangered the physical or mental health of the victim*";

[323] See para. 115 of the Court's Rule 98 Decision.

c. *"the perpetrator's conduct was neither justified by the medical, dental or hospital treatment of the victim, nor carried out in the victim's interest"*;
d. that *"the victim was a person protected under one or more of the Geneva Conventions of 1949 or was not taking an active part in the hostilities at the of the alleged violation"*;
e. that *"the violation took place in the context of and was associated with an armed conflict"*; and
f. that *"the perpetrator was aware of the factual circumstances that established the protected status of the victim"*.[324]

280. The evidence analysed below and in relation to the other counts shows that the Prosecution has failed to prove its case.
The offence of "other inhumane acts" in count 11 as a crime against humanity punishable under Article 2.i of the Statute has already been dealt with under Count 8 herein.

Kono District

281. The evidence given by TF1 – 072 also confirms the superiority of Savage in Tombodu area. This witness whose hand was amputated by Savage was captured along with a friend and taken to Savage who accused him of killing soldiers and of not being there when they came to save them. This supports evidence of other witnesses that Savage was in charge of Tombodu and did not take orders from anyone. That being the case, it cannot be said that the 1st Accused can be held responsible for the actions of Savage. This was supported by the evidence of DAB 023 who gave evidence of the control of Savage in Tombodu.[325]

282. Furthermore the evidence of TF1 – 074 (witness on whom the letters RUF, AFRC were inscribed) appears to be a confusion as to which organisations people belonged

[324] See para. 172 of the Court's Rule 98 Decision.
[325] See evidence of 31st July 2006

to.[326] At page 13 of the transcript the witness said that on their third day in Wordu, one of the rebels was told to take a letter from Komba Gbundema (RUF man) "to the boss man with whom we were, and they said that they were report to Kayima". Furthermore the witness at pages 29 and 30 of the transcript that himself and others were taken to the front as cartridge and bomb carriers. He remained 3 years with his captors (1998 – 2002) during that period the 1st Battalion commander was Komba Gbundema and he was with the operation and company commander Captain Barry (RUF). In his four years of capture, he was only taken to Yiffin (front). In that period, the battalion commander was Major Komba Gbundema (RUF). Captain Ibrahim Ticker was also from RUF. The witness also came across Captain SK, the operation commander of the 4th Battalion (RUF). This clearly indicates that what happened to the witness was clearly the work of the RUF, who were in charge and carried out these mutilations. Under cross examination it was put to the witness that in a previous statement to the Investigators from the Special Court he had said that a man named Katta had marked him.[327] The witness refused to accept that he had said that, but this only goes to reinforce the point that this witness' evidence is confusing and cannot be relied upon. Also, although this witness had said he was captured by one Bangalie of the AFRC who was in full combat uniform in his statement given to investigators from the Office of the Prosecutor he had said that he was captured by rebels mainly RUF.[328] It is submitted that Tamba Brima could not hold individual responsibility for the work of person or persons over who he exercised no control. There is in any event no evidence upon which the Prosecution can rely that Tamba Brima by his acts or omissions was individually responsible for the actions of these perpetrators.

283. The evidence of TF1 198 cannot be used as proof of physical violence in the Kono District. That witness who gave evidence on the 28th June 2005, gave a description of physical violence the type of which is not alleged in the indictment at paragraph 59.

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[326] Evidence of 5th July
[327] Page 8209 of prosecution statements
[328] Page 8208 of statement

Moreover, the witness says she was asked if she did not want Foday Sankoh[329] which by itself indicates that the persons who abducted her were members of the RUF.

284. Evidence given by TF1-206 also confirms that amputations did take place in Kono. However as pointed out in paragraph above this witness could not tell which faction the rebels belonged to and therefore cannot support any assertion that Tamba Brima was part of or was responsible for these act or omissions.

Kenema District:

285. As stated above, the evidence adduced is that Sam Bockarie alias Mosquito was in total control of Kenema District and the Eastern Province. Indeed, although Sam Bockarie was part of the Supreme Council at the inception of the AFRC government, the Prosecution evidence is that he soon left the government to return to Kenema where he exercised control to the exclusion of all others.

286. The Defence position is that the Prosecution evidence adduced is insufficient to uphold any assertion that Tamba Brima has a case to answer for any offences committed in Kenema town, Kenema District, Kailahun District and the Eastern province as a whole.

Koinadugu District:

287. The Defence called in support of his case DAB 089.[330] This witness, a crime based witness is from the Koinadugu District. This was a witness who had the words RUF inscribed on his forehead and his chest by his captors.[331] There was no mention of AFRC and he had only heard the names of SAJ Musa as leader of the SLA and Superman as leader of the RUF.[332]

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[329] Page 20 of the Transcript
[330] See evidence of 24th July 2006
[331] See pages 53 and 54 of the transcript of 24th July 2006
[332] Id page 55

Count 12: Use of child Soldiers

288. Count 12 alleges the crime of "conscripting or enlisting children under 15 years into armed forces or groups, or using them to participate actively in hostilities", an other serious violation of international humanitarian law, punishable under Article 4.c of the Statute. In its Rule 98 Decision, the Court noted that in order prove the aforesaid crime as alleged in the Indictment, the Prosecution should lead evidence to prove the elements of the offence within the meaning of Article 4.c of the Statute as follows:

a. that *"the perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities"*;
b. "*such persons were under the age of 15 years*";
c. that "*the perpetrator knew or should have known that such person or persons were under the age of 15 years*";
d. that "*the conduct took place in the context of and was associated with an armed conflict*"; and
e. that "*the perpetrator was aware of the factual circumstances that established the existence of an armed conflict*".[333]

289. No evidence that Tamba Brima individually or in concert with others ordered the abduction of children or the use of abducted children as soldiers.

290. TF1-199 a child at the period under review gave evidence that he was abducted by Lieutenant-Colonel Savage and Lieutenant Marah who belonged to Brigadier Mani's group.[334] Evidence before the Trial Chamber has never suggested that Brigadier Mani's group came in contact with Tamba Brima or any group of which he is part. Futhermore Brigadier Mani has been said to be senior in rank and position to Tamba Brima.

291. The description given by witness TF1-157, another child soldier, of the person he referred to as Gullit, and the person whom the Prosecution say is Tamba Brima of fair in

[333] See para. 194 of the Court's Rule 98 Decision.
[334] Evidence of the 6th October 2005.

complexion, not very tall, has a stammer when he speaks and is bulky does not fit the person who answers to the name of Tamba Brima and is one of those accused. TF1-158 also fails to describe Tamba Brima describing him as wearing sun glasses, helmet, jacket uniform and a pair of short, a description which would fit any of the men amongst whom he was being held.[335]

292. Moreover there was no evidence put forward that Tamba Brima was aware of the presence of these child soldiers or was involved in their abduction, training and decision for them to fight. The Prosecution would like the Chamber to accept that Tamba Brima did know or if he didn't then he ought to have known. However none of the witnesses either TF1-157 or TF1-158 described any contact with Tamba Brima save to say that TF1-157 said that he became aware of the names of some of the rebels and soldiers and he mentioned the name Guliit amongst others.[336] TF1-157 could only say that he knew 'they' were bosses by the way they spoke to people. His evidence is littered with what 'they' did but we are not clear who they are, under whose command, who exercised command and control or who carried out the crimes against TF1-157 and other child soldiers.[337] Other witnesses also failed to show any connection with the child soldiers by Tamba Brima or any command by Tamba Brima over them

293. Witness TF1-334 gave evidence of an order from the Accused that the abducted children should be distributed.[338] He failed to expand on how it was to be effected, when to and whom this distribution was to be made. Indeed witness TF1 -334 had said that Gullit on ordering the attack on Karina said that strong men should be captured[339]. He doe not say that he ordered the capture of children. Similarly witness TF1-167 makes no mention of an order given by Tamba Brima for the abduction of and use of child soldiers. The evidence of witness TF1-167 differs, in that he said that Accused order that Karina must be burnt down 'and anyone who sets hands on must be killed.[340]' This piece of evidence is unsupported by any other witness of fact who claims to have been present and

[335] Evidence of 26th July 2005
[336] Evidence given on the 22nd July as pages 90-91 of the transcript
[337] Evidence of 22nd and 25th July 2005
[338] Evidence 23rd May 2005
[339] See evidence of 23rd May 2005 – page 58 line 27 of transcript.
[340] Evidence of 15th September 2005, page 54, line 1 of the transcript

been part of the assault on Karina town. The Trial Chamber is expected to assume that the distribution was made in order that the children are trained to fight. Furthermore we do not know how the witness came by this information. Without any foundation, the Prosecution cannot rely on this evidence to support its assertion. Furthermore the witness TF1-334 said that he trained children abducted from Karina and trained at Rosos. At no point during his extensive evidence on this point does he say that he was ordered to do so by Tamba Brima.[341] Also the witness appeared to be painting a picture of a well organised training course where details of ages and place of residence were taken by him and records of all the children were kept. Yet, he failed to elucidate on these records, produce them or provide any evidence upon which the Chamber can safely conclude that a record of these children's ages were kept in order to conclude that those trained by this witness and who are the subject of count 12 were underage. This piece of evidence does not support any assertion that Tamba Brima conscripted or enlisted children under the age of 15 years into armed forces or groupings.

Abductions and Forced Labour

294. The 1st Accused is also charged with abductions. The witness TF1-334 gave evidence of the 1st Accused abducting a 12 year old girl at State House in Freetown. However, during cross examination, he described this 12 year old as a lady and admitted he merely saw her with him and did not see any actual abduction, nor did he see him abduct any person[342]. This is important evidence as it comes from a witness who claims to have been with the 1st Accused throughout from Kono in 1998 to Freetown in January 1999. There is no evidence of the First Accused personally abducting any person.

Kenema District

295. The Prosecution led evidence on force labour in the Kenema District. However, the Defence submits that the Prosecution failed to adduce sufficient evidence of abductions

[341] Evidence of 24th May 2005 pages 24 to 30 of the Transcript.
[342] See Transcript of proceedings of 16th June Cross examination by Counsel for the 1st Accused at page 3 lines 5-21

and forced mining in the Kenema District. Witness TF1-045 a former RUF combatant, who gave evidence of mining in Tongo Field in the Kenema District gave no reliable evidence upon which the Prosecution can rely.[343]

296. The witness' evidence was as follows:

Q: Thank You. In your presence did you witness anything happen to civilians who were mining?
A: Well yes. I saw. That was done the forced mining. When they were doing the morning, some of them were forced to mining you see. So I saw that.
Q: Again if you know or if you saw what would happen to a civilian who refused to mine.
A: Well if you refused to mine and you are captured you will be beaten, you will undergo serious torture, if.... And if you are not lucky you will die. They will shoot you with a gun.
Q: Mr Witness did you see this happen to civilians in Tongo?
A: I .saw it on many occasions when it took place. I saw it[344]

297. It is noteworthy that the witness does not give a description of what he claims to have seen for him to form the conclusion that this was forced labour in the mining fields. There is nothing about who said what, when, how and to whom. This evidence does not support any assertion that Tamba Brima was acted or omitted to act in relation to abductions and forced labour in the Kenema District. This witness gave the names of those present in Tongo at the time and indeed those persons who were in charge of the mining and other operations in that particular area. The witness' identification of the Defendant was on two occasions neither of which was at Tongo.

298. Witness TF1-122 also stated that AFRC and RUF formed a very strong team and left for Tongo Field, Lower Bambara Chiefdom, Kenema District, between May 1997 and March 1998 He stated they were heavily armed and that Issa Sesay and Akim were

[343] Evidence of the 19th July 2005
[344] Page 55 of transcript, lines 9-20

among them.[345] The Prosecution's case is that Issa Sesay was a high ranking RUF official and indeed one of those who bear the greatest responsibility. The witness went on to say that two days later, a lot of displaced people came from Tongo and reported to him that they were attacked by RUF/AFRC at Tongo Field they killed and captured a lot of men, to do diamond mining for them. This evidence is unreliable. Though the witness was a police officer at he time, he demonstrated no knowledge of what transpired in Tongo except for what he had been told and nor did he make any effort to verify if what he had heard was indeed a fact. It is at best a general statement without foundation and as such cannot be relied upon as evidence of forced labour for which Tamba Brima can be held responsible.

299. The Defence also relies on the evidence given by DAB 033 that the mining in Tongo was under the RUF command.[346] Therefore any forced labour done at the Tongo mining fields was under the command of the RUF.

300. The Defence submits that no witness Prosecution or Defence ever stated that they saw the First Accused visit either Kenema or Tongo or any other part in the Kenema District. Yet this was put to in cross examination of DAB 147 by Counsel for the Prosecution as a theory of the Prosecution case. The witness answered in the negative[347]. The Defence submits that this is further evidence of the Prosecution moving the case to be met by the Defence. It if anything is a revelation that the Prosecution itself lost track of what its case was and what case the Defence was required to meet.

