HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 39

on appeal from [2005] EWCA Crim 52

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R
v.
Coutts (Appellant) (On Appeal from the Court of Appeal (Criminal Division))

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hutton
Lord Rodger of Earlsferry
Lord Mance

Counsel

Appellants:
Edward Fitzgerald QC
Paul Taylor
(Instructed by Fisher Meredith)

Respondents:
John Kelsey-Fry QC
Mark Summers
(Instructed by Crown Prosecution Service)

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LORD BINGHAM OF CORNHILL

My Lords,

1. The appellant, Mr Coutts, was convicted of murder on an indictment charging him with that crime alone. Evidence was adduced at the trial which would have enabled a rational jury, if they accepted it, to convict him of manslaughter. But the trial judge, with the support of the prosecution and the consent of the defence, did not leave an alternative count of manslaughter to the jury. He directed the jury that they should convict of murder if satisfied that the appellant had committed that offence and, if not so satisfied, acquit. On his appeal to the Court of Appeal (Criminal Division) the appellant contended that a manslaughter verdict should have been left to the jury for their consideration, irrespective of the parties' wishes, since there was evidence to support it. The Court of Appeal rejected that contention, and by leave of the House the appellant now challenges its decision. The narrow question raised by the appeal is whether, on the facts of this case, the trial judge should have left an alternative verdict of manslaughter to the jury. The broader question, of more general public importance, concerns the duty and discretion of trial judges to leave alternative verdicts of lesser-included offences to the jury where there is evidence which a rational jury could accept to support such a verdict but neither prosecution nor defence seek it.

The facts and the proceedings

2. The facts of the case were summarised at some length by the Court of Appeal ([2005] EWCA Crim 52, [2005] 1 WLR 1605), and are the subject of a fairly detailed statement agreed between the parties for

the purpose of this appeal. For present purposes a bare outline will suffice.

3. The deceased (Jane Longhurst) lived with her male partner in Brighton. The appellant and his girlfriend Lisa Stephens lived in a flat in Hove. Lisa Stephens was a friend of the deceased, with whom the appellant became acquainted. On 14 March 2003 the deceased died at the appellant's flat. He stored her body first in his car, then in his shed, then in a commercial storage facility. On 19 April he took her body to an area of woodland some distance away and set fire to it. When found, the body was burning and unclothed. It had a ligature made from a pair of tights tied twice around the neck, with a knot on the right-hand side. The appellant was interviewed by the police before and after discovery of the body, but prevaricated for reasons which he later sought to explain and justify. Some weeks later he told a legal representative that he had not intended to kill the deceased or cause her serious harm, and that he had never caused harm to anybody in the past when using ligatures in sexual activities. He was charged with murder and in due course tried before His Honour Judge Brown and a jury in the Crown Court at Lewes.

4. The expert pathologists called by the prosecution and the defence respectively at the trial were agreed that the cause of the deceased's death was compression of her neck by the ligature, causing her to be asphyxiated. But they disagreed on the most likely mechanism. The prosecution expert thought vascular strangulation or respiratory strangulation the most likely mechanisms, and considered vagal inhibition to be less likely. The defence expert thought vagal inhibition the most likely explanation. Both experts gave reasons for holding the opinions which they did, which were fully explored in evidence before the jury. The evidence suggested that death, if caused by vascular or respiratory strangulation, would have occurred within about 2-3 minutes; if by vagal inhibition, it would have occurred more quickly, possibly within 1-2 seconds.

5. Much of the evidence at trial was directed to the appellant's sexual habits and propensities. One witness, called by the prosecution, had had a seven-year relationship with the appellant, during which he had, with her consent, placed his hand around her neck, before and during intercourse, and had used tights and knickers around her neck. Another witness had had a shorter and more recent relationship. The appellant had asked her to put her hands around his neck during intercourse, and he had put pressure on her windpipe, sometimes using a

stocking tied round her neck, which he would pull from both sides. She had allowed him to do this because of the pleasure it gave him but she had never enjoyed it herself and he had always stopped when she asked. With his current partner, Lisa Stephens, he had on a few occasions indulged in what he called "breath control play". There was some evidence, which was denied, that the deceased had engaged in similar activity with a partner other than the appellant.

6. The appellant said that he had been fascinated by women's necks for about 20 years, but that he had no interest in violence and his fetish did not extend to strangulation. He testified that on 14 March 2003 he and the deceased had had consensual asphyxial sex and her death had been a tragic accident. He had put his hand around her neck, and she had squeezed his hand to tighten his grip. He had then, with her consent, tied a pair of tights round her neck and tied a knot in them. At some point he had closed his eyes and released the tights. He did not know how the deceased had died.

7. The prosecution led evidence to show that before and after 14 March 2003 the appellant had visited a number of pornographic websites, showing violence towards women. Reliance was also placed on certain websites and on repeated visits by the appellant to the storage facility where the body of the deceased had been stored to suggest that he had necrophiliac propensities.

8. At the close of the evidence the trial judge very properly invited the submissions of counsel on whether he should direct the jury that a verdict of guilty of manslaughter was open to them. Prosecuting counsel submitted that it would be unfair to do so. He said:

> "It is true that one could mount an argument in law to suggest that the defence account, even if accepted, might amount either to gross negligence, on the one hand, or, arguably, an unlawful and dangerous act on the other; and so there would be room, arguably, for an alternative verdict, even on the defence account, of manslaughter …"

But he submitted that the Crown had throughout put forward the case that this was a deliberate killing and nothing else. If that was not proved, the appellant was entitled to be acquitted. It would be wrong to put the case on any alternative basis. Counsel then representing the

appellant agreed, although he later ventilated the possibility of a verdict of "no intent manslaughter" as opposed to "unlawful act or gross negligence manslaughter". The judge asked counsel directly whether he was inviting him to put manslaughter on any basis to the jury, and counsel gave a provisional answer in the negative, while reserving the right to discuss the question with the appellant and raise the matter again. He did not raise the matter with the judge again, but did discuss it with the appellant. According to a statement of the appellant, seen and not controverted by counsel then acting, the latter asked him "Do you want us to make representation, or do you want to roll the dice and be home with Lisa and the boys?" The appellant was advised that if convicted of manslaughter he would receive a sentence of as long as 15 years', and agreed that counsel should not ask the judge to leave manslaughter to the jury. Thus the judge directed the jury on the ingredients of murder in terms of which no complaint is made, and directed them to acquit if they thought that the death was or might have been an accident. No mention was made of manslaughter. The jury convicted the appellant of murder.

9. In the Court of Appeal it was submitted for the appellant that a trial judge ought in the ordinary way and save in some exceptional cases to leave to the jury an alternative count of manslaughter which there is evidence to support, and that the trial judge in this case should have done so whether or not that was the course which counsel on both sides preferred. The Court of Appeal (Lord Woolf CJ, Cresswell and Simon JJ), having reviewed the leading authorities, rejected that submission: [2005] 1 WLR 1605, paras 81-84. The court did not recognise a risk that a jury in a case of this kind, faced with a stark choice between convicting of murder and acquitting altogether, might improperly convict. It would have been unfair and unjust to leave the alternative count "for the very good reason that it involved a different and inconsistent case from that put forward by the prosecution". To have introduced an alternative count would have made the jury's task far more complicated without enhancing the interests of justice.

The parties' submissions

10. Mr Fitzgerald QC (who did not appear at the trial) submitted for the appellant that if in a trial for murder there is credible evidence which would, if accepted, support a verdict not of murder but of manslaughter, the trial judge ought in the ordinary way to leave manslaughter to the jury for their consideration, unless it would for any reason be unfair to do so. The judge should follow that course even though the defence has

not advanced such a case or sought such a verdict, and even though the prosecution has not raised, or has rejected, that possibility. The jury, as the tribunal of fact and arbiter of guilt, ought in principle to be invited to consider all issues properly raised by the evidence. If in a horrific case such as this the jury are faced with a stark choice between convicting of murder and acquitting a defendant whose conduct might be thought not only repulsive but dangerous, and are not alerted to an intermediate verdict which might (depending on their assessment of the evidence) best fit the facts as they find them, the risk arises that the jury may convict of murder because, consciously or subconsciously, they are unwilling to acquit. If the trial judge fails to leave to the jury a verdict which is raised by credible evidence, that is an irregularity which will ordinarily render the verdict unsafe, unless in all the circumstances the Court of Appeal concludes that the jury would inevitably have convicted even if the alternative verdict had been left.

11. Mr Kelsey-Fry QC for the Crown took issue with this approach. Accepting, as he had throughout, that the evidence, if accepted, supported a possible verdict of gross negligence manslaughter, he pointed out that neither the Crown nor the defence had asked that such a verdict be left to the jury and it was not a course the judge had favoured. The Crown had taken its stand that this was a deliberate, sadistic killing. The defence said that the death was an accident. The judge had given the jury a clear and accurate direction. If the jury thought that the death might have been an accident, they were to acquit. The integrity of jury trial depended on acceptance that a properly instructed jury would heed and follow the instructions of the judge. It must therefore be accepted that the jury, having deliberated, had found the full elements of murder to be established. There is no reason to suggest that the jury may, despite their oaths, have convicted improperly, and there is nothing to render the conviction unsafe. The Court of Appeal were right to dismiss the appeal for the reasons they gave.

Discussion

12. In any criminal prosecution for a serious offence there is an important public interest in the outcome (*R v Fairbanks* [1986] 1 WLR 1202, 1206). The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime

deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (*Von Starck v The Queen* [2000] 1 WLR 1270, 1275; *Hunter and Moodie v The Queen* [2003] UKPC 69, para 27).

13. Statutory rules (building in part on rules developed at common law) have been enacted to facilitate achievement of this important objective. Subsections (2) and (3) of section 6 of the Criminal Law Act 1967 provide:

> "(2) On an indictment for murder a person found not guilty of murder may be found guilty–
>
> (a) of manslaughter, or of causing grievous bodily harm with intent to do so; or
>
> (b) of any offence of which he may be found guilty under an enactment specifically so providing, or under section 4(2) of this Act [assisting offenders]; or
>
> (c) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty;
>
> but may not be found guilty of any offence not included above.
>
> (3) Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

Thus, to take familiar examples, a defendant accused of murder may be convicted of manslaughter if the evidence shows that he was or may have been provoked, and a defendant accused of wounding with intent may be convicted of unlawful wounding if the evidence establishes the wounding but leaves room for doubt about the intent.

