

ENGLAND AND WALES / JUDGMENT

Stone, R v

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Neutral Citation Number: [2005] EWCA Crim 105 IN THE COURT OF APPEAL CRIMINAL
DIVISION No: 200300595/B3 Royal Courts of Justice Strand London, WC2 Friday, 21st January 2005
B E F O R E: THE VICE PRESIDENT (LORD JUSTICE ROSE) MR JUSTICE MOSES MR JUSTICE
WALKER

- ----- R E G I N A -v- MICHAEL JOHN STONE
- ----- Computer Aided Transcript of the Stenograph Notes of Smith Bernal Wordwave Limited 190 Fleet Street London EC4A 2AG Tel No: 020 7404 1400 Fax No: 020 7831 8838 (Official Shorthand Writers to the Court)
- ----- MR N SWEENEY QC appeared on behalf of the CROWN MR E FITZGERALD QC appeared on behalf of the APPELLANT
- ----- J U D G M E N T 1. 2. 3. 4. THE VICE PRESIDENT: Each member of the Court has contributed to this judgment. We give our reasons for having, on 19th January, dismissed this appeal. On 4th October 2001 at Nottingham Crown Court, following a re-trial before Poole J, the appellant was convicted by a majority verdict of 10 to 2 of two offences of murder and one of attempted murder. He was sentenced to life imprisonment. The previous trial had been at Maidstone Crown Court before Ian Kennedy J. On 23rd October 1998 the appellant had been convicted, again by a majority verdict, on the same three counts. On 8th February 2001, the Court of Appeal (Criminal Division) quashed those convictions and ordered a re-trial because, of the three prosecution witnesses who gave evidence in relation to an alleged confession to them by the appellant, one, a man called Thompson, subsequently retracted his evidence and was shown to be hopelessly unreliable. A second witness, a man called Jennings, had been paid money by a national newspaper and offered further money if the appellant were convicted. The Jennings aspect was not dealt with in the Court of Appeal's judgment, nor did it lead to the quashing of the convictions at the first trial. The Court's judgment focused on the evidence of Thompson and the impact which it might have had on the jury's assessment of the evidence of Damien Daley, the third of the witnesses at the first trial, whose evidence is at the centre of the present appeal. Daley was the only one of the three whom the prosecution called at the re-trial which is the subject of the present appeal. The appellant appealed against conviction by leave of the Single on one ground relating to the adequacy of the judge's directions in summing-up in relation to the evidence of Daley. During the course of the appeal, leave was granted on a second ground on this aspect and on grounds 3, 4, 5, 6 and 6A which arise from further disclosure, made since

the re-trial, of the full terms of an interview given by Daley, a statement made by Annette Conway, a probation officer and the medical notes of Daley's general practitioner. Without objection by the prosecution, all this material was received in evidence during the hearing of the appeal. Other fresh evidence, from a man called Gilheaney, was proffered but we declined to receive it and refused leave on ground 7, which was based upon it.

5. We come to the facts. On 9th July 1996 at about 4.00 pm, Dr Lin Russell, who had no purse or handbag with her, together with her six year old daughter, Megan, and her 9 year old daughter, Josie, left a swimming gala at Godnestone School, in Kent, to walk home with their family dog. At about 4.25, as they walked along Cherry Garden Lane, a quiet unmade track near Chillenden, they were attacked by a man getting out of a car intent on robbery. He took them into a thicket, tied them up with torn towels and shoe laces, blindfolded them and savagely beat the head of each of them with a hammer, smashing their skulls to a greater or lesser degree. Dr Russell and Megan both died. Josie was seriously injured but survived. The dog was killed. When they did not return home Dr Russell's husband raised the alarm. The bodies were discovered at 12.30 the following morning. It was the prosecution case that the appellant was responsible for the attacks. Central to that case was the evidence of Damien Daley, a criminal on remand, who was in a cell in the segregation unit at Canterbury Prison. The appellant 6. 7. was put in an adjoining cell. Daley's evidence was that, via a heating pipe, running between two cells, the appellant confessed to him that he had carried out the killings. The injuries which Josie suffered caused her to have significant difficulty in expressing herself. But, 2 months after the attack, she indicated to her father that she had some recollection of what had occurred. A speech and language therapist began a series of sessions and she was interviewed by the police several times from September onwards. She was able to indicate that, while in Cherry Garden Lane, she had seen a red saloon car, to whose male driver she had waved. Later it stopped across their path. She indicated that the attacker had yellow hair, was of medium build and was as tall as her father. The appellant is several inches shorter than her father. She gave a description of the man's clothing and said his hair was short. He had no beard and he did not wear spectacles. He had hurt her head using a hammer. He had tied her hands behind her back with a shoe lace and had tied her mother with a blue towel which he had torn. She had run away, but the man had run after her, hitting her on the head, and had brought her back to the others. Later, she gave further details of the man chasing her, and hitting and tying up her mother. Later still, when she was able to speak, she said the man had asked for money. After the appellant's arrest, she attended an identification parade but was unable to identify anyone. Nicola Burchell described driving home from work just before 4.45 pm and, at a junction near the scene of the attack, a car pulled out in front of her, causing her to slow down. She followed it bumper to bumper. The male driver kept looking in his wing mirror. She later provided the police with two e-fit pictures of the driver, whom she described as 30 to 35, with short gingerly blond hair and a fair complexion. When Josie saw the e-fits she recognised them as being consistent with the appearance of the attacker. When, 14 months after the murders, Miss Burchell attended an identification parade, she was unable to make a positive identification