Koinadugu District

301. The evidence of the Prosecution witnesses is that Koinadugu was the base of S.A.J. Musa a commander senior in position and rank to Tamba Brima and Denis Mingo alias Superman of the RUF. Whilst evidence was led of visits to SAJ Musa, in the Koinadugu

[345] Page 71 of Transcript of 24th June 2005
[346] See Transcript of 2nd October 2006 page 53 lines 22 to the end
[347] See Transcript of 3rd October 2006, page 65 at lines 20-28

District, there is no evidence of Tamba Brima ever commanding troops in the Koinadugu District. This was further corroborated by witnesses for the Defence who came form that district. Events in Koinadugu cannot therefore be put on the door step Tamba Brima.

Bombali District

302. When the Prosecution opened its case, Mr David Crane[348] said thus

> *"After being moved toward Makeni, this witness will testify that she saw 130 children were kept by Brima, Kanu and another indictee and Issa Sesay of the RUF amongst others"*[349]

303. The Defence submits that the Prosecution failed to adduce any evidence of the First Accused being involved in the abduction of children in Makeni.

304. Evidence was adduced of abductions in the areas of Bonoya and Karina in the Bombali District. There is however no evidence that the First Accused ordered or participated in the abductions of theses individuals.

305. The Defence submits that the Prosecution failed to adduce sufficient evidence of abductions and forced labour by the First Accused in the Bombali District.

Kailahun District

306. The Defence relies on the submissions made above in relation to Kailahun District.

307. The Prosecution's own evidence was that this was an area controlled the entire period of the war by the RUF.[350] This evidence is supported by witness TF1 -045 who

[348] Then Prosecutor of the Special Court
[349] See Transcript of 7th March 2005 at page 27 line 29, continuing on page 28

said that he was amongst those who effected the arrest of Gullit, the person whom the prosecution say is Tamba Brima. This witness also said that Mosquito used force on Johnny Paul Koroma the leader of the AFRC and that Issa Sesay another senior RUF figure raped the wife of Johnny Paul Koroma.[351] The evidence of Tamba Brima's arrest in Kailahun is further supported by witness TF1 -167 and TF1-334. Furthermore witness TF1 – 113 gave evidence that she was based in Kailahun and worked in the RUF hospital. Her evidence described the control exercised by the RUF over that district which included the need to obtain passes from the RUF when moving around and the fact that Sam Bockarie alias Mosquito shot ordered the killing of some people and personally shot two people in her presence for allegedly being Kamajors. The witness goes on to say that another ten people were killed by a roundabout by Mosquito[352]. Indeed Witness TF1-045 gave evidence under cross examination of Mosquito's extensive controlled over the Eastern province which included Kono, Kailahun and half of the Kenema District including Tongo[353]

308. Witness TF1-334 also said that Tamba Brima had mentioned being detained by Mosquito in Kailahun. This evidence is supported by witness TF1 -045 who said that he was amongst those who effected the arrest of Gullit, the person whom the prosecution say is Tamba Brima. This witness also said that Mosquito used force on Johnny Paul Koroma the leader of the AFRC and that Issa Sesay another senior RUF figure raped the wife of Johnny Paul Koroma.

309. This evidence of the control wielded over the district by Sam Bockarie was supported by witnesses called on behalf of the Defence. Defence witness DAB 142[354] gave evidence that she did not witness a good relationship between the RUF and the soldiers.[355]

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[350] See the evidence of Zainab Bangura and TF1-113
[351] See evidence of TF1-045 of 19th July 2005 pages 96-100 of the Transcript.
[352] See evidence of witness TF1-113 18th July, 2005 – pages 84 to 90 of the Transcript
[353] See evidence of 21st July 2005 at pages 53 to 54 of the Transcript.
[354] This witness gave evidence of herself being a victim of force marriage by the RUF.
[355] See Transcript of 19th September 2006 at page 27 line 17 onwards and page 28 lines 1-15

310. There could therefore be no nexus between Tamba Brima with any or all the events which took place in Kailahun District even relying on the Prosecution's own evidence. Any atrocities whatever they may have been can be laid squarely at the door of Sam Bockarie and the RUF.

Freetown and the Western Area

311. It is the Defence case that the First Accused was not present in Freetown at the relevant period of the indictment.

Port Loko District

312. The Prosecution also led evidence from witness TF1-310, who had witnessed indiscriminate killing and had been shot herself. The witness was unable to tell the court which armed faction the armed men belonged to[356]. It would therefore be unfair to the Accused person if an assumption is made or an inference is drawn from this piece of evidence that the perpetrators belonged to a group or faction over which he exercised control.
There was no evidence adduced of any operations carried out in Koinadugu District by the group which Prosecution witnesses have said was being led by Tamba Brima.

Count 13

313. Count 13 alleges "enslavement", another crime against humanity punishable under Article 2.c of the Statute. The said enslavement, according to the Indictment, took forms of "abduction and forced labour". Like the crimes outlined above, the Court, in its Rule 98 Decision, noted that in order to prove the crime of "enslavement" as alleged, the Prosecution should lead evidence to prove the elements of the offence as follows:

[356] See evidence of the 5th July 2005

a. that "*the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty*",

b. that "*the conduct was committed as part of a widespread or systematic attack directed against a civilian population*"; and

c. that "*the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population*".[357]

314. The Court adopted the International Criminal Court's Preparatory Commission's Elements of Crimes, designed to assist judges in their interpretation and application of subject matter articles of the Rome Statute, in order to set forth the foregoing elements of the crime.[358] These elements, the Court held, "incorporates the definition [of the crime of enslavement] given in the ICTY case of *Prosecution v. Kunarac*[359] with the common elements of crimes against humanity"[360]. Thus, for *Kunarac*, the *actus reus* of the crime of enslavement comprises "the exercise of any or all of the powers attaching to the right of ownership over a person" and the *mens rea* comprises "the intentional exercise of such powers"[361].

315. The Defence refers to analysis of the individual crime bases above. It is submitted that there is no evidence before the Trial Chamber capable of supporting a charge of enslavement.

Count 14

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[357] See para. 214 of the Court's Rule 98 Decision, *supra*.
[358] Id., citing, Rodney Dixon and Karim Khan, *Archbold International Criminal Courts Practice, Procedure & Evidence* (London: Sweet and Maxwell, 2003), para. A3-011 etc.
[359] ICTY IT-96-23-T & IT-96-23/I-T, Judgment, at paras. 540-42 [hereinafter called "*Kunarac* Judgment"].
[360] Para. 215 of the Court's Rule 98 Decision, *supra*.
[361] See the *Kunarac* Judgment, *supra* at para. 540.

316. Count 14 alleges "pillage", a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II and punishable under Article 2.f of the Statute. The said enslavement, according to the Indictment, took forms of "abduction and forced labour". Like the crimes outlined above, the Court, in its Rule 98 Decision, noted that in order to prove the crime of "enslavement" as alleged, the Prosecution should lead evidence to prove the elements of the offence as follows:

a. that "*the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty*";

b. that "*the conduct was committed as part of a widespread or systematic attack directed against a civilian population*"; and

c. that "*the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population*".[362].

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[362] See para. 214 of the Court's Rule 98 Decision, *supra*.
[363] Id., citing, Rodney Dixon and Karim Khan, *Archbold International Criminal Courts Practice, Procedure & Evidence* (London: Sweet and Maxwell, 2003), para. A3-011 etc.
[364] ICTY IT-96-23-T & IT-96-23/I-T, Judgment, at paras. 540-42 [hereinafter called "*Kunarac* Judgment"].
[365] Para. 215 of the Court's Rule 98 Decision, *supra*.
[366] See the *Kunarac* Judgment, *supra* at para. 540.

318. The Defence states herein that the first, second and third elements of ICC elements as set out above, and adopted by the Trial Chamber have not been fulfilled as regards "count 14: looting and burning," indicted as "pillage" with regard to the burning aspect thereof. It is therefore the submission of the Defence, that burning does not fall under the definition of pillage.

319. In *Prosecutor v. Delalic et al.*, the ICTY Trial Chamber observed that "the offence of unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'."[367] Therefore, pillage requires appropriation, while the burning of property is something different: no property is appropriated, and there is certainly no intent of appropriation.

320. The Defence finds support for its argument in the Statute which specifically provides in Article 5(b)(i), (ii) and (iii) for wanton destruction of property, more specifically *"[s]etting fire to dwelling – houses, any person being therein (...),"* *"[s]etting fire to public buildings (...),"* and *"[s]etting fire to other buildings (...)."* The Prosecution thus deliberately chose to categorize burning, as alleged in the Indictment, as pillage, which does not fulfil the required elements.

321. As regards the evidence led in support of this count, much of it has been analysed above. The Defence however submits that so far as the evidence regarding Count 14 refers to Bo District, Prosecution witness TFI-334 stated that AF Kamara was supervised by the deputy-chairman, SAJ Musa [368] and Colonel Boissy Palmer was under the direct command of the chief of army staff. [369] There two people as stated above were all present and in some authority in Bo and if we were to rely on the hierarchy given by witness TF1-334, were supervised by SAJ Musa a person we were told the First Accused was

[367] *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 591.
[368] Witness TFI-334 TT 17 May 2005 pages 17-18
[369] Witness TFI-334 TT 17 May 2005 pages 21

subordinate to. Moreover, defence witness DAB-059 testified that the First Accused had no command and control over the SLA's in Bo and that Brigadier Boysie Palmer was the brigade commander in Bo[370].

322. The Defence submits that the evidence of TFI-004 cannot reasonable support a conviction.

323. As regards Koinadugu District, Indictment alleges that "between about 14 February 1998 and 30 September 1998, AFRC/RUF forces engaged in widespread looting and burning of civilian homes in various locations in the District, including Heremakono, Kabala, Kamadugu and Fadugu[371] Prosecution Witness TFI-199 testified that in Fadugu the rebels attacked the town and in the centre of town rebels burnt houses and abducted civilians. [372] The AFRC and RUF rebels attacked Kabala in an attempt to take if from government and ECOMOG. Rebels looted and burnt houses.[373] Witness TFI-133 testified that Kumala was burnt down. [374] He saw when these soldiers looted a handicapped person's shop, called Stevo. They said it was operation Pay Yourself. [375]

324. Several Defence witnesses testified that the ECOMOG attacked and bombed Kabala and Mongo Bendugu killing civilians. [376] Witness DAB 077 testified that the ECOMOG forces attacked Fadugu killing people.[377] The ECOMOG were in Fadugu from March to September 1998[378] and during this period they killed civilians. [379] A point to note here is that these were crime based witnesses with no relationship with any of the Accused persons.

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[370]

[371] Paragraph 76 of the Indictment
[372] Transcript 7 July 2005 page 77-80
[373] Transcript 6 October 2005 pages 86-88
[374] Transcript 7 July 2005 page 81
[375] Transcript, 22 September 2005 page 33
[376] DBK-012, Transcript 05 October 2006 page 92, 94-95 ; DBK-037 Transcript 03 October2006 page 87 and 94
[377] Transcript, 19 July 2006 page 56, 60
[378] Transcript, 19 July 2006 page 63
[379] Transcript, 19 July 2006 page 69,73-74 and 100 Cross-examination

325. The Defence submits that the crimes committed in Koinadugu district was done by the ECOMOG forces who attacked several areas in the Koinadugu district. The First Accused was never present during these attacks. The Defence submits that the evidence stated by TFI-199 and TFI-133 on the fact has no credibility and cannot be relied upon to convict the First Accused on any count of the Indictment.

326. At the highest, what the evidence in totality (that is to say Prosecution and Defence) suggest is that there is a doubt as to who committed what in Kabala. Such doubts the Defence submits should be exercised in favour of the Accused.

Kono

327. For the Prosecution TFI-074 stated that the AFRC and RFU soldiers attacked and looted Dandadu[380] TFI-074 testified that he remained 3 years with captors (1998 – 2002) during that period the commanders were Komba Gbundema, Captain Barry, Captain Ibrahim Ticker and Captain SK all RUF. [381]

328. Witness TFI-217 testified that in Koidu Town in 1998 Junta/rebels looted the town.[382] TFI-217 saw Lieutenant T a Junta and his boys burn houses.[383] Witness TFI-217 testified that Akim Sesay led troops to capture Koidu Town.. [384]

329. TFI-334 stated that "Raising someone" means to take away something completely from someone. There was a group called Wild Dogs operating under Junior Lion, which was engaged in raising. When Junior Lion gets something that he has raised, he would report. [385] DBK-129 left Kono because the command, was

[380] Transcript 5 July 2005 page 12
[381] Transcript 5 July 2005 pages 29-30 cross-examination
[382] Transcript 17 October 2005 pages4-5
[383] Transcript 17 October 2005 page 9
[384] Transcript 17 October 2005 page 8
[385] Transcript 20 May 2005 page 32-33

under the RUF. [386]Witness DBK-129 testified that he did not see Tamba Brima and the second accused, in Kono, during that time. It was the RUF was burning houses in Kono. Superman gave the order because he was the commander. They set fire on the houses by Five-Five [387].