14. These statutory rules are reinforced by two principles developed in the cases. The first of these principles, relating to manslaughter on grounds of provocation in the context of a count of murder, was expressed by Lord Reading CJ in the Court of Criminal Appeal in *R v Hopper* [1915] 2 KB 431, 435:

> "We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence – we say no more than that – upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that this verdict of murder cannot stand."

This passage was quoted with approval by Viscount Simon LC giving the unanimous opinion of the House in *Mancini v DPP* [1942] AC 1, 7-8. It was again cited with approval by Lord Tucker, giving the reasons of the Privy Council in *Bullard v The Queen* [1957] AC 635, 642, who held that it had

> "long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to

> return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

Lord Tucker went on to say (p 644):

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

Lord Tucker's ruling first quoted above was itself quoted with approval by the Court of Criminal Appeal in *R v Porritt* [1961] 1 WLR 1372, 1376-1377. It has since been applied in many cases. But the fullest statement of the principle is that given by Lord Clyde on behalf of the Privy Council in *Von Starck v The Queen* [2000] 1 WLR 1270, 1275, when, in a case where there was evidence throwing doubt on the defendant's capacity to form the intent necessary for murder, he said:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept

> it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in *Xavier v The State* (unreported), 17 December 1998; Appeal No. 59 of 1997 a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In *Xavier v The State* the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that, 'If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter'. In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury."

This ruling has been applied by the Privy Council in *Hunter and Moodie v The Queen* [2003] UKPC 69 and by the Court of Appeal in Northern Ireland in *R v Shaw and Campbell* [2001] NIJB 269. The judge's duty to leave a possible manslaughter defence arising on the evidence to the jury, even though such defence has not been advanced or has been expressly disavowed at the trial, is clear: see, for example, *R v Cox* [1995] 2 Cr App R 513, 516-517; *R v Dhillon* [1997] 2 Cr App R 104, 114.

15. The second principle is closely allied with the first (and is not, as counsel for the appellant insisted, engaged on the facts of this case). It is that ordinarily, and subject to limited exceptions, a trial judge should leave to the jury the possibility of convicting of lesser-included offences, that is, lesser offences within section 6(3) comprising some but not all the ingredients of the offence charged. In *R v McCormack* [1969]

2 QB 442 a defendant accused of unlawful sexual intercourse with a girl under the age of 16 denied that charge but admitted in evidence an act which was in law an indecent assault. The judge left that alternative to the jury, holding that he had no discretion to do otherwise, and the defendant was convicted of the lesser offence. His argument that the judge should not have left that alternative to the jury was rejected on appeal, although a discretion not to do so was held to exist. Fenton Atkinson LJ, giving the judgment of the Court of Appeal (which also included Melford Stevenson and James JJ), said (at pp 445-446):

> "It is said that the prosecution had not specifically run indecent assault as a possible verdict for the jury to consider and, therefore, that the deputy chairman had a discretion whether or not to leave that matter to the jury, and there was some discussion about that and Miss Harper [for the Crown] was submitting to the deputy chairman that it was his duty to put all the alternatives. The deputy chairman said: 'I would like to know whether I have a discretion not to do it. Frankly, I would exercise that discretion'. In fact, he went on to decide that he had no discretion in the matter, he left the alternative of indecent assault to the jury, and the jury convicted. Indeed, on our view as to what constitutes an indecent assault on a girl under 16, and in face of the defendant's own evidence, there was no possible answer to such a lesser charge.
>
> The view this court has formed is that the deputy chairman did have a discretion in the matter. Cases vary so infinitely that one can well envisage a case where the possibility of conviction of some lesser offence has been completely ignored by both prosecution and defence? it may be that the accused has never had occasion to deal with the matter, has lost a chance of giving some evidence himself about it or calling some evidence to cover or guard against the possibility of conviction of that lesser offence? and in such a case, where there might well be prejudice to an accused, it seems to this court there must be a discretion in the trial judge whether or not to leave the lesser offence to the jury.
>
> But that was not the situation here, and on the facts of this case we think plainly it would have been a wrong exercise of discretion not to leave this question of indecent assault to the jury, because this was a case where the defendant himself had given evidence and had said on oath 'True I did not have intercourse, but I did do that which amounts to an indecent assault'. In view of that perfectly plain

> evidence which he had given, we think the only right course for the deputy chairman to take was to do what he did and to leave that matter to the jury."

16. In *R v Fairbanks* [1986] 1 WLR 1202 the question before the Court of Appeal was whether, on an indictment charging a single count of causing death by reckless driving, an alternative of driving without due care and attention should have been left to the jury. Giving the reserved judgment of the court, Mustill LJ (sitting with Hodgson and Wood JJ) cited earlier authority on the leaving of lesser counts to the jury, including *R v Parrott* (1913) 8 Cr App R 186 where Phillimore J had said (at p 193):

> "There may be cases where, in the interests of the prisoner, a judge ought to do so; there are certainly many cases where the interests of justice are not met unless it is pointed out to the Jury that they may convict of a lesser offence, or, thinking it a case of 'neck or nothing', they may acquit altogether."

At pp 1205-1206, Mustill LJ continued:

> "These cases bear out the conclusion, which we should in any event have reached, that the judge is obliged to leave the lesser alternative only if this is necessary in the interests of justice. Such interests will never be served in a situation where the lesser verdict simply does not arise on the way in which the case had been presented to the court: for example if the defence has never sought to deny that the full offence charged has been committed, but challenges that it was committed by the defendant. Again there may be instances where there was at one stage a question which would, if pursued, have left open the possibility of a lesser verdict, but which, in the light of the way the trial has developed, has simply ceased to be a live issue. In these and other situations it would only be harmful to confuse the Jury by advising them of the possibility of a verdict which could make no sense.
>
> We can also envisage cases where the principal offence is so grave and the alternative so trifling, that the judge thinks it best not to distract the Jury by forcing them to consider something which is remote from the real point of

> the case: and this may be so particularly where there are already a series of realistic alternatives which call for careful handling by judge and Jury, and where the possibility of conviction for a trivial offence would be an unnecessary further complication.
>
> On the other hand the interests of justice will sometimes demand that the lesser alternatives are left to the Jury. It must be remembered that justice serves the interests of the public as well as those of the defendant, and if the evidence is such that he ought at least to be convicted of the lesser offence, it would be wrong for him to be acquitted altogether merely because the Jury cannot be sure that he was guilty of the greater."

The conviction was quashed.

17. The Court of Appeal (Mustill LJ, Farquharson and Tucker JJ) returned to this issue in *R v Maxwell* [1988] 1 WLR 1265. In that case the defendant had been charged with and convicted of robbery. He had denied that charge but had expressed willingness to plead guilty to burglary, a charge which the prosecution declined to prefer (and which was not a lesser-included offence). The judge rejected a submission by counsel for the defendant that the lesser offence of theft should be left to the jury. The jury, during their deliberations, asked whether there was a lesser charge than robbery of which the defendant could be convicted, having burglary in mind. The judge answered, correctly, that burglary was not an alternative and, incorrectly, that there was no available lesser charge: the defendant could in law have been convicted of theft. The issue on appeal was whether this lesser count should have been left. The court adhered to its general observations in *R v Fairbanks*, observing (p 1270D-E) that while the right course would vary from case to case "the judge should always use his powers to ensure, so far as practicable, that the issues left to the jury fairly reflect the issues which arise on the evidence". That precept had not been observed. Considering what consequences should flow from that conclusion, the court ruled (p 1270G-H):

> "To interfere with the verdict would require us to identify solid grounds for suspecting that the members of the jury had foresworn their oaths by deliberately returning a verdict of guilty when they were not sure of it, simply to avoid an unwanted outcome."

Since no such grounds were established, the appeal was dismissed. On further appeal to the House ([1990] 1 WLR 401), the Court of Appeal's decision in *R v Fairbanks* was approved, as was the court's ruling at p 1270D-E, quoted above, on the judge's use of his powers, although the House shared the view of the trial judge that theft, as compared with robbery, had been too trifling an offence to leave to the jury. But counsel's criticism of the passage of the court's ruling at p 1270G-H, quoted above, was accepted. Lord Ackner, speaking for the House, said (p 408):

> "What is required in any particular case, where the judge fails to leave an alternative offence to the jury, is that the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct."

18. *R v Maxwell* was applied by the Court of Appeal in *R v Maxwell (Nolan)* [1994] Crim LR 848. The judgment of the court was delivered by Hobhouse LJ, sitting with Garland and Curtis JJ, and at pp 5-6 of the transcript he said:

> "We consider that, in a case such as this, where there is a factual situation which requires a jury to consider the extent of the joint enterprise and whether all the ingredients of the offence have been proved against one of the defendants, and the fact that the evidence was capable of showing that different offences may have been committed by him, the jury should have that opportunity to consider the alternatives. This is not a case, such as often occurs, where there is a single main clear count charging an offence, and the alternatives to it are not viable alternatives. This is a case where the alternatives were, on the evidence before the jury, clearly viable as regards the appellant …
>
> The present case undoubtedly involved disgraceful conduct on the part of this appellant. He had been identified as one of the men in the minicab. It was clear and undisputed on the evidence that he had taken part in a joint attack on the minicab driver in the early hours of the morning and had, on any view, inflicted some injuries upon him. Indeed, on one view, he was the person who had started the actual violence. It was disgraceful conduct,

> and it would cause outrage if the appellant, having been identified as one of the men involved, were to 'get clean away'. If the jury were to have a proper opportunity to consider all the alternatives which were open to them in respect of the appellant, they should have had further directions from the Judge upon the alternative verdicts that were open to them. The Judge laid the ground in his directions about what was involved in a joint enterprise, and the different views that might be taken of how far the joint enterprise went. He referred to the facts, which indicated the increased gravity of the later parts of the incident, and the role of Oakley in aggravating the assault, as well as being involved in the robbery. But he did not then go on to direct the jury that there were alternative verdicts which were open to them.
>
> In our judgment, that did amount to a material irregularity in the conduct of this trial, and makes the appellant's conviction unsafe."

19. *R v Maxwell* is not an easy authority, for although, as already noticed, the defendant failed both in the Court of Appeal and in the House, he did so on different grounds, neither of which is unproblematical. The Court of Appeal dismissed the appeal because the jury were not shown to have returned an improper verdict. But given the restraint on disclosure of jury deliberations this is ordinarily very hard to show. Mr Kelsey-Fry was disposed to agree that the only basis for drawing an inference that the jury had returned an improper verdict would ordinarily be a question asked by the jury. Yet in *Maxwell* the jury did ask such a question and the inference was not drawn. The House dismissed the appeal because the lesser alternative offence was relatively trifling. Theft is, of course, a much less serious offence than robbery, lacking the aggravating feature of violence. But it carried a maximum sentence of ten years' imprisonment, and the discrepancy in terms of gravity between the offence charged and the lesser alternative was scarcely greater than in *R v Fairbanks*, where the defendant's appeal succeeded.