but said the appellant "looks very familiar. I don't know why. There is just something about him". She described the car as being light beige like an old Escort. Another witness saw what he thought was a beige Escort at about 5.10 pm parked by a tree. There was a man standing by the car whom seemed jittery and was looking across the field towards Chillenden. He was about 40, 5 feet 6, with quite short, close cut, light coloured hair. Later when he returned with his dog, he saw, near the tree, a string bag with strips of blue towelling which had been pushed into a hedge. Another witness saw a beige car, possibly a 10 year old Escort, about 4.50 pm near Rowling Court. The white male driver had short fair hair, and was aged 30 to 40. Near a tree at Rowling Court were found six separate strips of towel which, when fitted together, formed one complete towel, which was identified as belonging to the Russell family. All the strips were bloodstained. A number of the bloodstains and hairs were grouped and analysed for DNA. All were consistent with having come from the three victims. A black boot lace 99 centimetres long and knotted tightly in three places was found 45 metres away from the bodies. It had on it blood from Megan and Josie. Postmortem evidence in relation to Megan showed that there were injuries to her neck apparently caused by the boot lace. 8. There was no forensic evidence connecting the appellant with the attacks. But there was other relevant evidence. He was a heroin addict who kept syringes and a boot lace in his car. The lace was about two or three feet long, with a knotted loop at one end and SMITH BERNAL WORDWAVE two or three knots along its length. He was seen to use it five or six times, wrapped round his bicep to raise a vein for the purposes of injection. There was expert evidence that the boot lace found at the scene was in every way consistent with being a tourniquet used by abusers of heroin. The appellant knew the area. He had lived nearby when younger. In the early 1990s he was sufficiently familiar with the countryside to be able to give directions without a map, when driving around the area. It was his habit to carry a variety of tools, including a hammer in whichever car he was using. His aunt gave evidence that, between May and June 1996, the appellant had given her a lift in a very dirty old car, which was dirty beige inside and looked a dirty red outside. The appellant often changed his car, and they were generally old ones. Two other witnesses described seeing the appellant in various cars, red, green, white and beige during the summer of 1996. Sheree Batts said that, on an occasion two weeks before 24th July 1996, the appellant had called at her house between 11.00 am and 3.00 pm with blood on the front part of his T-shirt, visible beneath his jogging top. He said he had been in a fight but she could see no injury and he did not complain of any. 9. The appellant was arrested a year after the murders, on 17th July 1997 and was interviewed several times. He denied owning a beige car over the previous 2 years, having anything to do with the murders, or arriving at Sheree Batts's house with blood on his T-shirt. He said she was lying. He had thrown all his old clothes away. He admitted injecting heroin and using a rubber tourniquet and sometimes a tie but not, he said at first, a shoe lace or boot lace. Later, he said he might have used a white shoe lace, once, and then, that he might have used it a few times. He did not remember a black shoe lace. He denied ever going to Chillenden. He said, when Daley's statement was shown to him, that it was a pack of lies. He denied carrying a hammer in his car, and denied knowing the areas of the murders. He had not given his aunt a lift in a red car. He asserted a

comparison of his hair and any at the scene would prove negative.

10. Damien Daley said that, in September 1997, he was in Cell 3 in the segregation unit at Canterbury Prison. He was able to communicate with the prisoner in the adjoining cell by means of a heating pipe. He had heard that a woman and child had been murdered in Chillenden but he did not know the details. On 23rd September the appellant was brought to Cell 2. Daley had no foreknowledge of this. About 8.00 to 8.30 in the evening several prisoners were screaming and shouting at the appellant and asking what he was in for and he said robbery and intimidating witnesses. The shouting continued for 5 to 10 minutes. Daley told the others to leave the appellant alone and be quiet. They were. He then heard someone talking through the wall from Cell 2. He went to the pipe and listened. The appellant told him he was his "mate", and thanked him for doing what he had done. Daley told him to shut up but carried on listening. The appellant started talking about smashing heads and breaking eggs and inside it would be mush or something. He said: "I'd been okay if that slag hadn't picked me out". Daley told him to be quiet and did not really know what he was talking about. He started reading The Mirror newspaper which mentioned the Chillenden murders. We interpose there the comment that, as is apparent from the Daily Mirror which Daley had, the result of the identification parade had been withheld from publication, though it had been reported that Josie had attended such a parade. Daley said he had not realised there was a survivor. He realised the appellant was talking about that matter, so he SMITH BERNAL WORDWAVE went back to the pipe and told the appellant to be quiet or he would tell 'the screws'. The appellant said: "They won't believe you, and even if they do I'll be nutterd off" which Daley understood to mean he would plead insanity. The appellant talked about tying people with towels and a shoe lace or short lace. He talked about wet towels and somebody being disobedient in trying to get away but they did not get away. They did not have what he wanted. He referred to them as paupers, saying the dog more made more noise than they did. The appellant talked about making someone watch, but they closed their eyes and he hit them. He talked about a swimming costume, which he had sniffed and had been aroused to an orgasm, or nearly orgasm. Daley said it was like being told a horror story. The following morning, when prison officers came to his cell, he told them to be quiet, and banged on the wall, shouting "Stow, Stow". The officers pulled him from the wall, and later moved him to another cell. The judge excluded evidence from others about Daley's distress on that day.
11. Having been advised by his uncle that he would not be 'grassing' by so doing, Daley made a statement to the police on 26th September, which accorded with the evidence which he ultimately gave. In cross-examination, it was suggested that he had fitted up the appellant and prepared himself for that purpose. He denied making up the admissions. He did not know the appellant by name or personally, and he knew virtually nothing about the Chillenden murders. The appellant was a scum bag, if he had attacked a woman and children. He agreed he had a reputation as the hardest man in prison. He had taken every kind of drug. He had taken heroin in prison and at the first trial had given evidence on oath denying having done so. That was a lie. He lied when it suited him. He was a crook. He had