330. On behalf of the Defence, DAB-059 also testified that he left the first Accused in custody at Buedu in Kailahun District and was ordered by Superman to move with Rambo back to Kono to burn the home land of the First Accused because the First Accused was a coward and has refused to fight.[388] DAB-059 also gave evidence that Superman, Amara Peleto, Major OJ, and De Moor were responsible for the burning of Kono but not the First Accused.[389]

331. Witness DBK-113 testified that he did not ever see the First Accused being present at Koidu Town. [390] The Overall commander in Kono in charge of the RUF fighting forces in Koidu Town, at the time was Superman and he ordered that houses should be burnt. [391]

332. Witness DAB-027 testified that the RUF attacked Koidu Town and they burnt the houses. [392] He stated that it was the RUF SBU at Koidu Town that burnt houses. Witness DAB-027 testified that he did not hear about the First Accused being present in Kono.[393]

333. While in Kono DAB-018 received orders from Akim.[394] The overall boss was Mosquito.[395] The Alpha Jets bombed in Koidu Town.[396] Witness DAB-018

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[386] Transcript, 09 October 2006 page 73
[387] Transcript, 09 October 2006 page 71
[388] Transcript, 28 September2006 page82-83
[389] Transcript, 28 September 2006 page 87.
[390] Transcript, 13 October 2006 page 98
[391] Transcript, 13 October 2006 page 66
[392] Transcript, 05 September 2006 page 9
[393] Transcript, 05 September 2006 page 12
[394] Transcript, 07 September 2006 page 14-15
[395] Transcript, 07 September 2006 page 16
[396] Transcript, 07 September 2006 page 19

testified that it was the RUF High command that ordered Rambo for Kono to be burnt.[397]

Bombali District

334. For the Prosecution TFI-334 alleged that in Karina, Bazzy's CSO set a house ablaze with 5 girls in it, while the main door was closed by Bazzy. They stood there until the house burnt to ashes.[398] Witness TFI-167 stated he was with Bazzy when Eddie Williams aka Maf. went into the house, wrapped people in carpets of the house and set the house on fire. He drew fuel from the Mercedes Benz. [399] Prosecution Witness TFI-334 and TFI-167 both gave a contradiction stories and it was inconsistent with that of Prosecution Witness TFI-055 who is a factual witness from Karina. Witness TFI-055 was in Karina at the time of the attack, does not mention that anybody was burnt in a house in Karina.[400] and that some people told TFI-055 that Jabbie was the one who attacked Karina.[401]

335. Defence Witness DBK-094 testified that the names he heard that attacked Karina on May 8, 1998, were Jabbie and Adama Cut Hand.[402] Witness DBK-094 testified that he did not hear the name of the Firs Accused as one of those responsible for the burn ning and looting that took place in Karina during May 8th 1998. He only heard the name Alex Tamba Brima over the radio when witnesses were talking about him in the Court. DBK-094 testified apart from the radio, he never heard the name anywhere. [403]

336. Defence Witness DBK-113 testified that the troop s that got to Karina was led by FAT, Colonel Eddie and Junior Lion. Junior Lion said that Karina was Tejan

[397] Transcript, 07 September 2006 page 78
[398] Transcript 23 May 2005 page 66-67
[399] Transcript 15 September 2005 page 54-55
[400] Transcript, 12 July 2005 page 138
[401] Transcript, 12 July 2005 page 142
[402] 11 July 2006, page 73
[403] 11 July 2006, page 101-102

Kabba's village, so it should be burnt down. [404] DBK-113 that during this period at Karina, he did not see or hear about the First Accused being at Karina and he did not see or hear that First Accused gave orders to burn houses or to burn civilian in houses at Karina. [405]

337. The Defence reiterates the point made earlier that the evidence of TFI-334 and TFI-167 are contradictory and inconsistent, thus should not be relied upon to convict Tamba Brima on any count of this Indictment.

338. From the above, it is clear that there is no evidence objective, credible and without doubt that is capable of convicting the First Accused for the charges contained in Count 14 in so far as they refer to Kono District.

339. Here again, TFI-334 testified that there was looting at State House. [406] He stated that around the mental home area Gullit order that they should set ablaze the vehicles and Bazzy was present.[407] Witness TFI-046 alleged that Bazzy order the burning of vehicles around the mental home area. [408]

340. At Waterloo, Bazzy said the houses within the highway at Waterloo should be set on fire. [409] Prior statement TFI-334 stated that it was Gullit who made the order to burn down the villages in the Waterloo axis. TFI-334 insists it was Bazzy who gave the order. [410] Witness TFI-167 testified that they burnt houses at random. The burning went on throughout the whole eastern part of Freetown. [411]

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[404] Transcript 13 October2006 page 21
[405] Transcript 13 October2006 page 48-49
[406] Transcript 14 June 2005 page 26
[407] Transcript 14 June 2005 page 83
[408] Transcript 10 October 2005 page 24
[409] Transcript 15 June 2005 page 11
[410] Transcript 22 June 2005 page 33 Cross-examination
[411] Transcript 16 September 2005 page 56

341. The Defence submits that the evidence of TFI-334, TFI-167 and TFI-046 are inconsistent and flawed. As stated earlier the First Accused was not present in Freetown at the relevant period of the Indictment. This submission is supported by the evidence of the various Defence witnesses whose testimony has been analysed under alibi, above.

Expert Evidence

342. Both the Prosecution and Defence called experts in support of their case.

Command Responsibility and Military Structure

343. For reasons which have been expanded upon above, the Defence relies on the evidence of General Prins as opposed to that of Col Irons. The Defence submits that methodology used by its own expert lends itself to a finding which is more accurate that speculative and self serving. The Defence would ask the Trial Chamber to consider the evidence of this witness in its entirety, but in particular the following:

"The history of the SLA shows a total breakdown of military organization. During the AFRC regime all forms of discipline and regimentation of the RSLAF were brought down to zero and ultimately finished the image of the RSLAF. This was also the starting point of the AFRC faction when ousted from power in February 1998."[412]

"The precondition, set in the Iron[413] *report, that recognizable groups need to exist to establish a military organization, is not fulfilled during the conflict in which the AFRC faction participated. The various groups were not recognizable.*[414]

[412] Page 82 of his report at paragraph 172
[413] Col. Iron, Prosecution military expert witness
[414] Id page 83 paragraph 175

" The AFRC only had the semblance of a military structure and hierarchy. Specifically the criteria of the 'span of command' and the 'span of control' were not fulfilled.[415]

"Within the AFRC faction there was at most a coherent linkage between the operational level and the tactical level. The strategic-military level and the grand strategy level did not exist.[416]

"Based on the conclusions in the previous paragraphs (174 through178), I do not consider the AFRC faction a military organization in the traditional sense.[417]

"Between the RUF and the AFRC a joint force or joint structure in military operational sense was never established.[418]

344. In his evidence of the 17th October 2006, the witness stated the following which the Defence submits illustrates that the Accused could not have had effective control and command of the forces as alleged by the Prosecution.

345. The Forces that invaded Freetown on the 6th of January, 1999 could not have had effective Command and Control within their ranks because of the following reasons:

a. their training was sub-standard and the training centres had no capacity [419]

b. Recruitment was from the lower level of society – those with crime records, drug abuse records etc.[420]

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[415] Id paragraph 176
[416] Id paragraph 178
[417] Id paragraph 179
[418] Id paragraph 180
[419] See transcript of evidence of 17th October 2006 at page 63 line 7
[420] Id lines 15-17

c. Period of training was too short for trainees to be transformed into proper military soldiers[421]

d. The witness could not agree with Col. Iron that the AFRC had a recognizable hierarchy and structure, because they lacked the level of trained officers to carry out the staff jobs, or the jobs in the chain of Command. There should be 4 levels of Span of Command or in the chain of command – From Brigade to Battalion; then from Battalion to Company; and then from Company to Platoon; and then from Platoon to Squad.[422]

e. The witness however agreed with Colonel Iron that SAJ Musa's invading force was able to establish only **ONE LEVEL** out of the four levels that should make up the Chain of Command which was not good enough because one man has to control 80 up to 120 men[423]

f. One of SAJ Musa's Battalion Commanders 167 (Junior Lion) did not have any level of training to carry out the functions of a Subordinate Commander.[424] He also did not want to take any responsibility while carrying out the job of Subordinate Commander. You cannot run a military organisation if your subordinates don't take responsibility for their actions. It is the responsibility of the Subordinate Commanders to ensure that orders given were carried out. But 167 is quoted as saying in the Transcripts that, "I did not give orders, the orders came from above."[425]

g. The force that fled Freetown in February, 1998 were Junior Ranks, with only two Officers, that is FAT Sesay and King. Even if even some sort of command

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[421] Id lines 3-5
[422] Id at lines 25-29
[423] See Transcript of evidence of 17th Oct, 2006 page 85 at line 29 and lines 11, 12, 13, and 14 of page 86
[424] Id page 90 lines 10-13
[425] Id page 90 line 29

structure existed, at some stage in the time covered by the indictment, it collapsed. [426]-

h. The AFRC, as a 'Survival Force' was completely sealed off from outside, so that no funds can be channelled to them; no salaries were paid.

i. Witness agreed with Col. Iron that the AFRC had to be considered a Guerrilla Force rather than a conventional army.[427]

323. This the Defence submits supports its assertion that the faction was incapable of being controlled and therefore the First Accused could not have been in control of this or any other faction.

The Use of Child Soldiers

324. The Defence tendered a report by Mr Gbla about child soldiers. The Defence submits that amongst other things this evidence is also support the Defence assertion which was also put forward by a number of witnesses that those who were with the troops as they proceeded were in fact family members as opposed to abductees.[428] The Defence also submits that much can be deduced from the conclusions of the report particularly the following:

a. all the warring factions including the pro-government forces recruited child soldiers through various recruitment methods including voluntary and forced .The study however acknowledges that forced recruitment was most common with the RUF faction.

b. the role of the Sierra Leone government in recruiting child soldiers especially during the war in an attempt to bolster government forces to face the rebels

[426] Id page 66 at lines 26-27
[427] Id page 71 line 15
[428] Page 59 of Exhibit , The use of child soldiers in the Sierra Leone conflict by Osman Gbla

sidestepped recruitment procedures and undermined efficient training and this in a way influenced the composition of the SLA faction that withdrew into the jungle

c. that prior to the on-going British-led military training programme, there was very little serious and consistent efforts to infuse child rights issues in the training of the security forces in the country especially the military.

d. that although the Sierra Leone government has endeavoured over the years to put in place national legislations and to sign and ratify various international legal instruments bordering on the prevention of child soldiers recruitment into the military and by other armed groups, a lot still needs to be done in their implementation. Some of the national laws pertaining to the prevention of the recruitment of children into armed factions and the military are archaic, outdated and not in tune with international legal instruments like the UNCRC.[429]

e. that a number of civilians including children that followed the AFRC members after they were ousted from power in February were mostly family members and other associates that were afraid of reprisals.[430]

325. It is the submission of the defence, that on the basis of the analysis and conclusion of the report, the Accused cannot be held responsible for use of child soldiers. This is more so because of the difficulties of defining childhood in society, something that cannot be said to follow the western definition always and the difficulties associated with determining childhood. Where these exist, and it is submitted that in the fluid war situation that encompassed the AFRC, this was what undoubtedly would have been the case, it cannot be proved beyond reasonable doubt that the Accused person set out to recruit child soldiers, or that he was did not take any or any reasonable steps to ensure that child soldiers are not recruited. The prosecution would effect be imputing knowledge for a person in the position it alleges the First Accused was in. The Defence relies on the following excerpt from its expert report:

"*The traditional African setting offers a different conception of childhood as chronological age as an indicator for the termination of childhood is an arbitrary*

[429] The United Nations Conventions on the Rights of the Child
[430] Id paragraphs 55-59

concept. In this sense, the ending of childhood has little to do with achieving a particular age and more to do with physical capacity to perform acts reserved for adults. Marriage and the establishment of a new homestead are traditionally two prime indications of an adult male. As such, childhood refers more to a position in a societal hierarchy than to biological age and in order to become an adult it is necessary to ascend this hierarchy. [431]

The issue of defining who is a child in the Sierra Leone jurisdiction also varies according to context. The voting age under the 1991 Constitution (Act No 6 of 1991) is 18 years although persons who are 17 years and half can be lawfully recruited into the national army (Sierra Leone Military Forces Act No 34 of 1961). The Prevention of Cruelty to Children Act 1960 (Laws of Sierra Leone, Vol.1, Chapter 31 at section 2, defines child as some one who is sixteen years or younger. This lack of a consistent age limit for childhood affects the level of protection due to adolescent combatants and other younger persons." [432] [433]

326. Further those who made up the AFRC at least on the Prosecution's own case were once serving Sierra Leone Army personnel. This is also true of the First Accused who was a serving soldier. It must be acknowledge that common sense dictates that if, which it is denied, he did take a commanding role in conflict then the training must have come from that which he got from the military. It is submitted that that training had no components to deal with any of the laws of war to human rights from which the technicalities of the age limits for recruitment for fighting could have been learnt. The Defence finds further support on this point in the report which states that before the advent of the British training in the military there was little human rights being taught to soldiers in training.[434] It should also be noted that several witnesses did confirm in court

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[431] N. Argenti, 2002, Youth *in Africa: A major resource for change, in A.de Waal and N.Argenti, (eds,) Young Africa: Realising the rights of children and youth,* World Press Inc, Trenton NJ, and Asmara, 2002, p.125 cited in Afua Twum-Danso, 2003, ibid

[432] Mohamed Pa- Momoh Fofanah, *Juvenile Justice and Children in Armed Conflict: Facing the Fact and Forging the Future Via The Sierra Leone Test,* A Paper submitted in partial fulfilment of the Degree of Master of Laws at Harvard Law School, USA p.15

[433] Paragraphs 9-10 of page 7 of the report of the Use of Child soldiers on the Sierra Leone conflict

[434] Id paragraph 31 pages 14-15

that no such training existed in the army. This is also confirmed in the report of General Prins.