20. In *Gilbert v The Queen* (2000) 201 CLR 414 the defendant was charged with murder and the trial judge directed the jury, incorrectly under the law as later laid down, that manslaughter was not an alternative verdict. The jury, correctly directed on the ingredients of murder, convicted. The issue in the High Court was whether a substantial miscarriage of justice had occurred. Mr Kelsey-Fry relied on strong statements by McHugh and Hayne JJ, very much in line with his

own submission, that the verdict of a properly directed jury should be respected: see in particular paras 30-31, 52. But these were dissenting judgments. Gleeson CJ and Gummow J (para 6) recognised the difficulty of knowing whether a misdirection is advantageous to one party or the other and held (para 13) that while it could, as a general rule, be assumed that juries understand and follow judicial directions, it need not be assumed that juries were unaffected by matters of possible prejudice when making their decisions. An appellate court should not (para 16) assume that juries adopted a mechanistic approach to the task of fact-finding, oblivious of the consequences of their conclusion. Callinan J, agreeing, recognised (para 96) that a jury room might not be a place of undeviating intellectual and logical rigour, and concluded (para 101):

> "The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice."

21. In Australia, as here, the trial judge's duty to direct the jury on alternative verdicts which there is evidence to support is not removed by the decisions of trial counsel. In *Pemble v The Queen* (1971) 124 CLR 107, 117-118 Barwick CJ said:

> "Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part …
>
> Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused."

22. It appears that the approach of the majority of the High Court of Australia in *Gilbert v The Queen* reflects the principle generally applied in the United States: *Stevenson v United States* (162 US 313, 323 (1896); *Berra v United States* 351 US 131, 134 (1956); *Keeble v United States* 412 US 205, 212-213 (1973). In the last of these authorities Brennan J, giving the opinion of the Supreme Court, said:

> "Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction —in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault—could not have resulted in a different verdict."

But the approach to the decisions of trial counsel appears to differ. While the Federal Rules of Criminal Procedure provide that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged …" this has been universally interpreted as granting a defendant a right to a requested lesser-included offence instruction if the evidence warrants it: *Beck v Alabama* 447 US 625, 635, f.n.ll (1980). In the Supreme Court of Canada, the failure of the trial judge to direct the jury on the possibility of a manslaughter conviction has been held to be, following the language of Lord Tucker in *Bullard v The Queen*

[1957] AC 635, 644, a grave miscarriage of justice: *R v Jackson* [1993] 4 SCR 573, 593.

23. The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals, they do not engage the public interest to the same degree. I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial. Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.

24. It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged. But no such infringement has ordinarily been found where there is evidence of provocation not relied on by the defence, nor will it ordinarily be unfair to leave an alternative where a defendant who, resisting conviction of a more serious offence, succeeds in throwing doubt on an ingredient of that offence and is as a result convicted of a lesser offence lacking that ingredient. There may be unfairness if the jury first learn of the alternative from the judge's summing-up, when counsel have not had the opportunity to address it in their closing speeches. But that risk is met if the proposed direction is indicated to counsel at some stage before they make their closing speeches. They can continue to discount the alternative in their closing speeches, but they can address the jury with knowledge of what the judge will direct. Had this course been followed in the present case there would have been no unfairness to the appellant, and while taking a contrary view the Court of Appeal did not identify the unfairness which it held would arise. It is not unfair to deprive a defendant, timeously alerted to the possibility, of what may be an adventitious acquittal.

25. The Court of Appeal rightly recognised the high sense of public duty which juries customarily bring to their task. I would not wish to belittle that in any way. But one does not belittle it to decline (as the High Court of Australia has done) to attribute to juries an adherence to principle and an obliviousness to consequences which is scarcely attainable.

26. Nor, with respect, is it an objection that the jury's task would have been more complicated had a manslaughter direction been given. Compared with many directions given to juries, a manslaughter direction in this case would not have been complicated. But even if it would, that cannot be relied on as a reason for not leaving to the jury a verdict which they should on the facts have considered. If juries are to continue to command the respect of the public, they must be trusted to understand the issues raised even by a case of some complexity. For reasons already given, the wishes of counsel cannot override the judge's duty.

27. I am of opinion that the judge should have left a manslaughter verdict to the jury. His failure to do so, although fully understandable in the circumstances, was a material irregularity. While the murder count against the appellant was clearly a strong one, no appellate court can be sure that a jury, fully directed, would not have convicted of manslaughter. For these reasons, and those given by my noble and learned friends Lord Hutton, Lord Rodger of Earlsferry and Lord Mance, with which I agree, I would accordingly allow the appeal. I would remit the matter to the Court of Appeal and invite that court to quash the conviction. It may also deal with any application for a retrial which may be made, the appellant remaining in custody meanwhile.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

28. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Hutton, Lord Rodger of Earlsferry and Lord Mance. For the reasons they give, with which I agree, I too would allow this appeal.

LORD HUTTON

My Lords,

29. The appellant in this case was convicted of the murder of Jane Longhurst. At his trial his defence was that she had died by accident when he and she had been engaged in consensual sexual activity. The only issue left to the jury was whether he was guilty of murder. The question which arises on this appeal to the House is whether the issue of manslaughter should have been left to the jury as an alternative verdict which they could return under section 6(2) of the Criminal Law Act 1967, the appellant's contention that this issue should have been left having been rejected by the Court of Appeal.

30. An outline of the facts of the case are set out in the speech of my noble and learned friend Lord Bingham of Cornhill and in order to state my opinion on the point before the House it is relevant to refer to two particular parts of the evidence at the trial. One matter which was established was that in the past when the appellant engaged in sexual activity with a female partner by reason of his fetish with women's necks he would frequently restrict her breathing with her consent, telling her that it would heighten her feelings. On occasions he would put tights round her neck which he would pull tight from both sides. Two women who had had a relationship with the appellant, one between 1989 and 1996 and the other between 1996 and 1997, gave evidence of this consensual asphyxial sex with him. One of them said that she often had to tell the appellant to stop putting pressure on her neck and he always stopped when asked, and there was no suggestion that he continued putting pressure on the neck of the other woman if she asked him to stop.

31. The second part of the evidence to which I refer is the evidence of the forensic pathologist, Dr Richard Shepherd, called for the defence, as to the danger of pressure being put on the neck. In the course of his examination in chief he said:

> "Q. So it rather looks as if pressure to the neck is a pretty dangerous business?
>
> A. It – certainly from my practice I know and from reports recorded in the forensic literature, there is no safe way to squeeze someone's neck. It always

carries with it the risk of this stimulating these receptors and producing this vagal response.

Q. We can all understand that if you are choking someone, in the sense that you are restricting either the blood flow or the airflow in either of the first two ways, the vascular or the respiratory are potential ways of strangling someone but it is going to take time?

A. Yes.

Q. And there may be some sort of struggle or the opportunity to say: "I can't breathe"?

A. Yes.

Q. What about the vagal inhibition method, how does that affect that scenario?

A. If it kicks in at the level that we have mentioned, where there is a severe effect on the heart, causing it to slow right down or causing it to beat abnormally or causing it to stop, there is no prior warning to that; that will occur out of the blue.

Q. And is the situation therefore that someone may literally drop dead?

A. They may literally drop dead with the pressure being applied to their neck, and there are recorded cases of that occurring within the forensic literature."

In the course of his cross examination he said:

"Q. Doctor, I want to ask you about something else, please, and that is blood, not bruising blood, but blood in the way I am about to describe. If I have understood you correctly, vagal inhibition, stimulating the bearer (?) receptors, can make you drop dead?

A. Yes.

Q. Presumably if what you were saying earlier was right, that would mean anywhere on the neck that might happen?

A. Absolutely. Pressure anywhere on the neck is an extremely dangerous action. Extremely dangerous action."

32. Therefore if one of the appellant's sexual partners in the years between 1989 and 1997 had died as a result of his putting tights round her neck and pulling them tight and there had been no additional evidence, as there was at his trial, of his visits to pornographic websites showing extreme violence towards women under headings such as "asphyxiation and strangulation" and his visits to the place where he had stored the body of the deceased, which suggested that he had necrophiliac propensities, I consider it to be clear that if he had been charged with murder the defence could have advanced a case of some force that he had not intended to kill or cause grievous bodily harm and was, at most, guilty of manslaughter.

33. At the close of the evidence prosecuting counsel, Mr Kelsey-Fry QC, raised the issue of manslaughter:

> "Mr. Kelsey-Fry: May I raise what perhaps might be the first and most important topic. Ordinarily, of course, in a charge of murder there is an alternative verdict available.
>
> Judge Brown: Yes.
>
> Mr. Kelsey-Fry: The way the Crown have put the case, from start to finish, is that this was a deliberate killing, and it is a contest between the Crown's allegation of a deliberate killing on the one hand, and accident on the other. It is true that one could mount an argument in law to suggest that the defence account, even if accepted, might amount either to gross negligence, on the one hand, or, arguably, an unlawful and dangerous act on the other; and so there would be room, arguably, for an alternative verdict, even on the Defence account, of manslaughter. The Crown's view is that that would be quite unfair and quite wrong in this case. Having set the case out as a contest between deliberate killing and the Defence version, if we failed to prove the deliberate killing, in our submission the defendant is entitled to a full acquittal."

34. A discussion then took place between the judge and prosecution and defence counsel, and the judge put the specific question to defence counsel whether he invited him to put manslaughter on any basis to the jury. Counsel replied that his provisional answer was that he did not, but that he had not, as yet, had the opportunity to discuss the matter in detail with the appellant. He asked permission, if the position changed, to raise the matter with the judge the next morning, which permission the judge granted. Defence counsel made no reference to the matter the next day

and therefore with the agreement of both counsel the judge did not leave manslaughter to the jury.

35. In a statement which the appellant made for the purposes of his appeal to the Court of Appeal he said (and defence counsel accepts that it correctly represents the gist of his discussion with the appellant) that after the discussion between the judge and counsel, defence counsel said to him: "Do you want us to make representation, or do you want to roll the dice and be home with Lisa and the boys?" The appellant also said that he was advised that he would receive a sentence as long as 15 years on a conviction for manslaughter. Therefore it is apparent that rather than accept the strong probability of a conviction for manslaughter with a lengthy sentence, the appellant decided that he would bank on an acquittal on the count of murder with consequent release, although that course involved running the risk of a conviction for murder.