committed crimes of violence, robberies, thefts and burglaries, and he lied to get by in life.

12. There was evidence from prison officers that, on the morning of 24th September, Daley had asked to speak to them about the man in the next cell talking to him. They checked that you could communicate along the pipe between Cells 2 and 3, without voices being raised. Before Daley gave evidence, and unknown to him, the jury had been on a view of the cells, to see whether and how communication could be carried out along the pipe.
13. The appellant did not give evidence. None was called on his behalf. Defence counsel argued that, as the appellant had asked to be put in the segregation unit to protect himself from false stories of a confession, why should he then, hours later, confess to the man in the next cell? Daley was lying. He was doing so to gain credit with his peers or with the police.
14. The prosecution made an admission that there was nothing which Daley said, which was not either in the public domain or capable of being inferred from material in the public domain.
15. We turn to the grounds of appeal. It is convenient to deal with them in the reverse order to that in which they were advanced.
16. With regard to ground 7, based on proffered fresh evidence from Paul Gilheaney, we declined to admit that evidence and refused leave to appeal on this ground. The evidence was contained in statements made by Gilheaney on 7th September, 21st SMITH BERNAL WORDWAVE September and 30th September 2004. On 7th September Gilheaney, referring to his brother-in-law, Kelly, as 'James', a man called Hemphill as 'Gary' and to Daley as 'Damien', said this: "On one occasion in about February of 2004, I was watching television with Damien, Gary and James when it came on the television that Michael Stone had got another appeal. It also showed pictures of Damien Daley leaving the court handcuffed and put into a prison van. They also said that Damien was a prosecution witness in the case. James and I said to Damien: What's all that about then? He replied: Don't believe everything you see on TV. He then turned round and said he'd only done it to help himself, it was all bullshit and lies to try to get a reduced sentence or get out of prison. We were not happy with what he said and we kept away from him after this." On 21st September, in addition to seeking to explain why he was not prepared to go to court, he confirmed the truth and accuracy of his 7th September statement. On 30th September, following a video recorded interview, in the presence of his solicitors and the appellant's solicitors, he made a further amplifying statement, the material parts of which are as follows: "I am now willing to go to court... I would now like to add the conversation I had with Daley about the TV programme took place in my cell... on house block 2B Spur... I cannot remember the exact date but I believe it was in late February or early March... Damien Daley came into the cell. He sat on James' bed. James came and sat next to me. Gary sat nearest the TV... Suddenly I recall hearing something about an appeal on the TV. James also must have noticed it as we looked at each other and I looked at the TV. I could see a picture of Damien Daley being led by a security officer in handcuffs handcuffed to the officer... The TV programme also mentioned Damien by name... The TV programme talked about being a witness in the Stone case... Both myself

and James said at the same time: What was all that about? We looked at Damien as we said this. Damien looked shocked and possibly embarrassed, as I am in no doubt he had seen what was on TV. Damien then replied to us: Don't believe everything you see on TV... Damien then said: It's all lies and bullshit. Damien then said he had only done it to help himself... I did not think too much of what Damien had said. It was only later that it sunk in and I realised exactly what he meant. Once I am out of prison I do not tell anyone about the conversation I had with Daley in the cell. The first person I spoke to about this was Bob Henderson. I believe this was the 5th or 6th September 2004... When I came out of prison, I did think about what I had been told but I did not have a lawyer, so I did not know what to do. I thought I should make a statement about the conversation, but did not know how to do it. When I spoke to Bob he mentioned that Michael Stone's sister had contacted him. I then thought I would tell Michael Stone's sister. I got Bob to contact her and got her to ring me... I did not tell her what I knew but told her I would like to make a statement. She SMITH BERNAL WORDWAVE told me would I like to speak to a lawyer hence, my first statement."