Forced Marriages

327. The Prosecution called Mrs Zainab Bangura as an expert on forced marriages. Much was made about the suitability of Mrs Bangura, an activist and one time Presidential candidate as an expert on force marriages. It was clear from her curriculum vitae, that neither her educational background nor her professional background, though rich in women's rights issues and political activism lends itself to any expert knowledge on the concept. This evidence lacking in any independent research left the whole concept in a fog of confusion, thereby missing an opportunity to not only put forward the Prosecution's case, but also to clear up the doubts associated with the what is essentially a new concept in International Criminal Law and said to be unique to the Sierra Leone conflict. This Prosecution report fails even the most elementary standards of independent research and its purpose was more to buttress a theory expounded by the Prosecution. It is therefore submitted that the court is not helped in anyway by the evidence of Mrs Bangura.

328. The Defence called Dr. Dorte Thorsen as an expert on forced marriages. Her research background speaks for itself and is within the knowledge of the court. The Defence will submit that Dr Thorsen's assessment of the report by Mrs Bangura reproduced below, is accurate. It is therefore not necessary to elaborate on this here. However, in her report she stated that

"....the terms "bush wife' and 'bush husband' relate to the bundles of obligations and rights inherent in implicit conjugal contracts. Consequently, when a Sierra Leonean man told (an abducted) girl that she would be his wife, he forced her into the relationship but also indicated that he was willing to take on (some of) the responsibilities ascribed to a young husband. Whether he then fulfilled these responsibilities and whether he succeeded in overcoming the girl's contempt due to his initial use of force is a different question but

may give an indication of why some women have remained with their 'bush husbands' and others have not."

"....Mazurana and Carlson (2004)....pointed out that not all the young women were captives; some joined because their husbands asked them to, others because the Paramount Chief of their area made it mandatory that each family contributed with a member, others agreed to join or to become 'wives' to survive. The degree of freedom in such choices is impossible to estimate since they depend both on the situation in which girls find themselves and on the alternatives available to them."

"Commanders' 'wives' thus took the position of the first wife of a powerful man, something that few junior women would ever be in times of peace. Moreover, the loot gave some of the 'wives' and 'girlfriends' access to commodities on which they would otherwise never laid their hands.....being in a relationship with a high ranking commander offered an attractive base for marginalised young girls of up-ward social mobility. However, the studies focusing on the multi-faceted roles of girls and young women during the war also point to the vulnerability and the ease with which they were discarded as girlfriends and pushed into insecurity if their partner was killed."[435]

329. In her testimony in court[436] she stated inter alia that:

a. ....forced marriage is very much a legacy of Colonialism in which women are
    a. Seen as subordinate to the patriarchal structures and are vulnerable to be
    b. Married off at a very early age; being forced to marry.

b. Some of the Cultural practises are similar throughout the West African
c. Region, but the specifics are different.[437] .

d. It is impossible to judge the degree of force (when considering the concept of
e. 'forced marriage') and that even if women have constrained choices, it may not be

[435] Report on Forced Marriages - Dr Dorte Thorsen pages 16-71 Exhibit D 38
[436] Evidence given on the 24th October 2006
[437] Transcript of evidence of 14th October 2006 page 125 lines 7-9

a. because they lack agency; it may not be because they are just victims sitting
b. back doing nothing, it is because they reflect on the different options they have.

f. Bush wife is a concept unique to Sierra Leone and perhaps Liberia, but it is certainly not something seen in peaceful countries like Burkina Faso[438]

g. She does not think that a relationship exists between the concept of bush wife and forced marriage [439]

h. the Sexual vulnerability of young girls is not just a case of the War in Sierra Leone, that is a much broader aspect.[440]

i. There was a clear lack of contextualisation in the methodology adopted by Mrs. Zainab Bangura in her expert report.

j. Another flaw pertaining to Mrs. Bangura's report is that although she made a distinction between arranged marriage during peace time as different from the coerced bush wife situation, she talked about arranged marriages with a rhetoric of thought all the way through and I think it became contradictory.[441]

330. Clearly there are serious doubts as to the existence of the concept of forced marriages and even if something akin to allegations made by the Prosecution, there are serious doubts as to how criminal liability can be founded here. There is no evidence that the First Accused gave any orders regarding force marriages or bush wives. This point is borne out by witnesses including those Prosecution witnesses who claimed to have been coerced into marriage.

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[438] Id page 131 lines 26-28
[439] Id page 132 lines 15-19
[440] Transcript of 25th October 2006 page 17 lines 19-21
[441] Id page 18

Conclusions

331. The Defence for Tamba Brima, the First Accused respectfully submits that the Prosecution has not proved its case beyond reasonable doubt. In the light of that and in view of the foregoing reasons, the Defence asks that the Trial Chamber returns a verdict of not guilty on all counts.

Done this 1st day of December 2006

Glenna Thompson
Counsel for Brima Defence
Osman Keh Kamara
I. F. Mansaray
Legal Assistants

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ANNEXURES

1. Index of Authorities
2. R v Strudwicka and Another 99 Cr. Ap. Rep. 326.
3. R. v. Burge ; R. v. Pegg (1996) 1 Cr.App.Rep.163
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19399

Lexis UK CD 455, 99 Cr App Rep 326

R v **Strudwick** and another

COURT OF APPEAL (CRIMINAL DIVISION)

Lexis UK CD 455, 99 **Cr** App **Rep 326**

HEARING-DATES: 2, 3, 21 DECEMBER 1993

21 DECEMBER 1993

CATCHWORDS:
Criminal evidence - Accused - Lies - Death of child - Child abused - Evidence that accused had told manifest lies - Whether lies of the accused capable of establishing a case of manslaughter.

HEADNOTE:
This judgment has been summarised by LexisNexis UK editors.

The daughter of the second appellant died from blows to her abdomen. The child died in a caravan in which the second appellant and her co-habitee, the first appellant, were present. Medical evidence established that the blows were administered by an adult. The child had a number of other bruises on her body. The appellants were both charged with one count of manslaughter and two counts of cruelty to a child contrary to s 1(1) of the Children and Young Persons Act 1933. At the trial, evidence was given that the child had been physically abused. The second appellant blamed the first appellant who admitted that he had smacked the child but denied that he had injured her. Defending counsel for both of the appellants made submissions that the prosecution had not proved a prima facie case of manslaughter against either appellant because it had not shown who had caused the injuries. The judge rejected the submission on the grounds that the first appellant had admitted smacking the child and that both appellants had told 'manifest lies'. The appellants were convicted on all counts. They appealed on the ground that the prosecution had not made out a case of manslaughter, since, inter alia, the fact that a defendant had lied was not sufficient to establish a case of manslaughter.

Held: Lies, if they were proved to have been told through a consciousness of guilt, might support a prosecution case: however, on their own they did not make a positive case of manslaughter or any other crime. On the facts of the instant case, the prosecution had not made out a prima facie case of manslaughter against the appellants and the fact that the appellants might have lied was not on its own sufficient. The history of assaults only provided relevant background material, whilst the first appellant's admission that he had smacked the child did not connote an admission of criminal responsibility nor identify the occasion of the assault. Accordingly, the appeals would be allowed.

COUNSEL:
J Townend QC and S Shay for the First Appellant; H Hallett QC and R Deighton for the Second Appellant; R Camden-Pratt QC and R Shorrock for the Crown

PANEL: FARQUHARSON LJ, OWEN, LATHAM JJ

SOLICITORS:
Registrar of Criminal Appeals; Crown Prosecution Service

19400

19401

[1996] 1 Cr App Rep 163, The Times 28 April 1995, (Transcript: John Larking)

R v **Burge;** R v **Pegg**

COURT OF APPEAL (CRIMINAL DIVISION)

[**1996**] 1 Cr App Rep **163,** The Times 28 April 1995, (Transcript: John Larking)

HEARING-DATES: 14 MARCH 1995

14 MARCH 1995

CATCHWORDS:
Criminal evidence (Direction to jury (Murder (Lie direction - Guidelines

HEADNOTE:
This judgment has been summarised by Butterworths' editorial staff.

B and P had gone with a co-defendant equipped with masks, sticky tape and twine to burgle a property. The occupant was present in the property and a struggle had ensued. The occupant was overpowered and tied up with tape over his mouth. B and P instructed a friend to release the occupant after twenty minutes but he did not do so. The friend contacted the police and a pathologist subsequently established the cause of death of the occupant as asphyxia. At trial, the appellants gave evidence and the judge gave a direction in relation to the lies which the appellants told the police. The direction was that there might be a variety of reasons why a lie was told and that lies with innocent explanations should be discounted. The appellants were convicted of the offence and appealed against conviction. Counsel on behalf of B suggested that the judge erred in giving the lie direction in relation to the police interviews only, when it should also have been given in relation to the evidence in the witness box, as a lie direction was necessary where the appellant had given evidence and there were separate issues in relation to which his evidence might be disbelieved.

Held: - A lie direction was not necessary in every case where the defendant gave evidence and there were separate issues upon which the defendant might be disbelieved. It was requisite where there was a danger that the jury might conclude that those lies were probative of guilt. In principle, there were four circumstances which usually warranted a lie direction (i) the defence relied on an alibi; (ii) evidence to corroborate the defendant was sought and that evidence contained lies by the defendant; (iii) where the Crown relied on a lie in relation to separate and distinct issues as evidence of guilt in relation to the charge; and (iv) where the judge reasonably envisaged there was a real danger that the jury might rely on a lie in relation to a separate issue as evidence of guilt. In the instant case, the lie direction given to the jury in relation to lies in police interviews was expressed in terms that the jury could not fail to have regard to in relation to lies in the witness box. No further lie direction was necessary in the circumstances and the appeals would accordingly be dismissed.

COUNSEL:
Mr Titheridge and Mr Davis for the Crown; P O'Connor QC for Appellant **Burge;** Mr Hubbard for the Appellant **Pegg**

PANEL: KENNEDY LJ, CURTIS, BUXTON JJ

JUDGMENTBY-1: KENNEDY LJ

JUDGMENT-1:
KENNEDY LJ (reading the judgment of the Court):

Introduction

19402

On 24 March 1993 in the Crown Court at Winchester the two appellants pleaded guilty to robbery. A co-accused, Hurst, pleaded guilty to burglary. On 8 April 1993 the appellants were convicted of Murder. Hurst was acquitted of murder, but convicted of robbery. The appellants have appealed against conviction by leave of the Single Judge. At the conclusion of the hearing before us we dismissed the appeal. We now give our reasons for that decision. Although **Pegg** originally sought to renew his application for leave to appeal against sentence in relation to the offence of robbery, that application has not been renewed and we say no more about it.

Outline of Facts

In May 1992 the two appellants were living at different addresses in Weymouth. On Saturday evening 2 May 1992 they gathered at the home of their co-defendant Hurst, 5 Perth Street, where Hurst lived with his girlfriend Lisa Cuthbert. At that house there were also Peter Brown and his girlfriend Sian Kent. There was then discussion about the possibility of committing an offence to obtain money, an earlier burglary by Hurst having proved unrewarding. The appellants and Hurst agreed to visit 37 St Thomas Street where there was residential accommodation above a kebab house owned by Fazim Hakimi. The entrance to the residential accommodation was by a door in a porch to one side of the shop. The door had two bolts, but with a little ingenuity a small man could get at them to release them because there was damage to the fanlight and to one side of the porch. Hurst was a small man, and when he and the two appellants left Perth Street, his first task was to be to open the door at 37 St Thomas Street. At that address a room on the first floor was occupied by Yaghoub Hakimi, a 74 year old retired Iranian colonel, who was the father of Fazim. On the second floor was a room occupied by Anthony Harvey, a friend of Peter Brown. Both Harvey and Brown were drug users, burglars and thieves. Harvey knew that there was supposed to be money in Yaghoub Hakimi's room. He had mentioned that to a couple called Lem who had previously lived at 37 St Thomas Street, suggesting that there was as much as £ 10,000, but he claimed to have no recollection of telling Peter Brown about it.