36. It is clear that there was evidence at the trial which enabled the Crown to advance a strong case that the appellant deliberately and intentionally killed Jane Longhurst to satisfy his fantasies of sexual violence. But I also consider that there were parts of the evidence to which I have referred above which raised the reasonable possibility that he lacked the necessary intent either to kill or to cause grievous bodily harm and that he was guilty of manslaughter. When he raised the matter with the judge, prosecuting counsel accepted that the appellant's account of what had happened might amount either to manslaughter by gross negligence or, "arguably", manslaughter by an unlawful and dangerous act. In the absence of a finding of an intent to kill or cause grievous bodily harm, I consider that on the facts of this case the death would come more appropriately within the category of manslaughter by an unlawful and dangerous act than within the category of death by gross negligence. Quite apart from the evidence of Dr Shepherd, ordinary common sense indicates that putting tights round a woman's neck and pulling them tight is a dangerous act which creates a realistic risk of serious harm.

37. The appellant's actions in doing so were unlawful because of the danger involved and because consent does not prevent such a dangerous act in the course of sex being unlawful. In *R v Emmett* [1999] EWCA Crim 1710 (which the judge very properly drew to the attention of counsel in his discussion with them) the appellant in the course of sexual activity with his female partner and with her consent covered her head with a plastic bag which he tied at her neck with a ligature and which he then tightened to her point of endurance. She suffered distress because

of loss of oxygen and was found by a doctor to have suffered subconjunctival haemorrhages in both eyes and some petechial bruising around the neck. The appellant was charged with assault occasioning actual bodily harm. The Crown Court judge ruled that the defence of consent was not available to the appellant and he appealed to the Court of Appeal against this ruling. In dismissing the appeal the court (constituted by Rose LJ and Wright and Kay JJ) stated:

> "Accordingly, whether the line beyond which consent becomes immaterial is drawn at the point suggested by Lord Jauncey and Lord Lowry [in *R v Brown* [1994] AC 212], the point at which common assault becomes assault occasioning actual bodily harm, or at some higher level, where the evidence looked at objectively reveals a realistic risk of a more than transient or trivial injury, it is plain, in our judgment, that the activities [engaged] in by this appellant and his partner went well beyond that line. The learned judge, in giving his ruling said: 'In this case, the degree of actual and potential harm was such and also the degree of unpredictability as to injury was such as to make it a proper cause [for] the criminal law to intervene. This was not tattooing, it was not something which absented pain or dangerousness and the agreed medical evidence is in each case, certainly on the first occasion, there was a very considerable degree of danger to life; on the second, there was a degree of injury to the body.' With that conclusion, this Court entirely agrees."

38. In *DPP v Newbury* [1977] AC 500 Lord Salmon in a speech with which all the other members of the House agreed stated:

> "The direction which [the trial judge] gave is completely in accordance with established law, which, possibly with one exception to which I shall presently refer, has never been challenged. In *Rex v Larkin* (1942) 29 Cr.App.R.18, Humphreys J said, at p.23:
>
> 'Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.'

> I agree entirely with Lawton LJ that that is an admirably clear statement of the law which has been applied many times. It makes it plain (a) that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that that act inadvertently caused death and (b) that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous. This is one of the reasons why cases of manslaughter vary so infinitely in their gravity. They may amount to little more than pure inadvertence and sometimes to little less than murder.
>
> I am sure that in *Reg. v Church* [1966] 1 QB 59 Edmund Davies J, in giving the judgment of the court, did not intend to differ from or qualify anything which had been said in *Rex v Larkin,* 29 Cr App R 18. Indeed he was restating the principle laid down in that case by illustrating the sense in which the word "dangerous" should be understood. Edmund Davies J said, at p. 70:
>
> 'For such a verdict' (guilty of manslaughter) 'inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.'
>
> The test is still the objective test. In judging whether the act was dangerous the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger."

In *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245, 270A-271C Lord Salmon's statement of the law was approved and followed by Lord Hope of Craighead. Therefore, I consider that there was a viable defence case that the death of Jane Longhurst constituted manslaughter by an unlawful and dangerous act.

39. There is a long line of authority that the trial judge is bound to put to the jury such questions as appear to him properly to arise on the evidence even though defence counsel may not have raised a particular issue himself. Two of those cases are *R v Hopper* [1915] 2 KB 431 and *Mancini v DPP* [1942] AC 1. In *Hopper* Lord Reading CJ said at page 435:

> "Whatever the line of defence adopted by Counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence although counsel may not have raised some question himself."

In *Mancini* Viscount Simon LC said at page 7:

> "The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it."

40. This principle was applied by the Privy Council in *Von Starck v The Queen* [2000] 1WLR 1270, 1275 and in delivering the judgment of the Board the rationale of the principle was fully stated by Lord Clyde:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them… if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few

> circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them."

Lord Clyde's judgment was applied by the Privy Council in *Hunter and Moodie v The Queen* [2003] UK PC 69 and by the Court of Appeal of Northern Ireland in *R v Shaw and Campbell* [2001] NIJB 269.

41. In their judgment the Court of Appeal in the present case referred to two features which they considered distinguished the present case from the authorities relied on by Mr Fitzgerald QC for the appellant (who did not appear at the trial). In paragraph 58 they said:

> "It is to be noted that there are two critical features of this case, which distinguish it from the previous cases. First, as we have seen, it is the fact that both counsel for the prosecution and the defence thought that it would not be in the interests of the fair trial of the defendant, if the offence of manslaughter was left to the jury. The second distinction is that the only basis upon which the jury could convict the appellant of manslaughter, was factually wholly different from the case that the prosecution was advancing in order to obtain a conviction of murder. It was not, for example, a case where it would be possible for the jury to come to the conclusion that the appellant was not guilty of murder but guilty of manslaughter on the case for the prosecution."

They further said in paragraph 61:

> "In addition, at that stage of the case all the evidence, on behalf of both the prosecution and the defence, had been given so it could well have caused unfairness to the

> appellant to change fundamentally the nature of the case against him during the summing-up. While it is conceded that there was a viable basis for a verdict of manslaughter based upon the appellant's account, namely that it involved an unlawful and dangerous act of tightening the ligature around the victim's neck during consensual asphyxial sex, such a view of the facts would be wholly inconsistent with the case for the prosecution. So, for the judge to introduce the possibility of a verdict of manslaughter on these grounds would have transformed the nature of the case that the appellant was required to meet. The jury would not only have had to decide whether the victim may have died in the course of consensual sexual intercourse, but they would also have had to come to a conclusion as to the degree of danger that consensual asphyxial sexual intercourse, as practised by the appellant, involved."

42. Later in their judgment at paragraphs 83 and 84 the Court of Appeal said:

> "83. … What is important here is that the judge accepted it would be unfair, and therefore unjust, to leave the alternative count for the very good reason that it involved a different and inconsistent case from that put forward by the prosecution. If, in this case, manslaughter had been included, and the jury convicted the appellant of this offence, an appeal would almost inevitably have followed, and it is doubtful whether the conviction could have been regarded as safe. There may be cases where the approach based upon not withdrawing a defence from the jury should be extended to situations where the alternative verdict would not be a defence, but this case is not that situation. The judge's task is, as far as practical and appropriate, to simplify the task of the jury, not to make it more complicated than it would otherwise be.
>
> 84. As our detailed consideration earlier in this judgment of the facts is intended to make clear, the case for the prosecution required the jury to consider a formidable body of circumstantial evidence. The critical issue for the jury to determine, however, was whether it was possible for the victim's death to have been an accident. In this situation, to introduce an alternative count would make the jury's task far more complicated without enhancing the

> interests of justice. Properly understood, the authorities only require a jury to be directed as to manslaughter, as an alternative to murder, when it is in the interests of justice for this to happen. It is not in the interests of justice for this to happen where it would result in unfairness to a defendant, or where it would make the task of the jury far more difficult without there being any sufficient countervailing benefit which justifies an additional burden being placed upon the jury."

43. I am, with respect, unable to agree with the reasons given by the Court of Appeal for not following the principle applied in *Von Starck*. As regards the first reason, although defence counsel did not wish the judge to leave manslaughter to the jury it is clear that this was because of a tactical decision by the appellant to go for a complete acquittal notwithstanding that this involved the risk of a conviction for murder. But, although it appears distasteful that a defendant can ask the judge not to leave a lesser alternative count to the jury and then, when convicted on the greater count, complain to an appellate court that the alternative count was not left, the interests of justice require, as Lord Clyde stated, that the jury should be able to reach a sound conclusion on the facts in the light of a complete understanding of the law applicable to them.

44. As regards the second reason given by the Court of Appeal, I consider that the leaving of relevant issues to the jury which may result in the jury coming to the conclusion which is the most just one on the evidence cannot depend on the way in which the prosecution chooses to present its case but must depend on all the evidence; as Lord Clyde stated in *Von Starck* at page 1276, "the issues in a criminal trial fall to be identified in light of the whole evidence led before the jury."

45. I am also unable to agree with the view of the Court of Appeal that it would have been unfair to the defendant to leave manslaughter to the jury and that a conviction for manslaughter would almost inevitably have led to an appeal which might have succeeded. If the judge had decided to leave manslaughter to the jury he would have told counsel of his decision and they would have referred to the issue in their closing speeches to the jury. The actions and mental attitude of the defendant at the time of sexual activity with the deceased were relevant to the issue of manslaughter as they were to the issue of murder, and the defendant had given a full account of his actions and mental attitude to the jury. Not infrequently in a murder case, the defendant advances a defence

which, if not disproved by the prosecution, would entitle him to a complete acquittal, as when the defendant claims that he used a weapon in self defence, but the judge, pursuant to his duty, leaves the issue of provocation to the jury if it arises on the evidence, notwithstanding that defence counsel has not wished that issue to be left, and a verdict of manslaughter by reason of provocation does not necessarily mean that the defendant has had an unfair trial. In *R v McCormack* [1969] 2 QB 442,446 B the Court of Appeal said:

> "Cases vary so infinitely that one can well envisage a case where the possibility of conviction of some lesser offence has been completely ignored by both prosecution and defence – it may be that the accused has never had occasion to deal with the matter, has lost a chance of giving some evidence himself about it or calling some evidence to cover or guard against the possibility of conviction of that lesser offence – and in such a case, where there might well be prejudice to an accused, it seems to this court there must be a discretion in the trial judge whether or not to leave the lesser offence to the jury."