17. 18. 19. Following the adjournment, on 8th September last, of the hearing of this appeal, in the light, among other matters, of Gilheaney's 7th September statement, a detailed investigation was carried out into Gilheaney's claims. Mr Fitzgerald QC for the appellant accepted that we were entitled to take the fruits of that investigation into account, when having a regard to those matters identified in the amendments to section 23 of the Criminal Appeal Act 1968 by section 4 of the Criminal Appeal Act 1995, in deciding whether to receive this evidence. In particular, we concluded that Gilheaney's evidence was not capable of belief for a number of reasons which we now give. First, it is by no means uncommon in a case such as this, attracting great media interest, for a witness to come forward at the last moment, claiming, falsely, to have knowledge of relevant matters. Secondly, the terms of the statement of 7th September 2004 were, on their face, a vague and imprecise basis on which to claim that Daley had retracted his evidence as to the appellant's confession. As a comparative example, there could be no greater contrast than that between the few words of retraction attributed by Gilheaney to Daley and the dramatic detail of the account attributed by Daley to the appellant. The amplifying detail in the statement of 30th September served, when enquiries were made about it, not to enhance but to damage further the reliability of the earlier statement.

20. Thirdly, if Gilheaney, as he claimed, knew that the appellant's appeal was pending when Daley made the alleged retraction, it is astonishing, particularly as he was released from prison only a day or two later, that Gilheaney remained silent about the matter for 6 months. He did not offer to make a statement until the day before this appeal was listed for hearing in September and he did so only after a casual conversation led him to speak to the appellant's sister and then the appellant's solicitor. 21. 22. 23. Fourthly, when Kelly (who is, as we have said, Gilheaney's brother-in-law) was interviewed by the police on 15th September and when Hemphill was interviewed, initially on behalf of the appellant's solicitor on 7th September and subsequently by police on 16th September, both denied, or to put it no higher, refused to confirm, Gilheaney's claims that they were present at such a

conversation and that it was triggered by a television programme. Fifthly, on 21st September, within two weeks of making his statement on 7th September, Gilheaney refused to go to court, to support it. He was adamant that he would not go. Sixthly, his reasons for so refusing, namely, his fear for his family, because a chair had been thrown at his girlfriend's window and his treatment at Belmarsh Prison, were bogus. On enquiry, the chair incident was proved to be due to a neighbour, and both that incident and his treatment at Belmarsh were wholly unconnected with this appeal. 24. Seventhly, prison accommodation records, confirmed by the location where telephone PIN number were used by Gilheaney, Daley, Kelly and Hemphill, demonstrate that SMITH BERNAL WORDWAVE there was no occasion in February 2004, or in March, save between 17th and 23rd, when the four could have been, as Gilheaney claimed, together in his cell in block 2 spur B. Daley was in block 2 spur B from 22nd January to 23rd March, but Gilheaney himself, from 13th February to 16th March was not in block 2 spur B. Kelly did not reach the prison until 4th March and was not in block 2 spur B until 17th March. Hemphill was not in block 2 spur B until 2nd March. Accordingly, it would only have been possible for the four to be together in Gilheaney's cell during the week before he was released on 23rd/24th March. Yet it is to be noted that his statement of 7th September purported to date the alleged meeting as being in about February, and his statement of 30th September said it was in late February or early March.

25. Eighthly, painstaking enquiries as to television programmes show that none of the terrestrial TV channels capable of being received in block 2 spur B broadcast any item about the appellant's case or Damien Daley, during the period between 17th and 23rd March. It follows that Gilheaney's essential claim, that Daley retracted his evidence in the presence of the others, when triggered by a TV broadcast, is demonstrably false and it is not resurrected as capable of belief by his suggestion, in interviews in late October, that the broadcast and retraction may have occurred on different occasions. 26. It was in the light of these matters that we declined to admit Gilheaney's evidence and refused leave to appeal on ground 7.
27. We turn to grounds 3 to 6A which rely on fresh evidence, not known to the defence at the trial which, it is contended, would have provided powerful material for cross-examination of Daley, which was likely to have affected the verdict. The evidence falls into three categories:
 1. Evidence as to drug abuse and heroin addiction;
 2. Evidence as to bizarre behaviour and mental instability; and
 3. Evidence of subsequent misconduct indicating that he was prepared to lie on oath.
28. Grounds 3 to 5 relate to distinct sources for the material. Ground 3 refers to a police interview on 22nd May 1998, following arrest the day before for criminal damage. The interview demonstrates serious mental problems and bizarre thinking. Ground 4 relates to fresh evidence of heroin abuse and addiction, in particular emerging from admissions Daley made to a probation officer in 2003. Ground 5 relates to further evidence of drug abuse in medical records. Grounds 6 and 6A are compendious grounds drawing together the material