When the appellants and Hurst left Perth Street, it was the case for Hurst that he did not understand that an offence was going to be committed at 37 St Thomas Street. He believed that he was just going to let the other two into those premises to discuss with Harvey where they might find "an earner". The appellants, however, concede that they had it in mind to burgle the room occupied by Yaghoub Hakimi. Their case at trial was that they believed that he would not be there because he, at least on occasions, spent Saturday night with his son, a fact known to Sian Kent, but they did not tell Hurst of their intention because they knew that Hurst would not approve.

Perhaps surprisingly the appellants accept that they were equipped with masks (a stocking mask and snood) sticky tape and twine, the latter being provided by Brown. The appellant **Burge** also had in his pocket a piece of the black tights used to make the stocking mask. Their plan, they said, was to tie up Harvey with his consent, so that it did not look as though he was involved, and then burgle Yaghoub Hakimi's room.

At 37 St Thomas Street, after Hurst had let them into the building, they or one of them went up to Harvey's room. Harvey later told the police that he expected a visitor that night. Harvey refused to be tied up as proposed, and the appellants then put on their masks and went to Yaghoub Hakimi's room. **Pegg** forced the door and **Burge** rushed in. **Burge** says he was surprised to find himself attacked by Yaghoub Hakimi. There was a struggle. At one point, according to **Burge,** Yaghoub Hakimi had hold of **Burge's** testicles and **Burge** believed that in freeing them he may have broken a finger of Yaghoub Hakimi's left hand. In fact it was a finger of Yaghoub Hakimi's right hand that was broken in two places.

According to the appellants, they believed that they had been tricked by Peter Brown and Harvey into believing that the room was empty, but well-equipped as they were with tape, twine and a gag, they were able not only to overpower Yaghoub Hakimi but also to truss him up. They then took a watch and chain and departed, telling Harvey as they left to release Yaghoub Hakimi in twenty minutes or so. Outside the building they met up with Hurst, and all three went home.

Harvey undoubtedly became aware of what had happened to Yaghoub Hakimi, and after 5.00am he left the building, went to a taxi rank and to the Crown Hotel, asking for change for a pound coin, and eventually, at 5.24am, dialled 999, saying that there had been a burglary and that he

could get no sense out of Yaghoub Hakimi. The ambulance service attended at 5.29am, and the police soon afterwards.

Yaghoub Hakimi was dead. The pathologist put the time of death at between 11.30pm and 5.00am, and the defence suggestion was that Harvey was probably the killer because the appellants asserted that Yaghoub Hakimi had been alive when they left. The defence also relied on certain matters to which we will refer later on.

The cause of death was asphyxia. There were two broken bones in the neck. There was also heavy bruising of the lower right cheek and lighter bruising of the left jaw and the inside of the mouth. As we have already said, the right little finger was broken in two places.

In the early stages of the police enquiries, the two appellants, together with Hurst, Brown and Harvey, were all arrested. All told lies, but at this stage little turns on that.

Unsafe or Unsatisfactory?

At trial all three defendants gave evidence and there is no criticism of the summing-up, save that Mr O'Connor, for **Burge,** contends that the Judge should have extended his warning in relation to lies to cover lies told in the witness box. The main submission made by both Mr O'Connor and Mr Hubbard, on behalf of **Pegg,** is, however, that Harvey and Brown were unsatisfactory witnesses, their evidence left certain matters unresolved and, therefore, the convictions should be regarded as unsafe and unsatisfactory.

On Behalf of **Pegg**

Mr Hubbard submitted to us that all five originally arrested should have been in the dock so that the jury could decide who was culpable. Brown and Harvey, who were not charged, were, as we have indicated, drug addicts and burglars who committed crimes to fund their addiction. When arrested they, like these two appellants and Hurst, lied to the police. Brown, as Mr Hubbard pointed out, was himself involved with equipping the appellants to offend at 37 St Thomas Street. He provided the tape, the twine, and his girlfriend provided the stocking mask. Mr Hubbard submitted that despite Brown's denials, he must have known what his friend Harvey knew, namely that Yaghoub Hakimi was supposed to have £ 10,000 in his room, and Brown may well have suggested Yaghoub Hakimi as a target that night. If Hurst's girlfriend, Lisa Cuthbert, and her friend, Patricia Shotton, are to be believed, Brown later offered to change his evidence for £ 100 but, as Mr Hubbard conceded, the jury may well not have found that evidence of those two women persuasive.

Turning to Harvey, Mr Hubbard pointed out that he lied about whether Hurst had stayed with him on the Friday night, the night before the killing. As to the Saturday night, he told the police, and ultimately agreed in the witness box, that he was expecting a visitor so, submits Mr Hubbard, Brown and Harvey had everything planned. Harvey knew Yaghoub Hakimi's habits and must have known that Yaghoub Hakimi, on that night, was actually in his room and not staying with his son. Harvey offered no satisfactory explanation for the period of about 40 minutes or so before he dialled 999 (a point to which we will return later in this judgment) and when the deceased's room was examined, connections with Harvey could be made. His fingerprints were on the tape around the mouth of the deceased. A mark on the wall could have been made by a glove he owned, and although on the night of the killing the door had been forced by bodily pressure exerted by **Pegg,** screwdriver marks found on the door frame could have been made by a screwdriver which Harvey owned. The jury, Mr Hubbard submitted, should have had to contemplate five not three defendants, and because the picture presented to them by the prosecution was incomplete, there must be doubt about their conclusion.

On Behalf of **Burge**

Before dealing with Mr Hubbard's submissions, it is convenient to refer to submissions made by Mr O'Connor other than his submissions as to the direction required in relation to lies told in the witness box. Mr O'Connor reminded us of the jurisdiction granted to this Court by s 2(1)(a) of the Criminal Appeal Act 1968, and suggested that we should not pay too much respect to the decision of a jury which, despite the judge's warnings, may have had an emotional reaction to what was, on any view, a dreadful crime. That point has limited force because the jury did discriminate

between these appellants and Hurst.

Mr O'Connor concentrated his submissions on the witness Harvey who he described "critical". He submitted that if Harvey might have murdered Yaghoub Hakimi, the convictions of **Burge and Pegg** could not be safe and satisfactory, and there were, and are, submitted Mr O'Connor, good reasons for suspecting Harvey. He had an opportunity to commit the offence after the others left. He knew of the existence of money and possibly jewellery in the deceased's room. He was a dishonest drug addict, always in need of money, and he has never given a wholly satisfactory explanation of his movements after the appellants left and before he dialled 999.

Mr O'Connor, like Mr Hubbard, submitted that Harvey had a period of about 40 minutes to explain, a point which was clearly the subject of considerable attention at the trial. Undoubtedly that period ended at 5.24am when the 999 call was made, and the time of it recorded. That was immediately after Harvey had visited the taxi rank and the hotel, seeking change to telephone, even though, as a later search revealed, he had change in his room and, as everyone knows, money is not required to dial 999.

But when did the period of 40 minutes begin? When did the appellants leave 37 St Thomas Street? The evidence as to that came only from Harvey, the witness under attack, and the appellants themselves. Undoubtedly if Harvey's timings are right, the appellants left 37 St Thomas Street at about 4.40am but, as the Judge pointed out when summing up at p 65D:

"How accurate or how truthful he is in his timing is a matter for you, because he went on to describe the events of what, on his description, must only have taken a few minutes before he telephoned for an ambulance at what you know was 5.24am."

As Mr O'Connor said, Harvey's evidence did not explain the apparent gap. He did not even suggest that he must have got his timings wrong and, submitted Mr O'Connor, there is some evidence that suggests that Harvey's timings may be right, namely the evidence of the pathologist, Dr Anscombe, who said that the probable time of death was between 11.30pm and 5.00am. If that was right, Yaghoub Hakimi had been dead at least 24 minutes before the 999 call was made. But it is worth noting the width of Dr Anscombe's band, which may be attributable to the fact that he did not attend at the scene until 9.00am.

Mr O'Connor reminded us that there was evidence tending to suggest that before he raised the alarm Harvey had been out of the house because two girls waiting for a ferry saw a man who appeared to be a jogger entering a house which they later identified as 37 St Thomas Street. One of them described the man they saw as wearing track suit bottoms. The other could not remember whether he was wearing shorts or trousers. One said that they saw the man between 5.15 and 5.30am. The other put the time of observation at between 5.15 and 5.25am, so, as the Judge said, the bias of their timings was a bit before Harvey made his telephone call at 5.24am, and there was evidence which showed that at that time Harvey was wearing shorts. The submission to us, as to the jury, was that the man seen by the two girls was Harvey. It is suggested that he had probably been disposing of some incriminating evidence and was returning to his room where he shed his trousers and then he emerged to make the telephone call at 5.24am.

Mr O'Connor invited our attention to five pieces of evidence, all of which, he submitted, demonstrated the unreliability of Harvey as a witness. The first related to the way in which the right wrist of the deceased was bound. There was twine beneath the loop of pillow case and twine in the hand. Harvey claimed to have cut the twine, but not to have noticed the material, namely the loop of pillow case. That, submitted Mr O'Connor, was simply not credible. One loop of twine was not cut, and it was partially covered by material. Another loop may have been cut, but if Harvey cut it, he could not fail to have been aware of the adjacent material.

The second piece of evidence to which our attention was invited was Harvey's assertion that he undid the tape round the ankles. As the photographs show, the tape was cut.

The third piece of evidence was Harvey's reluctant admission that he was expecting someone that night. Mr O'Connor's contention was that he was indeed expecting someone.

Similarly, Mr O'Connor pointed to Harvey's reluctance to admit that Hurst had stayed with him for the previous night, and finally Mr O'Connor invited our attention to Harvey's assertion that when

the robbery was in progress he was watching a television programme, which enquiries showed not to have been transmitted.

Unsafe or Unsatisfactory - Our Conclusion

It is clear from what we have already said that in this case, on the evidence, the appellants had arguments to advance. Subject to what we say later as to the direction in relation to lies, it is really conceded in this appeal that the evidence and arguments were carefully presented, together with appropriate directions in law, in what we regard as a model summing-up. In particular, there were warnings as to how the jury should treat the evidence of Peter Brown and Harvey, and neither Mr Hubbard nor Mr O'Connor has contended that the warnings were less than adequate. But, of course, this Court still has a duty to perform if we consider the verdicts to be unsafe or unsatisfactory. In our judgment, these verdicts are neither. If these convictions rested on the uncorroborated evidence of either Peter Brown or Harvey, the latter being a witness whose appearance and performance in the witness box was such as to cause the trial judge to arrange for a medical examination, then we would be disposed to allow this appeal, but the evidence of those two witnesses, although important, was only a part of the picture. The jury was able to see how what they said fitted in with the rest of the canvas, which could be derived from other sources, including the appellants themselves. For example, and without intending to be exhaustive, it must have been clear to the jury that when these two appellants and Hurst left Hurst's home, the object of the expedition was to rob Yaghoub Hakimi, not to burgle his room but to tie him up and rob him. Why otherwise should they be armed with masks, tape, twine and material capable of being used as a gag? Why otherwise did the appellants put on the masks before they broke into Yaghoub Hakimi's room? Although not young, the deceased was apparently quite a fit man and, in the event, it is common ground that when the appellants burst into his room and overpowered him, they bound and gagged him, and took what they could find. Not more than an hour later Harvey was calling for help and, by then, on any view, Yaghoub Hakimi was dead. The cause of death was asphyxia. Why should anyone think that after the violent men had left, the inadequate drug taking burglar from upstairs went into Yaghoub Hakimi's room and killed him? As Mr Titheridge pointed out, that was not even a line of defence that occurred to either of the appellants when they were being interviewed by the police. They blamed each other for going too far, but at least by implication they accepted that death was caused in their presence. No doubt it was through Harvey and Peter Brown that the appellants learnt that Yaghoub Hakimi was supposed to have money in his room, but if Harvey was capable of murdering to get it for himself, why did he need to involve the appellants? Maybe he had tried to force the door with a screwdriver and maybe he did behave in a somewhat witless way when he found that the man he was supposed to untie was actually dead, but having regard to what was known of his character, that is hardly surprising.

Whether Harvey vacillated for as long as forty minutes maybe open to doubt because of the lack of really reliable evidence as to when these appellants left the scene. As the prosecution point out, there was also evidence from John Davis, a car park attendant who saw two men running very hard south across the town bridge at about 5.15am, the suggestion being that the two men may have been these two appellants fleeing the scene. If the man seen by the two girls was Harvey, and although they identified the premises they did not, so far as we are aware, identify him, then they may have seen him when he was panicking before he raised the alarm or, perhaps more likely, they may have seen him returning after raising the alarm and one of them must have therefore been mistaken about his dress. The times given by each of them were such as to make that explanation possible. Similarly, Dr Anscombe's estimate as to the time of death was given in such wide terms as to make it unlikely that, in his view, death could not have been as late as, for example, as 5.10 or 5.15am.