Whilst there will be cases, as the Court of Appeal recognised in *McCormack*, where it would be unfair to the defendant to leave an alternative verdict to the jury, I am satisfied that this is not such a case. Nor do I think that the task of the jury would have been unduly complicated by leaving the issue of manslaughter to them. Therefore, although it was understandable why he failed to do so, I consider that the judge should have left the issue of manslaughter to the jury. The question then arises whether the conviction for murder should be quashed as unsafe.

46. In the authorities which consider whether a conviction should be quashed on appeal when the judge has erred in failing to leave an alternative verdict to the jury two lines of reasoning have been adopted. One line of cases has followed the reasoning of Lord Ackner in *R v Maxwell* [1990] 1 WLR 401 (with whose judgment the other members of the House agreed). In that case the appellant had been tried and convicted on a count of robbery. Under section 6(3) of the Criminal Law Act on the count of robbery the jury could return the alternative verdict of theft, but an alternative verdict of burglary could not be returned. The prosecution declined to add a count of burglary to the indictment, a decision which Lord Ackner considered to have been

justified (see page 408). The appellant appealed on the ground that the judge should have left the alternative verdict of theft to the jury and the House dismissed the appeal, Lord Ackner stating at page 408 that:

> "on the facts of this case the judge was entitled to conclude that the alternative of theft was relatively so trifling that the jury's attention upon the essential issue – did the appellant intend violence to be used? – should not be distracted."

Lord Ackner therefore held that he could find no vitiating error or reason for regarding the verdict as unsafe or unsatisfactory, but he went on to state (by way of obiter):

> "What is required in any particular case, where the judge fails to leave an alternative offence to the jury, is that the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct. If they are so satisfied then the conviction cannot be safe or satisfactory."

47. A second line of cases makes no reference to the concern that a jury, properly directed by the judge as to the law on the count left to them, may nevertheless have convicted, not on a sound basis in accordance with the judge's directions and on their honest assessment of the facts, but from a reluctance to see the defendant get clean away with disgraceful conduct. These cases take a more direct approach to the issue and hold that where a lesser alternative verdict which was reasonably open on the evidence should have been left, but was not left, there has been a serious miscarriage of justice and the conviction must be quashed as unsafe.

48. Mr Kelsey-Fry relied on Lord Ackner's judgment and submitted that even if the judge should have left the manslaughter issue to the jury, nevertheless the conviction for murder was safe and should be upheld because the judge had properly directed the jury as to the relevant law, and on the facts of the case the House could not be satisfied that the jury had convicted out of a reluctance to see the appellant get clean away.

49. A considerable number of authorities have followed Lord Ackner's judgment in *Maxwell*. In *R v Maxwell (Nolan)* [1994] Crim LR 848 in delivering the judgment of the Court of Appeal Hobhouse LJ after citing Lord Ackner's judgment said at page 6 of the transcript:

> "The present case undoubtedly involved disgraceful conduct on the part of this appellant. He had been identified as one of the men in the minicab. It was clear and undisputed on the evidence that he had taken part in a joint attack on the minicab driver in the early hours of the morning and had, on any view, inflicted some injuries upon him. Indeed, on one view, he was the person who had started the actual violence. It was disgraceful conduct, and it would cause outrage if the appellant, having been identified as one of the men involved, were to 'get clean away'. If the jury were to have a proper opportunity to consider all the alternatives which were open to them in respect of the appellant, they should have had further directions from the Judge upon the alternative verdicts that were open to them. The Judge laid the ground in his directions about what was involved in a joint enterprise, and the different views that might be taken of how far the joint enterprise went. He referred to the facts, which indicated the increased gravity of the later parts of the incident, and the role of Oakley in aggravating the assault, as well as being involved in the robbery. But he did not then go on to direct the jury that there were alternative verdicts which were open to them."

50. In *Hunter and Moodie v The Queen* [2003] UK PC 69 Lord Hope of Craighead said at paragraph 28:

> "Their Lordships consider that the trial judge was wrong to deprive the jury of the opportunity of considering whether, in the light of the mixed statements, the Crown had proved in the case of each appellant that the 'triggerman' test was satisfied. He ought to have directed the jury to consider this question, and to have left with them the alternative verdict that the appellants were guilty of non-capital murder which would have been open to them on the evidence if they were satisfied that the appellants were acting in pursuance of a joint enterprise. They were, of course, left with the alternative verdict of

> not guilty [of capital murder]. But, as Lord Ackner explained in *R v Maxwell* [1990] 1 WLR 401, 408, if the judge fails to leave an alternative offence to the jury, the court must consider whether the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct. That was a very real possibility in this case. There was ample evidence that the appellants had guns in their hands, and that they had been using them during their running battle which they and their companions had started with the police. According to the police witnesses, all four men had been attempting to inflict grievous bodily harm on them from the start of this incident."

51. In *Gilbert v The Queen* (2000) 201 CLR 414 in the High Court of Australia Gleeson CJ and Gummow J, who were in the majority with Callinan J, delivered a judgment which acknowledged some degree of validity in the concern which underpins the approach stated by Lord Ackner in *Maxwell*. They said at page 420:

> "The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice."

And at pages 420 and 421 after citing passages in the judgments in *Mraz v The Queen* (1995) 93 CLR 493, delivered at a time when murder attracted the death penalty, including the statement of Fullagar J:

> "A jury which would hesitate to convict of murder may be only too glad to take a middle course which is offered to them."

They said:

> "These statements are inconsistent with the notion that an appellate court must assume, on the part of a jury, a mechanistic approach to the task of fact-finding, divorced

from a consideration of the consequences. Indeed, juries are ordinarily asked to return a general verdict. They make their findings of fact in the context of instructions as to the consequences of such findings, and for the purpose of returning a verdict which expresses those consequences."

52. However, McHugh J and Hayne J, dissenting, rejected the view taken by Gleeson CJ and Gummow J as to how a jury might come to their decision. McHugh J said at page 425:

"30. The argument for the appellant is a claim that this Court should proceed on one of two bases, each of which necessarily involves an assumption that, if manslaughter had been left as an issue, the jury might have disregarded their sworn duty to give a verdict in accordance with the evidence. The first assumption is that, if manslaughter had been left, the jury might have convicted of manslaughter even though they knew, because of the trial judge's directions, that the appellant was guilty of murder. The second assumption is that the jurors were not convinced beyond reasonable doubt that the appellant knew that his brother intended to kill or to inflict grievous bodily harm on Linsley, that they knew therefore that he was not guilty of murder, but that they nevertheless convicted him of murder rather than acquit him and see him go free. In my respectful opinion, as a matter of legal policy, no court of justice can entertain either assumption.

31. The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one – accused, trial judge or member of the public – could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials."

53. Hayne J said at page 431:

> "Nor does the conclusion which I have reached depend upon some judicial assessment of what was acknowledged to be a strong case against the appellant. It is a conclusion which depends entirely upon giving due weight to the verdict of the jury in light of what they were told by the judge and assuming (there being no basis for suggesting otherwise) that they did their duty conscientiously.
>
> The trial to which the appellant was entitled was a trial according to law. There were two questions for the Court of Appeal. First, was there a trial according to law (and all agreed that there was not). Second, and no less important, was the question whether a substantial miscarriage of justice had actually occurred. That second question is not concluded by pointing to the fact that there was a misdirection and that there was, therefore, not a trial according to law. The existence of the proviso denies that the fact of misdirection will, in every case, require an order for retrial. Nor can this second question be answered by making an assumption that the jury *might* have chosen to disregard what they were told by the judge. Such an assumption is unwarranted. It is an assumption which suggests that emotion (whether induced by the eloquence of counsel or otherwise) might have supplanted the collective common sense and careful reasoning that jurors bring to bear upon a difficult task. It is an assumption which, if effect is given to it, turns the judge's charge to a jury into a ritual incantation which appellate courts must examine for formal correctness but which appellate courts are free (if not bound) to assume a jury may have disregarded."

54. Callinan J in giving his reasons for allowing the appeal expressed a view at page 441 which I think does not involve acceptance that a jury may fail to carry out their duty:

> "The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice."

55. In the later case of *Gillard v The Queen* (2003) 219 CLR 1, 41 and 42, Hayne J described the effect of the decision of the majority in *Gilbert* as follows:

> "In *Gilbert*, a majority of the Court concluded that if manslaughter should have been, but was not, left to a jury as an available verdict on the appellant's trial for murder, the verdict of guilty of murder did not preclude the possibility that the jury may have failed to apply the instructions they were given. No party in this appeal sought to reopen the decision in *Gilbert*. It follows from what was decided in *Gilbert* that, in deciding here whether no substantial miscarriage of justice has actually occurred and thus, whether the proviso to s353(1) of the *Criminal Law Consolidation Act* applies, account may not be taken of the findings implicit in the jury's verdicts at the appellant's trial. It must be assumed that the jury may have chosen to disregard the instructions they were given, and convict the appellant of murder and attempted murder, rather than return verdicts of not guilty. Once it is accepted that the jury may have disregarded the instructions they were given, it is not permissible to reason, as the respondent submitted, from the fact that the jury returned verdicts of guilty on all three counts to the conclusion that the jury must therefore be taken to have applied the trial judge's instructions. Once it is said, as it was in *Gilbert*, that the jury may have disregarded the instructions they were given, it cannot be said that some levels of disobedience may be less probable than others."

Therefore the view taken by the High Court of Australia is that if, on a trial for murder, manslaughter was not left when it should have been, it must be assumed by the appellate court (contrary to Lord Ackner's requirement that the appellate court must be satisfied) that the jury may have chosen to disregard the instructions they were given.

56. The second line of cases does not follow the Maxwell approach but takes the more direct view that if a lesser alternative verdict could reasonably have been come to on the evidence, justice to the defendant requires that the jury should have been given the opportunity to return that verdict and the conviction must be quashed, and does not take into account the question whether the jury may have convicted out of a reluctance to see the defendant get clean away. In delivering the

judgment of the Privy Council in *Bullard v The Queen* [1957] AC 635, 644 Lord Tucker said:

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

57. In the High Court of Australia in *Pemble v The Queen* (1971) 124 CLR 107, 117 Barwick CJ said:

> "Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part."

58. In *R v Jackson* [1993] 4 SCR 573, 593 in delivering the judgment of the Supreme Court of Canada McLachlin J said:

> "It is true that the trial judge charged the jury clearly and correctly on the mental state required to find Davy guilty of murder. It is also true that the jury found Davy guilty of murder. Nevertheless, I agree with the Court of Appeal that one cannot be satisfied the verdict is just, given the failure of the trial judge to set out the basis for convicting Davy of manslaughter under ss. 21(1) and 21(2) [of the Criminal Code] and the absence of any instruction that a party may be guilty of manslaughter even though the perpetrator is guilty of murder."