obtained from the sources identified in grounds 3 to 5. Ground 6 contends that the overall history of Daley demonstrates his potential unreliability. Ground 6A, alternatively, contends that the conviction was vitiated by unfairness because, in the absence of that material, Daley was permitted to lie on an important issue that went to his credibility. 29. In support of these grounds the essential submission by Mr Fitzgerald QC, who did not appear at either trial, was that, absent the material which has now emerged, it is apparent that counsel for the defendant was unfairly deprived of a much greater SMITH BERNAL WORDWAVE opportunity to demonstrate the bad character and unreliability of the key witness, Daley. The new material demonstrates, so it was contended, to a far greater extent than hitherto had been possible, the extent of Daley's lies in evidence and his unreliability due to heroin addiction and instability. This submission must be considered in the context of the obligation of the Crown fully to research the character and antecedents of the prisoner, before deciding to call him to give evidence against a fellow prisoner (see R v Molloy & Hickey (Court of Appeal (Criminal Division) transcript of 30th July 1997 at page 383E and R v Causley [2003] EWCA Crim 1840 at paragraph 91). Mr Fitzgerald did not suggest that the Crown deliberately failed to undertake proper research. But he did contend that, inadvertently, material which ought to have been forthcoming did not emerge.

30. The starting point, contended Mr Fitzgerald, was Daley's deliberate concealment, during the course of the second trial of the extent to which he took drugs. At the first trial, he had said he had never taken heroin in prison. At the second trial, he made, so it was said, only limited admissions as to taking pills, which showed up as opiates during a drug test. 31. 32. It was submitted that Daley was a drug addict and this is significant because first it demonstrates, to a far greater extent, that he was lying at the second trial; secondly it is strong evidence of lack of reliability; and, thirdly, it provides a motive for him to concoct a false confession, in order to leave the segregation unit and reach a part of the prison where drugs were more readily available. In order to analyse the effect of the new material, it is first necessary to identify with precision what Daley said at the second trial. Mr Clegg, in cross-examination put to him the two occasions when he was found guilty of taking opiates by the prison governor at Elmley. He had pleaded not guilty on one occasion and changed his plea on the second. Daley asserted that the test had shown positive when he had not taken heroin. But when it was put to him he was saying he was a victim of a miscarriage of justice, he replied: "I have tried every drug. I have tried every drug." When asked why he had lied to the jury during the first trial, saying that he had never taken heroin in prison he replied: "Because I did not see my drug misadventures had any relevance at all on what I was doing at the time." Mr Clegg continued: "Q. You were quite happy to lie to that jury on oath, were you not? A. I did not see my drug taking had any bearing on the situation at hand Q. You are somebody who lies when it suits you? A. I am a crook." SMITH BERNAL WORDWAVE Later he said: "I lie to get by in life" and again: "I am a crook. That is what crooks do. They beg, borrow, steal and lie, however they can, to get by in life. Whether I thought that question was directed to me about the trial, then I would say 'No'. If you was to say it to me now, are you lying, I would say 'no I am not lying.'" Later Mr Clegg suggested that his lies

were designed to cover up his drug taking. Daley denied this and repeated: "I told the jury as well, also that I had taken every single drug there is."

33. Before us, Mr Fitzgerald specifically relied upon Mr Sweeney's re-examination, when Daley said he had taken heroin in the form of tablets which were painkillers. Mr Sweeney continued: "Q. Did you ever take it in the form of injecting yourself or in the form of snorting it or in the form of smoking it or any other ways a drug addict would take heroin as we would all understand it? A. You don't snort heroin, you just inject it or smoke or take it through the mouth or whatever. I have never heard of anyone snorting heroin. It would be cocaine or other things you snort like amphetamines. Them drugs aren't really used in jail because who wants to be awake all night basically? No, I've never stuck a needle in me and no I've never done any of that." The judge, twice, accurately summarised that evidence, first in his summing-up at pages 84 to 85 and again, in response to a jury question, at pages 161 to 162. The judge in summing-up added this comment: "Members of the jury, it is entirely for you to decide whether these questions and answers and his drug taking and his admissions or denials of it at various times assist you in assessing his credibility. The defence submit to you that they do affect his credibility as a witness. The prosecution submit that they do not affect it at all, that his account fits the facts and that he has no improper motives. It is for you to decide."
34. There has now been obtained and is before us evidence which goes to show that far from taking heroin in prison in the form of pills on isolated occasions, Daley was a drug addict and had been so for 5 years prior to the second trial. The evidence is contained in a probation report dated 11th April 2003, which was not therefore available at the time of either trial. In that report, the probation officer states that: "Mr Daley has a long-established drug habit. He informs me he had SMITH BERNAL WORDWAVE begun to inhale solvents at the age of 9 years and then went on to smoke cannabis. By the age of 13 years he was taking LSD and ecstasy plus smoking cannabis. At the age of 14 he tried cocaine and then would take anything that was available. He first experimented with heroin when aged 20 years but developed a habit when in prison in 1996. It was at this time he suffered the devastating loss of his parents and he said heroin deadened his pain. The four months prior to this remand in custody (21st March 2003) he was injecting heroin intravenously." There is further material which confirms Daley's abuse of drugs and addiction. Medical records which were not obtained for trial, either by the Crown or by the defence, confirm drug abuse. On 12th March 1998, clinical records show that Daley was very demanding and wanted his drugs. The following day a temporary medical assessment records him as a known drug addict with daily prescriptions of diazepam and temazepam. It described him as "very aggressive and very demanding, tending to deceive doctors into prescribing." 35. From 1st March 1999, Daley reported himself, on newly joining a local surgery, as suffering from drug abuse as a current medical problem. On 25th October 1999 clinical notes recorded that Daley had been asked by his wife to visit the surgery because of a long-term problem with drugs. On 28th February 2000 consultation notes recorded "drug addiction - opioids" and Daley used heroin to relieve his pain from an upper respiratory tract infection. Post trial reports of 22nd April