Although it is submitted on behalf of the appellants that Harvey's attempts to get changed to telephone were a charade, the hotel porter describes him as "quite panicky and concerned", and the hotel baker described him as being in a very agitated state, hopping from one foot to another and not making a lot of sense. Undoubtedly Harvey, and to a lesser extent Peter Brown, were unsatisfactory witnesses - the jury could not have regarded them otherwise - but when Mr O'Connor's critical question as to whether Harvey might have murdered Yaghoub Hakimi is set in the context of the whole of the evidence in the case, it becomes clear that it is a question to which the jury, who saw and heard the witnesses, were entitled to answer in the negative and thus, subject to the point of law to which we are about to turn, we are unable to conclude that the conclusion of the jury in relation to each of these appellants were either unsafe or unsatisfactory.

The Direction as to Lies

We turn now to the Judge's direction as to lies. When he was about to deal with what each appellant said to the police he said:

"In the course of the interviews of **Pegg and Burge,** each made allegations against the other and, to a lesser extent, against Hurst. They did not tell the common story that they have given you in evidence. Before I remind you briefly of what each said, I must give you two warnings, and counsel have already forecast these warnings."

The first warning related to what one defendant said in the absence of the other, and the Judge then said:

"The second warning is about the lies that each of them has told the police. The mere fact that a defendant tells a lie is not in itself evidence of guilt. You must consider in each case where you are satisfied that a defendant has lied, why he has lied. Defendants in criminal cases may have lied for many reasons, for example to bolster a true defence. They may feel that they are wrongly implicated and although innocent that nobody will believe them and so they lie just to conceal matters which look bad but which in truth are not bad. They may lie to protect someone else. They may lie because they are embarrassed or ashamed about other conduct of theirs which is not the offence charged. They may lie out of panic or confusion. All sorts of reasons. In the case of each of these defendants, if you think there is or maybe some innocent explanation for his lies, then take no notice of the lies, but in the case of each if you are sure that he did not lie for some such or innocent reason, then his lies can support the prosecution case."

Mr O'Connor submits that the warning was entirely adequate to deal with lies told to the police, but he submits that the jury should also have been told that it applies to any lie that they might find that either appellant told in the witness box dealing with any matter other than the central issue in the case, namely the charge of murder. Mr O'Connor submitted that in any case in which a defendant gives evidence, and in which there are separate and discrete issues on which his evidence may be disbelieved by the jury, then a R v Lucas [1981] 2 All ER 1008, 73 Cr App Rep 159 warning should be given. It should perhaps be noted that though the direction as to lies continues to be called the "Lucas" direction, and we will so refer to it, in fact the requirements in that case were as to lies relied on as corroboration. The whole of those requirements are not appropriate to non-corroboration cases.

In our judgment, no further warning was required in this case for two reasons. First, the warning actually given, although clearly related to what was said by the appellants to the police, was so expressed that the jury could not fail to have regard to it if minded to test credibility on the central issue by reference to what they were satisfied was a lie in relation to a peripheral matter told by one of the appellants in the witness box.

Our second reason for concluding as we do involves some consideration of recent decisions of this Court. We start with R v Goodway [1993] 4 All ER 894, 98 Cr App Rep 11, in which the Court was considering lies told during police interviews. In that case, counsel for the appellant and the Court accepted that a Lucas direction should be given wherever lies are relied upon by the Crown and might be used by the jury to support evidence of guilt as opposed to merely reflecting on the appellant's credibility. In giving the judgment of this Court, the Lord Chief Justice referred to what he had said in R v Richens [1993] 4 All ER 877, 98 Cr App Rep 43, at p 51 of the latter report, namely that:

" . . . the need for a warning along the lines indicated is the same in all cases where the jury are invited to regard, or there is a danger they may regard lies told by the defendant or evasive or discreditable conduct by him, as probative of his guilt of the offence in question."

The added emphasis is ours, because the point we wish to make is that a Lucas direction is not required in every case in which a defendant gives evidence, even if he gives evidence about a number of matters, and the jury may conclude in relation to some matters at least that he has been telling lies. The warning is only required if there is a danger that they may regard that conclusion as probative of his guilt of the offence which they are considering. In Goodway this Court cited, with approval, the New Zealand case of Dehar [1969] NZLR 763, in which the Court

said:

"How far a direction is necessary will depend upon circumstances. There may be cases . . . where the rejection of the explanation given by the accused almost necessarily leaves the jury with no choice but to convict as a matter of logic."

Again the emphasis is ours. Adapting words used by Professor Birch in the Criminal Law Review [1994] Crim LR 683, our view is that the direction on lies approved in Goodway comes into play where the prosecution say, or the judge envisages that the jury may say, that the lie is evidence against the accused: in effect, using it as an implied admission of guilt. Normally prosecuting counsel will have identified and sought to prove a particular lie on a material issue which is alleged to be explicable only on the basis of a consciousness of guilt on the defendant's part. This is, as Professor Birch says, a very specific prosecution tactic, quite distinct from the run of the mill case in which the defence case is contradicted by the evidence of prosecution witnesses in such a way as to make it necessary for the prosecution to say that in so far as the two sides are in conflict, the defendant's account in untrue and indeed deliberately and knowingly false.

The inappropriateness of a Lucas direction in the latter situation was indeed addressed by this Court in Liacopoulous and Others, unreported, 31 August 1994 where, giving the judgment of the Court at p 15B of the transcript, Glidewell LJ said:

". . . where a jury, as is so frequently the case, is asked to decide whether they are sure that an innocent explanation given by a defendant is not true, where they are dealing with the essentials in the case and being asked to say that as a generality what the defendant has said in interview about a central issue, or agreed in evidence about a central issue is untrue, then that is a situation that is covered by the general direction about the burden and standard of proof. It does not require a special Lucas direction."

As to whether this was a case where a particular lie on a material issue was relied on by the prosecution, or might have been regarded by the jury as probative of guilt, our enquiries of counsel have established that the prosecution did not adopt the tactic to which Professor Birch refers, and there was no reason for the judge to think that the jury would themselves approach the evidence given by the appellants in that way.

As there seems to be at the moment a tendency in one appeal after another to assert that there has been no direction, or an inadequate direction, as to lies, it may be helpful if we conclude by summarising the circumstances in which, in our judgment, a Lucas direction is usually required. There are four such circumstances but they may overlap:

1. Where the defence relies on an alibi.

2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.

3. Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.

4. Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.

If a Lucas direction is given where there is no need for such a direction (as in the normal case where there is a straight conflict of evidence), it will add complexity and do more harm than good. Therefore, in our judgement, a judge would be wise always, before speeches and summing up in circumstance number 4, and perhaps also in other circumstances, to consider with counsel whether, in the instant case, such a direction is in fact required, and, if, so how it should be formulated. If the matter is dealt with in that way, this Court will be very slow to interfere with the exercise of the judge's discretion. Further, the judge should, of course, be assisted by counsel in identifying cases where a direction is called for. In particular, this Court is unlikely to be persuaded, in cases allegedly falling under number 4 above, that there was a real danger that the jury would treat a particular lie as evidence of guilt if defence counsel at the trial has not alerted

the judge to that danger and asked him to consider whether a direction should be given to meet it. The direction should, if given, so far as possible, be tailored to the circumstances of the case, but it will normally be sufficient if it makes the two basic points:

1. that the lie must be admitted or proved beyond reasonable doubt, and

2. that the mere fact that the defendant lied is not in itself evidence of guilt since defendants may lie for innocent reasons, so only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the prosecution case.

In the present case, for the reasons which we have set out, no Lucas direction was required in relation to what the appellant **Burge** said in the witness box. The point has not been argued separately in relation to the appellant **Pegg,** but it applies also to him. Even if we were wrong about the need for a Lucas direction, the direction given was, in our judgment, wide enough to cover what was said by the two appellants in the witness box, and so, for those two separate reasons, Mr O'Connor's final ground of appeal fails.

DISPOSITION:
Appeals dismissed.

[1981] QB 720

REGINA v **LUCAS** (RUTH)

[COURT OF APPEAL]

[1981] QB 720

HEARING-DATES: 29, April 19 May 1981

19 May 1981

CATCHWORDS:
Crime - Evidence - Corroboration - Accomplice - Lies by person charged - Criteria rendering statement capable of amounting to corroboration - Whether lying statement in witness box capable of amounting to corroboration

HEADNOTE:
The appellant was tried on a count charging an offence in respect of which evidence implicating her was given by an accomplice. The appellant gave evidence which was challenged as being partly lies. The jury were warned of the dangers of convicting on the accomplice's uncorroborated evidence and were directed in terms which suggested that lies told by the appellant in court could be considered as corroborative of the accomplice's evidence. The appellant was convicted.

On appeal against conviction, on the question of the extent to which lies might in some circumstances provide corroboration:-

Held, allowing the appeal, that for a lying statement made out of court to be capable of amounting to corroboration it had to be deliberate and relate to a material issue, the motive for lying had to be a realisation of guilt and a fear of the truth, and the statement had to be shown to be a lie by admission or evidence from a witness who was independent and other than the accomplice to be corroborated; that lies told in court which fulfilled those four criteria were available for consideration by the jury as corroboration, but that the mere fact that the jury preferred the evidence of an accomplice to that of the person charged, who therefore must have been lying in the witness box, did not enable them to treat the lying evidence as corroborative of that of the accomplice; that, since the appellant's lie had not been shown to be such by evidence other than that of the accomplice who was to be corroborated, the apparent direction that a lie was capable of providing corroboration of the accomplice's evidence was erroneous and the conviction would be quashed (post, pp. 723G-H, 724C-D, E-G, 725G, G-H).

Reg. v. Chapman [1973] Q.B. 774, C.A. explained.

INTRODUCTION:
APPEAL against conviction.

On November 14, 1979, at Reading Crown Court (Judge John Murchie) the appellant, Iyabode Ruth **Lucas,** pleaded not guilty to two counts charging her jointly with Fritz Emmanuel Bastian with being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug, contrary to section 304 of the Customs and Excise Act 1952 as amended by section 26 of the Misuse of Drugs Act 1971; the particulars of count 1 were that the appellant and Bastian on December 12, 1978, at London (Gatwick) Airport were in relation to a Class controlled drug, namely, 25.17 kilograms of cannabis, knowingly concerned in the fraudulent evasion of the prohibition on importation imposed by section 3 (1) of the Misuse of Drugs Act 1971; and the particulars of count 2 were in similar terms relating to February 7, 1979, at London (Heathrow) Airport and 18.12 kilograms of cannabis. Only the proceedings relating to the appellant call for report. In relation to the appellant on November 23, 1979, the jury returned a unanimous verdict of guilty to count 2 and a majority verdict by 10 to 2 of guilty to count 1. The appellant was

sentenced to two years' imprisonment on count 1 and to three years' imprisonment concurrent on count 2. She appealed against conviction on the grounds that the jury were misdirected in relation to corroboration of the evidence of an accomplice and on various factual grounds, and she applied for leave to appeal against severity of sentence. Only the appeal against conviction calls for report.

The facts are stated in the judgment.

COUNSEL:
W. E. M. Taylor (assigned by the Registrar of Criminal Appeals) for the appellant. The appeal raises the following questions. In directing the jury about corroboration in relation to the Gatwick count did the judge deal adequately with the correct approach to be adopted by a jury on the question of a defendant lying? Should he have made a distinction between lies told by a defendant before the trial and those told by her on oath in the court in her own defence? If the jury found that she lied on oath in court, was it a correct statement of the law that such lies cannot be corroboration in any circumstances of an accomplice's evidence?

The judge should have directed the jury as to which matters, if they found them to be lies, were capable of amounting to corroboration.

Some confusion in the authorities exists about the extent to which lies may in some circumstances provide corroboration: see Tumahole Bereng v. The King [1949] A.C. 253; Credland v. Knowler (1951) 35 Cr.App.R. 48; Dawson v. M'Kenzie, 1908 S.C. 648 and Reg. v. Knight[1966] 1 W.L.R. 230. See also Cross on Evidence, 5th ed. (1979), pp. 210, 211; Phipson on Evidence, 12th ed. (1976), p. 692, para. 1642 and "Can Lies Corroborate?" by J. D. Heydon (1973) 89 L.Q.R. 552, 561.

The defect in the conviction on the Gatwick count taints the conviction on the Heathrow count as the judge appeared to say to the jury that they could give their decision on lies on both counts.

Douglas Blair for the Crown. A careful reading of Reg. v. Chapman[1973] Q.B. 774 reveals that, while the decision on the point in issue was correct, it is not authority for the proposition that in no circumstances

can lies by a defendant in court provide material corroboration of an accomplice's evidence: Reg. v. Boardman [1975] A.C. 421, 428-429.

The conviction on the Heathrow count is unaffected by consideration of the Gatwick count.

Cur. adv. vult.

May 19.