59. In *Von Starck* Lord Clyde made no reference to the *Maxwell* approach and said at page 1276 that it was the duty of the judge "to secure that a just result is obtained in the whole circumstances disclosed

in the evidence." In the context of the importance of ensuring a just result in the whole circumstances disclosed in the evidence, I consider, with respect, that there is much force in the perceptive observation of Callinan J in *Gilbert v The Queen* at page 441 which I have already cited that:

> "It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered…"

It is also relevant to observe that in addition to ensuring fairness to the defendant, the leaving of a lesser alternative verdict to the jury is in the public interest. As Mustill L J said in *R v Fairbanks* [1986] 1WLR 1202, 1206:

> "It must be remembered that justice serves the interests of the public as well as those of the defendant, and if evidence is such that he ought at least to be convicted of the lesser offence, it would be wrong for him to be acquitted altogether merely because the jury cannot be sure that he was guilty of the greater."

60. I was a member of the Board which followed the *Maxwell* approach in *Hunter and Moodie v The Queen,* but I now consider that that approach is an unsatisfactory one and should no longer be taken. It requires the appellate court, without having material before it to enable a proper assessment to be made, to attempt to make an assessment whether a jury has returned a verdict of guilty, not on a proper and fair weighing of the evidence in the light of the judge's directions as to the law, but from reluctance to see a defendant, who has behaved disgracefully, get clean away. In reality, it appears to oblige the appellate court to engage in speculation as to the factors which may have influenced the jury's decision. And it is relevant to observe that in following a course somewhat similar to the *Maxwell* approach the High Court of Australia has arrived at the point at which, if the judge has erred in not leaving an alternative verdict of manslaughter to the jury, it is to be assumed by the appellate court that the jury may have chosen to convict of murder in disregard of the instructions they were given.

61. Therefore I consider that the House should follow the reasoning in the second line of cases and hold that, save in exceptional

circumstances, an appellate court should quash a conviction, whether for murder or for a lesser offence, as constituting a serious miscarriage of justice where the judge has erred in failing to leave a lesser alternative verdict obviously raised by the evidence.

62. In conclusion I refer briefly to one further matter. The authorities make it clear that an alternative verdict should only be left if it is one to which "a jury could reasonably come" (per Lord Clyde in *Von Starck* at page 1275: see also Mustill LJ in *Fairbanks* page 1205, "unless the alternatives really arise on the issues as presented at the trial"). Therefore I am in full agreement with the test proposed by Lord Bingham in paragraph 23 of his speech that the alternative or alternatives "should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial." I also agree that the rule discussed by Lord Bingham should not be extended to summary proceedings.

63. Therefore for the reasons which I have given, and also for the reasons given by Lord Bingham and Lord Rodger of Earlsferry with which I agree, I would allow this appeal and make the order which Lord Bingham proposes.

LORD RODGER OF EARLSFERRY

My Lords,

64. In July 2003 the appellant, Graham James Coutts, was charged with the murder of Jane Katherine Longhurst earlier that year. After trial in the Crown Court at Lewes he was convicted of her murder and sentenced to life imprisonment with a recommendation that he serve a minimum of 30 years before being considered for release. He appealed to the Court of Appeal against his conviction, inter alia on the ground that the judge had wrongly failed to direct the jury that it was open to them to return an alternative verdict of manslaughter. The Court of Appeal dismissed his appeal against conviction, but allowed his appeal against sentence to the extent of substituting a minimum period of 25 years 2 months to be served by him before being considered for release.

65. The reason for the very long period to be served by the appellant before being considered for release becomes obvious when the nature of the murder of which the appellant was convicted is understood. The case for the Crown as presented to the jury was that he had murdered the deceased in order to obtain sexual stimulation and that, having strangled her with a pair of tights, he did indeed have some kind of sexual contact with her body. The prosecution led evidence, which was not disputed, that the appellant was in the habit of visiting various websites which related to sex and violence and which contained images under headings such as "asphyxiation and strangulation", "rape, torture and violent sex". In particular, the day before the deceased's death, he had logged on to a website "Death by asphyxia" for approximately an hour and three quarters.

66. The appellant did not dispute that the deceased had died in his flat, nor that, following her death, he had concealed her body in a storage unit, before eventually setting fire to it on an area of open land. His position at trial was that the deceased had died by accident when he and she had been engaged in consensual sexual activity. With her consent, when they were face to face on his bed, he had put a ligature, in the form of a pair of tights, round the deceased's neck. The sight of the ligature was intended to stimulate him sexually and the restriction of oxygen to the deceased's brain was intended to heighten her sexual pleasure. According to the appellant, when he was on his back and she was above him, he held the ends of the tights behind her neck with his left hand, while masturbating with his right hand. At some time before he ejaculated, he must have closed his eyes. When he opened them again, he was aware of the deceased lying over him and not moving. In fact, she was dead. He could not remember what had happened in the moments before her death. The appellant said that he had not pulled the ends of the ligature sufficiently strongly to cut off her blood supply and to kill her. Her death had just been an accident in the course of this consensual sexual activity.

67. There was evidence, led by the Crown but relied on by the defence, from two women with whom the appellant had had relationships, to the effect that they had sometimes engaged in consensual sexual activities with him which involved him putting some kind of pressure on their necks. Another woman spoke to having had a consensual sexual encounter with him in which he bound her wrists with masking tape.

68. Both counsel for the prosecution and counsel for the defence conducted the trial on the basis that the jury had to choose between these two starkly different versions of events, one involving a particularly horrendous murder, the other involving an accident in the course of a consensual sexual encounter. But after the evidence was over, and before speeches, in the absence of the jury the judge raised with counsel the possibility of an alternative verdict of manslaughter. On an indictment for murder a jury can, of course, return a verdict of manslaughter in an appropriate case: section 6(2) of the Criminal Law Act 1967. Prosecuting counsel, Mr Kelsey-Fry QC, immediately acknowledged that one could mount an argument in law to suggest that the defence account, even if accepted, might amount to manslaughter on the basis either of gross negligence or, arguably, of an unlawful and dangerous act. On either version there would be room, arguably, for an alternative verdict of manslaughter. The Crown's view, however, was that it would be quite unfair and quite wrong to allow for such a verdict in this case: "Having set the case out as a contest between deliberate killing and the defence version, if we failed to prove the deliberate killing, in our submission the defendant is entitled to a full acquittal." Under reference to the decision in *Emmett* [1999] EWCA 1710, the judge raised concerns which he had about that approach, but he eventually indicated that, if the Crown took the view that this was a case where, the Crown having opened the case in the way that it had, it would be unfair to proceed down an alternative, then it was not for the judge to enter into unfair approaches. Prosecuting counsel reiterated that, from the Crown's point of view, the case was about a deliberate and macabre murder: they had never advanced the case on the alternative basis and it would be wrong to do so now. Defence counsel readily agreed with the judge that he could not be expected to argue against that approach.

69. Subsequently, when the judge specifically asked defence counsel whether he was inviting him to put manslaughter on any basis to the jury, counsel said that he could provisionally answer the question, "No, I am not." He indicated that he had not had an opportunity to discuss the matter in detail with the appellant and asked to be allowed to raise it briefly the following morning if the position changed. Counsel did not subsequently raise the matter with the judge.

70. In a statement prepared for the purposes of his appeal to the Court of Appeal, the appellant said that the issue of manslaughter had been discussed in the preparation of the case, when he was advised that, if convicted of manslaughter, he would receive a lengthy sentence. He was also certain that he had discussed the matter further with defence counsel after the exchange in court. He recalled counsel saying "Do you

want us to make representation, or do you want to roll the dice and be home with Lisa and the boys?" He had been told that he would receive a sentence of as long as 15 years if convicted of manslaughter. The appellant followed his counsel's advice and agreed that they should not ask for manslaughter to be left to the jury. Trial counsel accepted that the appellant's statement correctly reflected the gist of their conversation. It is therefore clear that the appellant took a tactical decision not to ask the judge to give the jury directions on manslaughter in the hope that, faced with a stark choice between murder and accident, the jury would acquit him and he would immediately be free to go home.

71. In the light of the submissions made to him by counsel, the judge did not give the jury any direction on manslaughter. His direction on the law was to this effect:

> "As you know, of course, his defence is that this was an accident taking place during the course of consensual asphyxial sexual activities between himself and Jane, and therefore it follows that he is saying to you that he never had any intention to kill her or to cause her any really serious bodily harm. If her death was or may have been an accident, then, of course, he is not guilty of this allegation. The reason for that would be that you would not be satisfied that he intended to kill her or at least to cause her some really serious bodily harm. If, having considered all of the evidence in the case, you are sure that it was not an accident and that he did intend to kill her, or at least to cause her really serious bodily harm, then it would then follow that he is guilty of murder."

72. Despite the tactical decision which the appellant and his trial counsel took, not to ask the judge to direct the jury on manslaughter, he now contends that actually the judge was bound to give such a direction in the circumstances of this case and that his failure to do so amounted to a material misdirection in law. On behalf of the Crown Mr Kelsey-Fry contends that the judge was under no duty to give a direction on manslaughter but that, even if he was, the failure to do so did not make the jury's verdict unsafe since, in order to convict the appellant of murder, the jury must have been satisfied beyond a reasonable doubt that he had intended to kill the deceased or at least to cause her serious bodily harm.

73. My Lords, the inconsistency in the appellant's attitude at trial and on appeal is striking, not to say disturbing. But he is not the first defendant to have placed an appeal court in this predicament. In *Dhillon* [1997] 2 Cr App R 104, where the trial judge had consulted counsel and, in the light of their submissions, had not given a direction on provocation when he should have done, the Court of Appeal held that his failure to do so was an unfortunate material misdirection. Ward LJ aptly concluded, at p 114:

> "The result, making some mockery of our hallowed adversarial procedure which strives to do justice to both sides, is that the appellant is able both to have his cake at trial and also to eat it on appeal."

In *Cox* [1995] 2 Cr App R 513, 518, Glidewell LJ had been forced to a similar conclusion where the judge had failed to leave the issue of provocation to the jury. In *Gillard v The Queen* (2003) 219 CLR 1, at trial counsel for the defendant had successfully resisted an attempt by the prosecution to persuade the judge to direct the jury that verdicts of manslaughter were available. The appellant had fully exploited the forensic advantages of the jury being presented with a straight choice between murder and nothing. But, in the event, the jury convicted him. He appealed on the ground that the judge should indeed have directed the jury that manslaughter verdicts were available. Kirby J commented, at p 17, para 41:

> "Having secured, but lost, the advantages of the dichotomy which he urged at his trial, the appellant now wants another trial with a further chance to contest the indictment under new rules. It is easy to feel a sense of distaste about allowing such a course to succeed."