2002, also referred to drug addiction and that Daley was fed up with it. On 27th June 2002 current medication was recorded as methadone. On 5th July he was recorded as being dependent on benzodiazepine and wished to reduce such dependency. 36. It was submitted that, had counsel for the appellant been armed with this material at trial, the jury would have better appreciated the extent to which Daley was lying, not only because of his lies, but also because of the unreliability stemming from his drug addiction.

37. The material now obtained undoubtedly provides powerful evidence that Daley concealed an addiction to heroin. Further, it supports the suggestion of a dependency on benzodiazepine in the form of diazepam and temazepam. In the absence of the documents to which we have referred, Mr Clegg at trial was unable to suggest such an addiction and the jury remained ignorant of it. If Mr Sweeney had known of this material, as he frankly accepted, he would not have asked the question in re-examination, which we have quoted, designed to distinguish Daley's use of drugs from the methods of abuse to be expected of an addict.
38. But the crucial question is: what extent does the new material cast greater doubt upon the veracity of Daley's evidence as to the confession than was cast in the second trial? We do not accept that this material bears the weight suggested on behalf of the appellant. It must be viewed in the context of what Daley admitted about himself at trial. In our judgment, while the new material shows a dependency on drugs and brings into sharper focus the lies Daley told, it makes no material difference. We say this for the following reasons: SMITH BERNAL WORDWAVE 39. 40. First, it must have been obvious to the jury that Daley was deeply flawed. He was a hardened criminal, who lied when it suited him and he had, on his own admission, taken every type of drug. He had lied specifically about taking heroin at his first trial, because he thought it had no relevance to the evidence which he gave. Secondly, it must be recalled that there was, and is no evidence whatever that Daley was suffering withdrawal symptoms when he was placed in the segregation unit on 9th September 1997, or in the following weeks. On the contrary, medical records from Canterbury prison, where Daley was in custody until 10th October 1997 were disclosed to the defence and gave no indication that Daley was suffering from any such symptoms. A statement from the Canterbury senior medical officer, Dr Whiting, which dealt with evidence of Daley's distress post confession excluded by the trial judge, says that Daley was in good health on his arrival at Canterbury; and Daley's statement that he was not taking any medication, seems to have been confirmed by the doctor on examination. An assessment sheet on 15th September, after Daley was placed on segregation, but a week before the alleged confession, recorded that there was no history of drug abuse, which is inconceivable had he been showing withdrawal symptoms at the time. 41. In reality, the only evidence of drug abuse, at or around the time when Daley said he heard the appellant confess, was that contained in disciplinary adjudications and reports, some weeks later, at Elmley Prison, which were disclosed to the defence and related to possible drug abuse, in October and December 1997.

42. Thirdly, in the light of Daley's admissions of lying, and about taking heroin, which we have already rehearsed, evidence that he lied to a greater extent than was apparent at the time of the second trial, does not, in our judgment, significantly affect the quality of his evidence. The jury was well aware that he was not only prepared to lie, but to do so on oath. The judge, on two occasions, reminded the jury of Daley's attitude to the truth. 43. In those circumstances, the additional material showing addiction, in our judgment, added little of significance and certainly lacks such sufficient weight to affect the safety of the jury's conclusion that Daley was telling the truth about the confession. Nor does the new material provide any evidence of motive for concocting a confession, in order to get out of the segregation wing so as to obtain drugs. The evidence of his medical condition at the time provides no basis for any such suggestion, which has no substance.
44. The second category of material on which the appellant now relies relates to what is said to be evidence of bizarre behaviour and mental instability. The primary source referred to, in ground 3, is the terms of an interview on 22nd May 1998, following Daley's arrest the previous day for criminal damage. The defence, at the second trial, were unaware of this evidence, although there was a reference to his activities leading to his arrest and a brief reference to his behaviour and condition in material disclosed, in March 2001, before the second trial. It is argued that Daley's admissions reveal bizarre and unstable behaviour. He is recorded as saying: "My head is not my head sort of thing." SMITH BERNAL WORDWAVE "I do bang my head because it's a thudding feeling". "The whole situation has been like one big dream" and he remembers "whacking the 'phone across me head and hearing things." 45. It is clear, not only from what Daley himself said but also from statements from a paramedic and custody officer, that Daley had been drinking heavily for two or three days before his arrest on 21st May 1998. The occasion was an anniversary of his father's death which had occurred while Daley was in custody. Daley's actions, in biting a head rest in the ambulance, dialling the telephone number of his deceased mother and smashing the telephone, are evidence that he was drunk. But, in our judgment, they provide no material of mental instability, such as to cast doubt on the truth of his evidence.
46. The other material, which it is said demonstrates mental instability emerges from the medical records. A letter from his general practitioner, dated 4th March 1998, referred him to a psychiatrist, Dr Safraz. The letter says that Daley was seen in prison by the psychiatrist, but, on investigation, there is no evidence that that in fact happened. The letter continues by recording that: "He was prescribed diazepam and temazepam to control his agitation. Is quite depressed with a lot of anxiety. According to him he has a lot of anger as he lost both his parents within the last six months." There is no evidence as to whether he saw the psychiatrist or had any further diagnosis or treatment.
47. This material, in our view, does not significantly advance the appellant's case. It is not evidence of mental instability let alone such instability as to cast doubt on Daley's veracity or the safety of the appellant's convictions. 48. Finally, the appellant relies upon the fact that, on 13th April 2004, Daley was convicted of possessing heroin with intent to supply. He had