PANEL: Lord Lane C.J., Comyn andStuart-Smith JJ

JUDGMENTBY-1: LORD LANE C.J

JUDGMENT-1:
LORD LANE C.J: read the following judgment of the court. This is an appeal pursuant to leave of the full court by Iyabode Ruth **Lucas** against conviction at Reading Crown Court on November 23, 1979, on two counts of being knowingly concerned in the fraudulent evasion of the prohibition on the importation into this country of a controlled drug, namely, cannabis, contrary to the Misuse of Drugs Act 1971. The first count was in respect of an importation on December 12, 1978, through Gatwick Airport and related to 25.17 kilogrammes of the drug; the second was in respect of an importation some two months later through Heathrow Airport of 18.12 kilogrammes. In both cases the appellant had arrived here from Nigeria. The jury first brought in a verdict of guilty on the Heathrow count. That verdict was unanimous. Then, after a majority direction, they returned 22 minutes later giving a 10 to 2 majority verdict of guilty on the Gatwick count. The judge sentenced the appellant to three years' imprisonment on the Heathrow count and two years' imprisonment on the Gatwick count to run concurrently.

In both counts the appellant was charged together with a man called Fritz Emmanuel Bastian.

Bastian originally pleaded not guilty to the Gatwick count but guilty to the Heathrow count. During the trial he changed his plea to one of guilty on the Gatwick count also.

The appellant and Bastian were admittedly together on both occasions. On the first occasion they were accompanied by a man called Crike Areh. Areh was charged independently with an offence in the terms of the Gatwick count, pleaded guilty to it at Lewes Crown Court, and was sentenced to 18 months' imprisonment. He took no part at all in the Heathrow matter. At the trial of the appellant and Bastian, Areh gave evidence in detail implicating both of them in the Gatwick count. The only material point in this appeal is whether the judge gave a correct direction on the question of corroboration of Areh's evidence.

Mr. Taylor, for the appellant, therefore directs his main attack against the Gatwick conviction, that is, count 1, but seeks to keep alive his contention that the conviction on count 2 (Heathrow) is tainted by any defect in the conviction on count 1.

We can dispose of that matter at once. The fault which we are con strained to say occurred in respect of the Gatwick count does not, in our judgment, in any way affect the validity of the conviction on the second, the Heathrow, count. The judge most carefully pointed out to the jury that the two counts were separate and had to be considered by them separately. That they fully heeded that direction was plain from the different form of their verdicts; unanimous in regard to the Heathrow count, a 10 to 2 majority in respect of the Gatwick count. It only remains to say of the Heathrow count that there was very strong evidence implicating the appellant and that the keys of the suitcase containing cannabis which

Bastian tried to smuggle through customs were found shortly afterwards in the appellant's fur coat. His and her attempted explanation that he put them there unknown to her was plainly and understandably rejected by the jury. The appeal in respect of the second count fails.

What Mr. Taylor says about the Gatwick count is this. Areh was undoubtedly an accomplice; therefore it was incumbent upon the judge to give the usual warning to the jury about the dangers of convicting on his uncorroborated evidence, and then to point out any potentially corroborative facts. There is no dispute that the warning was given in impeccable terms. The complaint is confined to the way in which the judge directed the jury as to what might be considered by them as corroboration.

Having explained to the jury that they were entitled to convict on the evidence of the accomplice even though uncorroborated, provided they heeded the warning of the dangers of so doing, he went on to explain that such corroboration could sometimes be found in the evidence of the defendant herself. He correctly directed the jury that when a defendant tells lies there may be reasons for those lies which are not connected with guilt of the offences charged and that one of their tasks would be to decide, if the defendant had told lies, what was their purpose. He went on to say:

"In the same way it is said that the defendant lied to you on various matters, and you will consider those aspects. ... If you weigh the defendant's evidence, if you reject it on many aspects, you are entitled to say: 'Why has this evidence, which we the jury reject, been given to us by the defendant?' If there is only one possible answer - for example, that Mr. Areh, though wholly unsupported, was telling the truth - you are entitled to give your answer to that question in your two verdicts, providing you bear in mind my warning to look for independent support of the evidence of a tainted man."

Apart from that passage, there is nothing in the direction which suggests to the jury what, if anything, is capable of amounting to corroboration of the accomplice's evidence. Although read literally the judge does not say so, the jury may have received the impression that they were entitled to ask themselves whether they rejected the defendant's evidence given before them and, if the answer was "Yes," to use their consequent conclusion that she had lied to them as corroboration of Areh's evidence. This was certainly what counsel for the Crown thought the judge was saying, because at the close of the summing up, in the absence of the jury, he invited the judge to clarify the matter. That invitation was not accepted.

We accept that the words used in the context in which they were, were probably taken by the jury as a direction that lies told by the defendant in the witness box could be considered as

corroborative of an accomplice's evidence, and we approach the case on that footing.

The fact that the jury may feel sure that the accomplice's evidence is to be preferred to that of the defendant and that the defendant accordingly must have been lying in the witness box is not of itself something which can be treated by the jury as corroboration of the accomplice's evidence. It is only if the accomplice's evidence is believed that there is

any necessity to look for corroboration of it. If the belief that the accomplice is truthful means that the defendant was untruthful and if that untruthfulness can be used as corroboration, the practical effect would be to dispense with the need of corroboration altogether.

The matter was put in this way by Lord MacDermott in Tumahole Bereng v. The King [1949] A.C. 253, 270:

"Nor does an accused corroborate an accomplice merely by giving evidence which is not accepted and must therefore be regarded as false. Corroboration may well be found in the evidence of an accused person; but that is a different matter, for there confirmation comes, if at all, from what is said, and not from the falsity of what is said."

There is, without doubt, some confusion in the authorities as to the extent to which lies may in some circumstances provide corroboration and it was this confusion which probably and understandably led the judge astray in the present case. In our judgment the position is as follows. Statements made out of court, for example, statements to the police, which are proved or admitted to be false may in certain circumstances amount to corroboration. There is no shortage of authority for this proposition: see, for example, Reg. v. Knight [1966] 1 W.L.R. 230, Credland v. Knowler (1951) 35 Cr.App.R. 48. It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew if he told the truth he would be sealing his fate. In the words of Lord Dunedin in Dawson v. M'Kenzie, 1908 S.C. 648, 649, cited with approval by Lord Goddard C.J. in Credland v. Knowler, 35 Cr.App.R. 48, 55:

"'... the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made.'"

To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

As a matter of good sense it is difficult to see why, subject to the same safeguards, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration. In other common law jurisdictions they are so treated; see the cases collated by Professor J. D. Heydon in "Can Lies Corroborate?" (1973) 89 L.Q.R. 552, 561, and cited with apparent approval in Cross on Evidence, 5th ed. (1979), p. 210 (footnote).

It has been suggested that there are dicta in Reg. v. Chapman [1973] Q.B. 774, to the effect that lies so told in court can never be capable of

providing corroboration of other evidence given against a defendant. We agree with the comment upon this case in Cross on Evidence, 5th ed., pp. 210-211, that the court there may only have been intending to go no further than to apply the passage from the speech of Lord MacDermott in Tumahole Bereng v. The King [1949] A.C. 253, 270 which we have already cited.

In our view the decision in Reg. v. Chapman [1973] Q.B. 774 on the point there in issue was correct. The decision should not, however, be regarded as going any further than we have already stated. Properly understood, it is not authority for the proposition that in no circumstances can lies told by a defendant in court provide material corroboration of an accomplice. We find ourselves in agreement with the comment upon this decision made by this court in Reg. v. Boardman [1975]

A.C. 421, 428-429. That point was not subsequently discussed when that case was before the House of Lords.

The main evidence against Chapman and Baldwin was a man called Thatcher, who was undoubtedly an accomplice in the alleged theft and dishonest handling of large quantities of clothing. The defence was that Thatcher was lying when he implicated the defendants and that he must himself have stolen the goods. The judge gave the jury the necessary warning about accomplice evidence and the requirement of corroboration, and then went on to say, at p. 779:

"If you think that Chapman's story about the disappearance of the van and its contents is so obviously untrue that you do not attach any weight to it at all - in other words, you think Chapman is lying to you - then I direct you that that is capable of corroborating Thatcher, because, members of the jury, if Chapman is lying about the van, can there be any explanation except that Thatcher is telling the truth about how it came to disappear? ... My direction is that it is capable in law of corroborating Thatcher. Similarly in the case of Baldwin, if you think that Baldwin's story about going up to London and buying these ... is untrue - in other words he has told you lies about that - then ... that I direct you, so far as he is concerned, is capable of amounting to corroboration of Thatcher."

That being the direction which this court was then considering, the decision is plainly correct, because the jury were being invited to prefer the evidence of the accomplice to that of the defendant and then without more to use their disbelief of the defendant as corroboration of the accomplice.

Providing that the lies told in court fulfil the four criteria which we have set out above, we are unable to see why they should not be available for the jury to consider in just the same way as lies told out of court. So far as the instant case is concerned, the judge, we feel, fell into the same error as the judge did in Reg. v. Chapman [1973] Q.B. 774. The lie told by the appellant was clearly not shown to be a lie by evidence other than that of the accomplice who was to be corroborated and consequently the apparent direction that a lie was capable of providing corroboration was erroneous. It is for that reason that we have

reached the conclusion that the conviction on the Gatwick count, that is count 1, must be quashed and the appeal to that extent is allowed.

DISPOSITION:
Appeal against conviction on count 2 dismissed.

Appeal against conviction on count 1 allowed. Conviction quashed.

SOLICITORS:
Solicitor: Solicitor, Customs and Excise.

L. N. W.

Lexis UK CD 693, [1997] 2 Cr App Rep 222

R v **Rackham**

COURT OF APPEAL (CRIMINAL DIVISION)

Lexis UK CD 693, [**1997**] 2 Cr App Rep **222**

HEARING-DATES: 4, 7 MARCH **1997**

7 MARCH **1997**

CATCHWORDS:
Indictment - Particulars - Accuracy - Course of conduct - Application for better particulars of offence - Judge providing initiative to add further charges - Whether sufficient particulars of offence given - Whether judge outside of authority.

Criminal evidence - Sexual offence - Evidence of previous unfounded allegations of sexual interference - Whether such evidence admissible.

HEADNOTE:
This judgment has been summarised by LexisNexis UK editors.

The appellant was originally charged with five counts of sexual offences against his co-habitee's two daughters during the period 1984 to 1993. The conduct against each daughter spanned seven years. One daughter was over 16 during part of the period of abuse. Counts 1, 3 and 5 were opened to the jury as specimen counts on the basis that the indecent assaults had embraced a range of behaviour. The appellant applied for identification of the incidents upon which the Crown relied under those counts, for otherwise, the jury might convict on one of those counts when there was no unanimity as to which incident it was that was being talked about. The judge refused that application on the grounds that the appellant would suffer no prejudice, as his defence was that nothing indecent had happened at all. There was evidence to select specific incidents with regard to some of the charges. The application was re-addressed at the end of the prosecution case. In light of a recent decision, the judge raised the need to add further charges to the indictment as it was now impermissible to sentence on a single count as if it involved a conviction on the course of conduct alleged, the prosecutor should indict on a sufficient number of counts that the sentence could better meet the case. Counts 1a, 3a and 5a were then added in similar terms to its twin. During the defence case, a witness was prevented from giving the reason that one of the complainants voluntarily left employment because she had made unfounded allegations of sexual interference. The judge directed the jury not to convict on count 2. The appellant was convicted on the remaining counts and appealed against those convictions. He complained of, inter alia, the failure to force the prosecution to particularise offences for the purposes of counts 1, 3 and 5 and their twins, 1a, 3a and 5a, of the refusal of the judge to let a defence witness give evidence on the reasons why one of the complainants had left employment, and of the judge providing the initiative for adding charges to the indictment.

Held: (1) It was not necessary to look for authority for the proposition that an indictment should be so drawn or exemplified that a Defendant would know with as much particularity as the circumstances of the case would admit, the case he had to meet. Hardly less important was the need for a judge in the event of a conviction to know what precisely it was that the jury had found proven. Indictments should steer a safe course between prejudicial uncertainty and over-loading. However, if a Defendant chose to meet general charges without objection, he could not easily raise want of particularity in the Court of Appeal. On the facts of the instant case, as regarded count 1, it would have been important to know whether the complainant had been under 16 at the time, or if over 16, whether she had consented. Furthermore, given the passage of time, the judge was in error in not acceding to the request for better particulars. It followed that the convictions for counts 1, 1a, 3, 3a, 5, and 5a were unsafe.

(2) Where the disputed issue was a sexual one between two persons in private, the difference between questions going to credit and going to the issue was reduced to vanishing point. On the facts of the instant case, the reason behind one of the complainant's leaving work would have been a collateral issue, and as such the judge was correct to exclude it.

(3) In did not matter that the initiative for the additional counts came from the judge. That was not an intervention outside his proper role. Further, as the appellant had been contending for particularisation of the offences, he could not have fairly resisted the addition of a modest number of new counts to reflect other specific incidents. It followed that the conviction on count 4 would stand, and thus that part of the appeal would be dismissed.