Nevertheless, his Honour came to the view that the failure to give a direction on manslaughter constituted a wrong decision on a question of law and that there would indeed have to be a new trial.

74. These authorities help to identify the attitude which an appeal court must adopt in a case such as this, despite any justifiable feeling of distaste for the appellant's approach. If the court concludes that there was a material misdirection which rendered the jury's verdict unsafe, then it must give effect to that conclusion and quash the conviction. An

unsafe verdict cannot stand just because the appellant was partly to blame for its being unsafe.

75. At the hearing before the House Mr Fitzgerald QC, who did not appear in the trial, submitted on behalf of the appellant that a verdict of manslaughter would have been available on the basis of the defence version of events. So far as the Crown is concerned, as I have explained, when the trial judge raised the question of manslaughter, Mr Kelsey-Fry immediately acknowledged that, on the defence account, there would be room for an alternative verdict of manslaughter, on the basis that the victim's death had resulted either from gross negligence or, arguably, from an unlawful and dangerous act. Before the House he similarly acknowledged that a verdict of manslaughter would have been open on the defence version – though he submitted that the proper basis would have been gross negligence, rather than an unlawful and dangerous act. It is therefore common ground that, on the totality of the evidence, if directed on the law of manslaughter, the jury would have been entitled to find the appellant guilty of manslaughter. I agree with that view. In these circumstances, it is unnecessary to determine whether one, rather than the other, legal basis for such a verdict would have been the more appropriate.

76. The issue accordingly is whether, given that a verdict of manslaughter would have been available on the evidence before the jury, the trial judge should have directed the jury on manslaughter. Here the judge raised the issue with counsel and their common position was that he should not do so. While the judge was fully entitled to take account of counsel's attitude, ultimately any trial judge is responsible for ensuring a fair trial in which the defendant is convicted of a crime only if his guilt is proved according to law. That duty is not compromised or qualified by the strategy or tactics adopted by counsel on either side - although these may affect what the judge has to do in fulfilment of his duty.

77. Appeal courts have frequently had to consider whether on a murder indictment a trial judge needed to put the alternative verdict of manslaughter before the jury. In *Mancini v DPP* [1942] AC 1, 7 Viscount Simon LC said:

> "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence – a defence which, if it had been accepted by

> the jury, would have resulted in his complete acquittal – it was undoubtedly the duty of the judge, in summing up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter. The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury which would justify a direction that they should consider it…. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence, even although counsel may not have raised some question himself."

Viscount Simon added, at p 8:

> "The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or, at any rate, might induce a reasonable doubt whether this was, or was not, the case."

In *Kwaku Mensah v The King* [1946] AC 83, 91-92, the judge had failed to give a direction on provocation in a case where the issue properly arose. Delivering the judgment of the Privy Council, Lord Goddard said:

> "But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the judge must put that question to the jury. This was distinctly laid down in *Rex v Hopper* [1915] 2 KB 431, a case in some respects resembling the present, more especially in that the line of defence adopted was that the killing was accidental and no attempt had been made at the trial to rely on provocation. The ruling was expressly approved by the House of Lords in *Mancini v Director of*

> *Public Prosecutions* [1942] AC 1. The reason for the rule is that on an indictment for murder it is open to the jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought. If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the judge must bring it to the attention of the jury, because if they accept it or are left in doubt about it the prosecution have not proved affirmatively a case of murder."

The Privy Council adopted and applied this statement of the law in *DPP v Daley* [1980] AC 237, 244.

78. In *Von Starck v The Queen* [2000] 1 WLR 1270 the appellant had been convicted of murdering a woman by stabbing her. On being arrested, he admitted killing her. In the course of the trial the Crown led evidence of that admission and of a statement in which the appellant said that he and the deceased woman had been taking drugs in his hotel room when he suddenly had a knife in his hand and, although he did not know exactly what had happened, he remembered seeing her on the ground and thinking she was dead. In an unsworn statement at his trial the appellant did not mention taking cocaine but said that he did not know what had happened. The judge withdrew the appellant's pre-trial statements from the consideration of the jury on the ground that they were inconsistent with what he had said at his trial. The Privy Council allowed his appeal and, by agreement, substituted a conviction of manslaughter. In the course of giving the judgment of the Board Lord Clyde said, at p 1275:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility

not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in *Xavier v The State* (unreported), 17 December 1998; Appeal No 59 of 1997 a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In *Xavier v The State* the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that, 'If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter.' In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury."

79. The statement of the law in *Von Starck* was applied by Sir Robert Carswell LCJ in the Court of Appeal in Northern Ireland in *R v Shaw and Campbell* [2001] NIJB 269 and by Lord Hope of Craighead, giving the judgment of the Privy Council, in *Hunter and Moodie v The Queen* (unreported) (Privy Council Appeal No 64 of 2002), para 27.

80. In the present case, however, the Court of Appeal suggested, [2005] 1 WLR 1605, 1621, para 69, that in *Von Starck v The Queen* Lord Clyde had expressed his views in terms that were more extensive than was necessary for the decision in that case. They did not believe that he would have expressed himself in those terms if he had had in mind the sort of situation being considered here. In my view Lord Clyde's observations, while not specifically phrased in terms of murder and manslaughter, are simply a fuller version of the statements of law to be found in the earlier decisions which I have quoted. I would respectfully endorse his formulation of the law.

81. As these authorities make clear, the duty of the trial judge to direct the jury on manslaughter arises if a jury might reasonably return such a verdict on the whole of the evidence, whether led by the Crown or by the defence. Contrary to what the Court of Appeal said in para 83 of their judgment, [2005] 1 WLR 1605, 1624, the duty applies even though the result may be that the jury convict the defendant of manslaughter on a basis which is different from, and inconsistent with, the case put forward by the prosecution. That is a necessary implication of the judge's duty to direct on manslaughter when it arises on all the evidence, even if the prosecution case is that the jury should accept particular elements of the evidence, on the basis of which they should find the defendant guilty of nothing less than murder. The stance of prosecuting counsel cannot be determinative of the range of verdicts fairly open to the jury on the evidence.

82. Directing the jury on the way that the law applies to any reasonable view of the facts disclosed by the evidence ensures that they have a proper understanding of the way that the law is intended to work, depending on the view of the facts which they take. Therefore, by omitting to mention manslaughter in a case where it could apply on a reasonable view of the facts, the judge will misrepresent the position by making the law seem more rigid and less nuanced than it actually is. While, for tactical reasons, it may suit counsel on either or both sides to represent the law in this way, as offering a stark alternative between murder and acquittal, with nothing in between, in fact the law provides for an intermediate position. The jury are entitled to be told of that intermediate position, whenever it might come into play on a reasonable view of the evidence. The intermediate position may not be to the liking of either the prosecution or the defence, but the jury are still entitled to be told of it, so that they may reach their conclusions "in light of a complete understanding of the law applicable to them." Where the duty of the judge is to give a direction on the alternative verdict, counsel have

to adjust their speeches to the jury to take account of that prospective direction.

83. As Lord Clyde points out, this approach secures that the overall interests of justice are served in the resolution of the matter committed to the jury. If the jury are not aware that the law provides for conviction of manslaughter on the view of the evidence which they form, there is a risk that they may go wrong in either of two ways. On the one hand, the jury may convince themselves that, despite what the judge has told them, a conviction of murder must be open even in circumstances where it is not actually the lawful verdict because the crime of manslaughter comes into play; on the other hand, they may conclude that the defendant is entitled to be acquitted completely, say, on the ground of accident, in circumstances where the law actually requires that he should be convicted of manslaughter. The first eventuality harms the defendant, the second harms the wider public interest. But both are unacceptable. And our system guards against them by requiring the judge to explain the law of manslaughter to the jury so that they are aware of it in any appropriate case. Omitting the direction removes the safeguard.

84. Since the duty to put the possibility of a viable alternative verdict before the jury exists to promote the interests of justice in this way, it will not apply in circumstances where giving the direction would not serve those interests and might indeed undermine the fairness of the trial. For instance, there might be cases where it could properly be said that one or other of the parties was prejudiced because, if they had realised that the alternative verdict was going to be left to the jury, they would have examined or cross-examined the witnesses differently or would have led other evidence. If the prejudice was significant and could not be avoided or mitigated at that stage, the overall interests of justice might mean that the duty to direct on the alternative verdict would not apply. There could also be cases, other than murder-manslaughter, where the alternative verdict would be so trivial that the jury would be unlikely to be misled by not knowing about it and the public interest would not suffer if the defendant were not convicted of the offence. In such a case, as Mustill LJ envisaged in *R v Fairbanks* [1986] 1 WLR 1202, 1206, the judge could properly conclude that it was best not to introduce an unnecessary complication and distract the jury by forcing them to consider something which was remote from the real point of the case. Again, the duty would not apply. But, in a case such as the present, the duty applies and any additional complications in the directions to the jury are the necessary price of ensuring that they have

all the information on the law which they need to discharge their responsibilities.

85. Since, in order to discharge those responsibilities, the jury require to be directed on manslaughter whenever (as in this case) it arises as a viable issue on a reasonable view of the evidence, a failure by the judge to give the direction will amount to a material misdirection in law. In terms of section 2(1) of the Criminal Appeal Act 1968 an appellate court will therefore have to quash the conviction if they think that, by reason of the misdirection, the conviction is unsafe. This is just to reach virtually the same position as is succinctly stated in the judgment of Lord Tucker in the Privy Council in *Bullard v The Queen* [1957] AC 635, 644:

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached."

86. Mr Kelsey-Fry submitted, however, that, even if your Lordships concluded – as I have concluded – that the judge had been wrong not to give the jury directions on the alternative verdict of manslaughter, this would not be a sufficient basis for quashing the appellant's conviction of murder. In effect, his argument was that, when a jury has been properly directed on a more serious offence and has convicted the defendant of that more serious offence, the failure to direct on a lesser alternative offence does not of itself render the conviction unsafe. In the words of Lord Ackner in *R v Maxwell* [1990] 1 WLR 401, 408, "the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct."