denied his guilt, relying on the fact of his addiction. Intelligence material shows the extent to which Daley's denials were false, as the jury obviously found. For the reasons which we have already given, we do not think the fact that there now exists a further example of Daley's willingness to lie on oath diminishes the quality of Daley's evidence to any greater degree than must have been apparent to the jury. It is, as Mr Sweeney remarked, merely "more of the same".

49. Looking at the new material as a whole, in the context of what took place at trial, we are unpersuaded that it significantly devalues Daley's evidence so as to cast doubt on the safety of the verdicts. This was not a case of a witness who appeared to the jury to be of impeccable status, but is subsequently shown to have been discredited. The contrast with cases such as *R v Twitchell* [2000] 1 Cr App R 373, relating to police officers, is stark. The jury knew the nature of the source of the key evidence in the case. Daley was dishonest, a criminal, with an ability to lie when it suited him, even on oath, and had taken every kind of drug. The new material merely confirms what must have been obvious to the jury. We reject grounds 3 to 6A. SMITH BERNAL WORDWAVE
50. We turn to grounds 1 and 2. Ground 1 is that the judge failed to give the jury an express and strong warning that they must be very careful before relying on the evidence of Daley because of his bad character, his admission of past lies and his potential motives to lie and because of the general dangers of placing reliance on alleged oral confessions to fellow prisoners.
51. Mr Fitzgerald submitted, rightly, that the courts have long recognised the dangers of cell confessions, and he drew attention to four particular points:
- (1) They are easily concocted and difficult to prove;
 - (2) Most prison informants are of bad character and willing to lie in their own interests.
 - (3) An informer, particularly if on remand, is likely to have an interest of his own, whether of benefit from the authorities or to gain kudos from his fellows in a case of this kind;
 - (4) These dangers may not be apparent to the jury. He emphasised that the appellant's conviction at his first trial was quashed because, as we have already said, the evidence of Jennings was unreliable.
52. Mr Fitzgerald identified two safeguards: the duty on the Crown to research the character of their witness; and the duty of the court to give a warning.
53. Mr Fitzgerald accepted that, although defence counsel's closing speech had suggested that Daley might be lying in order to gain credit with his peers or with the police, this had not been put in cross-examination to Daley. But, he said, the duty of the judge to give a special warning did not cease simply because the matter was not put to Daley. Mr Fitzgerald submitted that no warning was given by the judge, that a warning was obligatory and that counsel did not waive the appellant's right to a warning.

54. As to the absence of warning, Mr Fitzgerald accepted that twice in his summing-up the judge directed the jury to examine Daley's evidence with great care. We rehearse those passages. The first starts at page 12, the last line: "Both counsel told you rightly that the outcome of the case rests on the evidence of Daley. The other evidence, described variously as 'circumstantial' or as 'evidence of consistency,' cannot on its own suffice for a conviction. You assess the witnesses, all of them, including what you know of their background. Daley's background, to use his own word, is that of a "crook" and you should, of course, examine his evidence with great care. It is right to say that a bad background does not mean that a witness cannot be telling the truth, any more than a good background guarantees that a witness is telling it. It is for you to decide and your decision will depend upon your detailed examination of the evidence." At page 73C the judge said this: SMITH BERNAL WORDWAVE "... Damien Daley. This witness, as you well understand, is central to the case and obviously you should examine his evidence with great care. Only if you are sure that he is telling the truth, that is to say that the defendant did confess to the killing and that it was a true confession, should the verdicts you return be ones of 'Guilty'. Equally, if you are not sure of that, then the verdicts must be ones of 'Not guilty.' the other evidence in the case on its own is not capable of supporting verdicts of guilty."
55. Mr Fitzgerald submitted that the warnings given by the judge would be equally appropriate to any evidence upon which a criminal case hinged and contained no warning as to the potential unreliability of this particular type of evidence.
56. As to the contents of a proper warning, Mr Fitzgerald referred to *Pringle* [2003] UKPC 9 and *Benedetto v The Queen* and *Labrador v The Queen* [2003] UKPC 27, [2003] 1 WLR 1545.
57. Mr Fitzgerald noted that, like *Benedetto* but unlike *Pringle*, the present case involves both a cell confession and an informer with a bad character.
58. As to bad character, Mr Fitzgerald said that references to the need for a warning in this regard in *Benedetto*, tied in with a duty recognised in earlier authorities to warn of the special risks of relying on the evidence of a man of bad character. He gave as a good example of an extended warning as to both bad character and potentially tainted motive, the direction given by the trial judge, in *Molloy & Hickey*. 59. In addition, Mr Fitzgerald said there was a need for the trial judge to inform the jury that confessions of this kind were easy to fabricate, and experience had shown that reliance upon such a confession can lead to miscarriages of justice. He relied on a decision of the High Court of Australia in *Pollitt v The Queen* (1992) 174 CLR 558, in particular the judgment of Deane J at pages 586 and 588, *Dawson and Gaudron JJ* at page 599; *Toohey J* at page 606 and *McHugh J* at pages 618 to 619.
60. As to the obligation to give a warning, Mr Fitzgerald asserted that, in cases of cell confessions, there is a general duty to give a special direction, analogous to the duty in cases of disputed identifications. This arises primarily from the risk that the evidence is tainted by an improper motive. He referred to *Pringle* (paragraph 31), where the Privy Council cited the judgment of Ackner LJ in *R v Beck* [1982] 1 WLR 461 at 469A.