R v Shore 89 Cr App Rep 32 distinguished.

COUNSEL:
R Pardoe for the Appellant; M Joyce for the Crown

PANEL: MCCOWAN LJ, IAN KENNEDY, STUART-WHITE JJ

SOLICITORS:
Registrar of Criminal Appeals; Crown Prosecution Service

[2005] NICA 27, (Transcript)

R v Mullen

COURT OF APPEAL

[2005] NICA 27, (Transcript)

HEARING-DATES: 3 JUNE 2005

3 JUNE 2005

PANEL: NICHOLSON, CAMPBELL LJJ, HIGGINS J

JUDGMENTBY-1: HIGGINS J:

JUDGMENT-1:
HIGGINS J:

(reading the judgment of the court)

[1] This is an application for leave to appeal against conviction. The Applicant was convicted on two counts by the unanimous verdict of the jury at a trial before His Honour Judge McFarland at Dungannon Crown Court on 9 September 2004. Count 1 alleged assault occasioning actual bodily harm contrary to s 47 of the Offences against the Person Act 1861. The particulars of the offence alleged:

"Geraldine Ann Mullen on a date unknown between the 23 day of October 2002 and the 29 day of October 2002, in the County Court Division of Fermanagh and Tyrone assaulted Carol Mullen, thereby occasioning her actual bodily harm."

[2] Count 2 alleged cruelty to a child contrary to s 20(1) of the Children and Young Persons Act (NI) 1968. The particulars of the offence alleged:

"Geraldine Ann Mullen on a date unknown between 23 October 2002 and 29 October 2002, in the County Court Division of Fermanagh and Tyrone, having attained the age of sixteen and having the custody, charge or care of a child under that age, namely Carol Mullen, wilfully assaulted the said Carol Mullen in a manner likely to cause her unnecessary suffering or injury to health."

[3] The Applicant was sentenced to 12 months' imprisonment on each count concurrently. A six months' suspended sentence for an offence of theft was reduced to two months and put into effect consecutively.

[4] The Applicant lived with her husband George at 53 Liskey Road, Strabane. George's brother Harry is the father of five children whose mother is Rosemary Waring. On 9 May 2002 all five of those children were taken into care. A foster placement was arranged with the Applicant for three of the children, one of whom was Carol Mullen, the injured party, who was born 19 September 1998. On 27 May 2002 she along with two of her siblings went to live with the Applicant and her husband, when the Applicant assumed the role of foster mother to them. The children's natural parents maintained twice weekly contact with them. This took place on Mondays and Thursdays at the offices of Strabane Social Services. One such contact visit took place on Thursday 24 October 2002. Nothing untoward was noticed on that occasion.

[5] The next contact visit was scheduled for Monday 28 October. On the morning of that date the Applicant telephoned social services and attempted to cancel that visit. However, social services declined to agree to that and the visit proceeded. At that visit it was observed that Carol had marks on her body. She was returned to the Mullen household that evening and on the following

day, 29 October 2002, was taken to Londonderry where around noon she was examined by Dr Knowles, a paediatrician with 27 years' experience. She found faded linear marks on the back of the child's right thigh. She also noted many linear marks on the right buttock, across the sacrum on the left upper buttock and the left lower buttock. They were running obliquely from the upper right area to the lower left and below the linear marks was blue/reddish blue type bruising. The left buttock was slightly tender. The linear marks on the upper buttock ran at a different angle from those on the lower buttock. Superimposed on top of the linear marks was blue bruising that was slightly tender to touch. While acknowledging the difficulty in determining the age of bruising, Dr Knowles said that generally speaking they were two to four days old and could have been caused at the one time. She also said they would have required the application of considerable force to the child's body. Dr Knowles considered the marks were caused by a shoe with a ridged sole.

[6] At 6.00pm on the same day, 29 October 2003, Carol was examined by a consultant paediatrician, Dr Sandi Hutton. She found the same patterning of injury on Carol's buttocks and thigh as Dr Knowles found and agreed that they were two to four days old and were likely to have been caused by the sole of a shoe. She was of the opinion that the marks were caused non-accidentally and were almost certainly a clear imprint of a shoe. Significantly she said that the infliction of them would undoubtedly have been painful and Carol would have been distressed at the time. She could not say for definite that a person would seek medical attention for such marks but added: "There is no doubt that if one saw a child with that extent of bruising I think one would be concerned." Photographs of Carol were taken at this time and were produced to the court and jury. These show clear patterned bruising across the child's buttocks and lower back. The marks are at different angles suggestive of as many as five or six separate applications of blunt force. In Dr Hutton's opinion these were more likely to have been caused by repeated blows than stamping.

[7] On the afternoon of 7 January 2003 police officers went to the Applicant's home and there seized four pairs of ladies' shoes. Three pairs belonged to the Applicant and were found in a wicker basket. The fourth pair belonged to her daughter, Jolene. All the shoes were sent to the Forensic Science Laboratory for examination.

[8] The Applicant was arrested on the same day and interviewed at Strabane Police Station in the presence of her solicitor. She told the police that sometime between 1.00pm and 2.00pm on the Friday before the contact visit, Carol was playing with the Applicant's grandson Thomas, then aged 18 months, in the conservatory (Friday was 25 October). The Applicant was in the kitchen. She told the police that there was no one else in the house. Thomas got out of the conservatory and Carol ran after him and fell down steps at the back of the house. The steps have wire mesh over them. She went out and found Thomas at the top of the steps and Carol was lying on her back on the third or fourth step down and she was crying. She pushed 'Thomas back out of the way and grabbed Carol by the arm and pulled her up. She took her into the conservatory. She noticed the marks on her back. She described them as "wee lines" and rubbed cream on them. The marks looked like the wire on the steps and to her the wire caused the marks. They were in the same position as the marks visible in the photographs, but more red in colour. Over the weekend more bruising appeared in the same location. Carol never complained about the bruising or the fall, or about feeling sore. Only the Applicant and her husband were in the house over the weekend as their children were grown up and usually stayed with friends. On Saturday she went to Bundoran with her husband and the three foster children. On the Sunday she and her husband were at home with the three children. She could not say if any of her own children were about or had called to the house. On the Monday morning her son Thomas, who is married and lives elsewhere, telephoned and asked her to go to Belfast with him to look at fitted kitchens. She agreed to go with him and to take Carol with her. Then she remembered that Carol was to see her mother that day. So she phoned social services and tried to cancel the visit, but social services declined to agree to this. She did not tell social services about the bruising during this call. When asked why she did not tell them she said that it was because a social worker called Violet was away and she was waiting for her to come back. She denied hitting Carol with her hand, a shoe or any other object.

[9] Of the four pairs of shoes recovered from the home the forensic evidence was that the black shoes, belonging to Jolene, could not have made the marks, but any of the other three pairs could have done so. Furthermore these marks could not have been caused by falling down the steps at the rear of the house nor by contact with the wire mesh that overlays them. This is self-evident from the photographs of those steps with the wire mesh.

[10] At the conclusion of the case for the prosecution a submission was made that the accused had no case to answer and that the trial judge should direct the jury to find the Applicant not guilty. The judge ruled against that submission. The Defendant did not give evidence nor was any evidence called on her behalf.

[11] In his submissions to this court Mr McCann, who appeared at the trial, advanced as his principal argument that the trial judge should have directed the jury to find the Applicant not guilty at the conclusion of the prosecution case on the ground that a prima facie case against the Applicant had not been established. He referred to the well-known passage in Archbold at 4-294 based on the decision in R v Galbraith. He accepted that a crime had been committed against Carol but not that the Applicant had committed it. He submitted:

(i) there was no evidence that the Applicant had assaulted Carol or treated her with cruelty;

(ii) if there was evidence (which he did not accept) it was insufficient to establish a prima facie case;

(iii) relying on R v **Strudwick and Merry [1994**] 99 **Cr** App **Rep 327,** that the trial judge should have recognised that other persons lived in the house with opportunity to commit the crime and that there was no evidence as to which of them had committed the crime and in those circumstances the judge should have withdrawn the case from the jury, in line with similar cases involving prosecution of parents for harming their children;

(iv) relying on R v **Strudwick and Merry,** if the Applicant told a lie about how the child sustained the injuries, that lie could not fill the gap in the prosecution case or provide the basis for a conviction in the absence of other evidence.

[12] In R v **Strudwick and Merry** the mother of a three year old child and her co-habitee were jointly charged with the manslaughter of the child and two counts of cruelty. They both admitted that the child was with them during the period when the fatal injuries must have been inflicted. The prosecution were in the "familiar difficulty" identified by Lord Goddard in R v Abbott [1955] 2 QB 497, 503, [1955] 2 All ER 899. This occurs when two persons are jointly indicted and the evidence does not point to one rather than the other and there is no evidence that they were acting in concert. Lord Goddard said that in those circumstances the jury ought to return a verdict of not guilty because the prosecution had failed to prove its case against either or both of them; see, in a different context, R v Whelan, Whelan and Whelan [1972] NI 153.

[13] Mr McCann submitted that the trial judge in this case should have assumed that there were three persons on trial - the Applicant, her husband and her daughter. If he had done so he would have noted that the prosecution case could not prove which of them assaulted the child and accordingly he would have directed the jury to find the Applicant not guilty. In R v **Strudwick and Merry** both parents, who were present at the material time were prosecuted, but the prosecution could not prove which parent had caused the injuries to the child or whether both had been involved.

[14] In the instant appeal only one person, the Applicant, was accused and the evidence was circumstantial in nature. The prosecution case was that Carol was injured at a time when she was in the sole custody of the Applicant and no other person. The Applicant told the police that Carol sustained injuries when she fell down the steps and that those injuries, which she saw at that time, albeit not fully developed, were the same ones and in the same place as those shown in the photographs. The evidence of the experts was that the injuries could not have been caused on the wire mesh on the steps and that while it is difficult to age bruising the injuries were probably two to four days old. The Applicant told the police the injuries shown in the photographs were caused on the Friday. If the jury accepted the evidence of the experts, as they clearly did, it was open to them to conclude that the injuries were caused by the application of blunt force probably with a shoe at that time when the Applicant was the only adult present. Thus the prosecution case did not involve the question - which of the occupants of the house caused the injury. The Applicant did not seek to say in her interviews with the police that someone else was alone with the child during a critical period or that another member of the household was responsible for Carol's injuries. We do not consider that this was a case in which the "familiar difficulty", identified by Lord Goddard, arose. If it did, once the trial judge decided that a prima case existed, it would

have been open to the Applicant to have given evidence about it. This was a case, as Mr McKay contended for the Crown, where the strength or weakness of the prosecution evidence depended on the view to be taken of matters which were generally speaking within the province of the jury. On one possible view of the facts there was evidence on which the jury could properly come to the conclusion that the defendant was guilty. In such a case the judge should allow the matter to be tried by the jury (see Lord Lane CJ at p 127 of Galbraith).

[15] Counsel for the Applicant submitted that if the Applicant told a lie about how the injuries were caused, that is to say in suggesting that they were caused through contact with the wire mesh on the steps, the fact of that lie could not prove that she assaulted Carol. It could not "plug the gap" to adopt Mr McCann's words. He relied on a passage in the judgment of Farquharson LJ in R v **Strudwick and Merry [1994]** 99 **Cr** App **Rep 327** at p 331 in which he said:

"Lies, if they are proved to have been told through a consciousness of guilt, may support a prosecution case, but on their own they do not make a positive case of manslaughter or indeed any other crime."

In that case there was no evidence that either appellant struck the fatal blows and no evidence that one assisted or encourage the other. In those circumstances the lies they told could not make a positive case of manslaughter against them. In R v Lane and Lane [1986] 2 **Cr** App **Rep** 5, a mother and stepfather were charged with the manslaughter of a child. The evidence against each other separately did not establish his or her presence whenever the child was injured or any participation by either in those injuries. Neither made any admission but both told lies, the purpose of which was to provide each with an alibi. As Croom-Johnson LJ pointed out, the lie did not advance the prosecution case and lead to an inference of the appellants' presence at the crucial time. Such lies may support a case for the prosecution but are insufficient to make such a case on their own.

[16] In this case the issue of guilt and the lie were central to the case and so inextricably linked that they stood or fell together. It was open to the jury, as they clearly did, to conclude that the injuries to Carol were inflicted on the Friday when the only adult present was the Applicant, that the account that the injuries were sustained on the steps was false and that this account was given by the Applicant to cover up the injuries that she inflicted on the child.

[17] There was a clear prima facie case against the Applicant based on circumstantial evidence and the trial judge was correct in allowing the case to go to the jury. The Applicant did not give evidence and no complaint is made about the trial judge's direction on that issue. There was sufficient evidence for the jury to conclude that the injuries sustained by Carol were non-accidental and that they were inflicted by the Applicant. Therefore the application for leave to appeal is refused.

DISPOSITION:
Appeal refused.

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