87. Despite its authoritative provenance, the test propounded by Lord Ackner is problematical, to say the least. So far as murder-manslaughter is concerned, it appears to be inconsistent with Lord Tucker's approach in *Bullard v The Queen.* The test is also difficult to apply. Since the appeal court cannot inquire into what went on in the jury room, it is very far from clear how they are meant to satisfy themselves in any given case that a jury may have convicted out of a reluctance to see the defendant get clean away. Moreover, the test supposes that the jury will

have consciously convicted the defendant in the face of the judge's directions. Yet the foundation of the system of trial by jury is the assumption, which is thought to be borne out by experience, that juries apply the directions which the judge gives them. In *Bergman and Collins* [1996] 2 Cr App R 399 the Court of Appeal suggested that Lord Ackner's test might be satisfied if the jury had asked whether an alternative verdict was open to them – but Hutchison LJ pointed out that this had not actually availed the defendant in *R v Maxwell*. Mr Kelsey-Fry suggested that protracted deliberations by the jury might be a pointer to the jury having ultimately gone wrong in this way – but the lengthy deliberations could equally point to the jury having taken particular care in applying the directions which they had been given. The reality is that the test is so uncertain that it is likely to produce inconsistent results, however conscientiously it may be applied.

88. In any event, the test is wrong in principle. In *Bullard v The Queen* [1957] AC 635, 644 the Privy Council regarded the direction on manslaughter as essential in an appropriate case and as leading to a grave and irremediable miscarriage of justice if it was omitted. This can only be because the direction is necessary if the jury are to consider their verdict on the proper basis and to avoid the risk of being misled into an inappropriate verdict. So it must be assumed that giving or omitting the direction affects the way that the jury consider the issues in the case. In the words of Callinan J in *Gilbert v The Queen* (2000) 201 CLR 414, 441, para 101:

> "The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice."

89. The present case provides a good illustration of the point. The jury were told that they had to choose between convicting the appellant of murder and acquitting him on the ground that the victim had died as a result of an accident. On that basis they chose to convict of murder. But the jury should also have been told that, depending on their view of the facts, they could convict him of manslaughter. Mr Kelsey-Fry says that the additional choice is irrelevant since the jury convicted the appellant of murder and so they would never have reached the question of manslaughter, which only arose if they were not prepared to convict of murder. But that is to make an unreal assumption that, at all stages of

their deliberations, the jury would keep the various issues in separate boxes, to be considered in a prescribed order. The reality is that, in the course of their deliberations, a jury might well look at the overall picture, even if they eventually had to separate out the issues of murder, manslaughter and accident. So, introducing the possibility of convicting of manslaughter could have changed the way the jury went about considering their verdict.

90. Mr Kelsey-Fry further objects that, in any event, when reaching their verdict, the jury would have considered all the relevant facts – it made no difference that they were unaware that the law attached the label of manslaughter to one version of those facts. But experience shows that, as in this case, counsel deliberately choose not to mention manslaughter to the jury on the view that this may indeed influence the way that the jury react to the facts. At the very least, Mr Kelsey-Fry's submission ignores the possibility that the jury's approach might have been different if they had known that the appellant's version of events might better be regarded as constituting the crime of manslaughter, rather than as involving a mere accident. In *Muir v HM Advocate* 1933 JC 46, 50, where the jury in a murder trial had not been directed on the possible verdict of culpable homicide on the ground of diminished responsibility, Lord Sands, who agreed that the appeal should be allowed, noted: "A brutal crime had been committed, and a measure of mental weakness might have been regarded from quite a different angle if the jury were aware that its affirmance did not involve complete acquittal." In much the same way, in the present case the jury might have regarded the defendant's version of events from quite a different angle if they had been aware that accepting it did not involve his complete acquittal.

91. In my view therefore, in a case where the judge has wrongly omitted to direct the jury on a viable alternative verdict, the failure to give the direction must be regarded as a material misdirection. In *Bullard v The Queen* [1957] AC 635, 644 the Privy Council considered that failure to give the appropriate direction on manslaughter in a case of murder would always be irremediable. In the absence of detailed argument on that particular point, it is enough to say that a failure to give the necessary direction must usually make the verdict unsafe since the appeal court will have no sufficient basis for concluding that a reasonable jury would inevitably have convicted the appellant of murder if they had been given the appropriate direction.

92. In the present case I am certainly unable to say that, if given a direction on manslaughter, a reasonable jury would inevitably have convicted the appellant of murder. I think accordingly that the verdict is unsafe. For these reasons, as well of those given by my noble and learned friends, Lord Bingham of Cornhill, Lord Hutton and Lord Mance, I would allow the appeal and make the order which Lord Bingham proposes.

LORD MANCE

My Lords,

93. I have had the advantage of reading in draft the judgments prepared by my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry. I agree with their reasoning and conclusions and add only a few words of my own out of deference to the careful submissions of Mr Kelsey-Fry QC for the Crown and because our decision marks a change from the approach taken in previous authority in both this House and the Privy Council to the safety of a verdict of guilty of a particular offence where the jury has not been directed as to the possibility of a finding of guilt of some alternative lesser offence.

94. Many of the cases cited to the House concerned failure by a judge to direct the jury about the possibility of circumstances which would reduce the charge laid to some lesser offence, e.g. provocation or self-defence which would reduce a murder charge to manslaughter: see e.g. *Mancini v. DPP* [1942] AC 1 and *Bullard v. The Queen* [1957] AC 635. The Privy Council decision in *Von Starck v. The Queen* [2000] 1 WLR 1270 falls to my mind into the same category - the judge directed the jury not to consider the issue of intoxication by cocaine, thus withdrawing from them the possibility of a finding that the defendant, because of such intoxication, lacked the specific intent necessary for a conviction for murder, while retaining the basic intent which is sufficient for a conviction for manslaughter (cf *Blackstone's Criminal Practice 2006*, paras. A3.10 and B1.35). Depriving a defendant of the benefit of an answer to the Crown's case, so leaving him or her exposed in law to conviction for an offence which he did not commit, must render any verdict unsafe.

95. But there have been some cases considering the situation where an alternative offence presents itself not as an answer to the Crown's case, but as a possibility which (although not canvassed by either side) arises in law on the defendant's own case if and only if the Crown's case is rejected. In this situation, a direction by the judge to the jury to consider the alternative offence may lead to conviction in circumstances when otherwise the jury would in law have had completely to acquit. Not surprisingly, there are cases in which defendants have complained that the judge should *not* have left an alternative offence to the jury in these circumstances: e.g. *R v. McCormack* [1969] 2 QB 442; where, equally unsurprisingly, the complaint was rejected (although the court pointed out, at page 446, that a trial judge must have a discretion not to leave an alternative to a jury, if to do so might cause undue prejudice, as where the defendant had lost the chance of giving or calling evidence to cover or guard against the alternative). An important public interest is served by the conviction of offenders of offences which they have committed, and the judge is not bound by the way in which either side has presented its case, if an alternative offence can without injustice be left to the jury.

96. In the present case the appellant's complaint is the reverse. The appellant was content at trial that the jury should be left with a choice between being satisfied of murder and the possibility of accident. But a criminal judge has to ensure a fair trial, irrespective of the attitude taken at trial by either side: see *Von Starck* at p.1275 per Lord Clyde. The appellant now therefore complains that the judge should have insisted on directing the jury that, even on the defence case of accident, they should consider whether the appellant's conduct amounted to manslaughter, at least by gross negligence, and that the verdict is unsafe because he did not.

97. It can be said with some force that our jury system rests on the hypothesis that juries follow the directions and decide between the options they are given loyally and dispassionately: see e.g. the dissenting judgments of McHugh and Hayne J in *Gilbert v. The Queen* (2001) 201 CLR 414 (High Court of Australia). There are after all many circumstances in which no alternative verdict is possible, but the jury may, on the defendant's own account of events, feel very considerable disgust regarding his conduct (as they did no doubt in the present case with regard to the defendant's conduct after the deceased's death). The jury is in such circumstances trusted, nevertheless, to approach the question of guilt or innocence in respect of the offence charged loyally and dispassionately.

98. However, in the limited number of previous cases in the United Kingdom, a different general approach has been taken in a context where an alternative verdict presents itself as possible. The approach has been (a) to recognise that there *can* be a real risk of the absence of a direction regarding the possibility of an intermediate alternative verdict influencing a jury to convict of the more serious charge laid by the Crown, out of reluctance to let the appellant "get clean away" with a complete acquittal, and (b) to seek to identify whether in the particular circumstances of the case that real risk actually arose: see e.g. *R .v Fairbanks* [1986] 1 WLR 1202, *R v. Maxwell* [1990] 1 WLR 401, *R v. Maxwell (Nolan)* [1994] Crim LR 848 and *Hunter and Moodie v. The Queen* [2003] UKPC 69 (cf also *The Queen v. Shaw and Campbell* [2001] NIJB 269). The test involved in part (b) of this approach was advanced by Lord Ackner in *R v. Maxwell*, at p.408 in the following terms:

> "What is required in any particular case, where the judge fails to leave an alternative offence to the jury, is that the court, before interfering with the verdict, must be satisfied that the jury may have convicted out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct".

99. I am persuaded that this is an unworkable test to apply to a jury trial. There is no reliable means by which an appellate court can, on so particular a basis, measure whether or how a jury may react to an unnatural limitation of the choices put before it. One is entitled to assume that juries go about their task in the utmost good faith, but the concern is with sub-conscious as well as conscious reactions. Like my noble and learned friends, I find persuasive the reasoning of Callinan J in *Gilbert v. The Queen* (2000) 201 CLR 414, 441, para. 101, to the effect that, as a matter of human experience, a choice of decisions may be affected "by the variety of choices offered, particularly when … a particular choice [is] not the only or inevitable choice". (In the present case, the possibility that the decision not to leave manslaughter to the jury might conceivably play out against, rather than for, the appellant is also inherent in defence counsel's apparent remark to the appellant at the time about "rolling the dice".)

100. Accordingly, in my view, where, as Lord Bingham has said, an obvious alternative verdict presents itself in respect of some more than trifling offence and can without injustice be left for the jury to consider, the judge should in fairness ensure that this is done, even if the

alternative only arises on the defence case in circumstances where as a matter of law there should apart from that alternative be a complete acquittal.

101. Mr Kelsey-Fry submits, with some force, that the charge of murder laid by the Crown and any alternative offence of manslaughter which may be suggested would, despite its deplorable nature, still be of a very different order of seriousness. Nevertheless the latter could not conceivably be regarded as anywhere near trifling – a point which defence counsel's advice at trial that a conviction for manslaughter could attract a sentence as long as 15 years amply demonstrates.

102. It follows that the present verdict of guilt, arrived at when the jury was presented with a stark choice between murder and complete acquittal, cannot be regarded as safe, and I too would therefore allow this appeal and remit the case to the Court of Appeal on the basis indicated by Lord Bingham.