61. Mr Fitzgerald observed that in *Benedetto*, at paragraph 32, the Privy Council categorised the evidence of a prison informer as "inherently unreliable." In the present case, he submitted the duty was triggered because
- (1) Daley was a prisoner facing trial and, as an experienced criminal, would know he stood to benefit from assisting the police.
 - (2) These facts alone gave him an incentive to lie.
 - (3) He had an obvious motive to win transfer out of segregation. SMITH BERNAL WORDWAVE
 - (4) The facts contained in the alleged confession were admitted to be in the public domain.
62. Mr Fitzgerald also relied on *R v Price* [2004] EWCA Crim 1359 as establishing that it is not generally sufficient for a judge merely to recite the points that have been made by defence counsel in relation to a cell confession, and that failure to give a specific warning about the dangers of evidence as to cell confessions may be a misdirection.
63. As to the bad character of Daley, Mr Fitzgerald submitted that this alone required a direction to treat his evidence with caution. He cited *Lord Hailsham in R v Spencer*
- [1987] AC 128 at 134E, *R v Causley* [1999] Crim LR 572 (transcript of 22nd October
- 1998) and a decision of the Supreme Court of Canada in *Brooks* 141 CCC (3rd) 321. Mr Fitzgerald submitted that there were overwhelming reasons for a special direction here, namely, Daley's substantial record, including dishonesty, the fact that he had lied on oath and had every motive to fit up the appellant to gain credit with his fellow prisoners and, further, he was on remand. Although, at trial, defence counsel had invited the judge to consider "a diluted corroboration warning or the need to approach his evidence with caution", the judge's reaction, no doubt having in mind *R v Makanjuola* (1995) 2 Cr App R(S) 469 at 473, was that this was entirely a matter for his discretion. Trial counsel accepted that there was no requirement. But, Mr Fitzgerald submitted, *Makanjuola* had been considered by the Privy Council in *Pringle* and *Benedetto*, and those authorities had carved out an exception in cell confession cases, so that there is at least a presumption in favour of a warning which sufficed to turn discretion into obligation.
64. This led to Mr Fitzgerald's third proposition, that defence counsel had not waived the appellant's right to a specific warning. In a note to this Court, trial counsel says that had the cases now relied upon by the appellant been decided prior to the conclusion of the second trial, he would have sought such a direction.
65. Mr Fitzgerald then turned to the second ground of appeal, namely that the trial judge did not fully analyse the potential fallibility of Daley, given his motive to lie as a remand prisoner, his admitted acrimony towards "nonces", his criminal history, his admission that he lied on oath at the earlier trial when denying using heroin and his potential animosity towards those attacking women and young children.

66. Mr Fitzgerald identified six matters which ought to have featured in the judge's summing-up:
- (1) A specific direction to approach the evidence of Daley with caution, because of his bad character alone, without the neutralising addition of the words "a bad background does not mean that the witness cannot tell the truth";
 - (2) A direction as to the significance of Daley's admission that he lied to get by in life and was ready to lie when it suited him;
 - (3) The relevance of Daley's admission that he lied on oath at the first trial and his unconvincing attempt to explain away his disciplinary adjudications in relation to SMITH BERNAL WORDWAVE drugs;
 - (4) A direction that there might be any number of motives to lie given Daley's bad character, history as a career criminal and status as a remand prisoner on the segregation block;
 - (5) As a prisoner on remand Daley might consider he had something to gain from the police;
 - (6) Other potential motives to lie were to gain credit with other prisoners and satisfy his own prejudices by "putting away" a "nonce".
67. Mr Fitzgerald said that, even if these points were not put in cross-examination, they still remained relevant and needed to be included in the summing-up.
68. On behalf of the Crown, Mr Sweeney QC submitted that a full direction of the kind envisaged in Benedetto was not required in this case, and that the judge's directions were entirely adequate. The mere fact that a confession was alleged by an untried prisoner did not automatically require a full direction: there is a threshold beyond that mere fact and the threshold is material indicative of motive. Trial counsel, on behalf of the appellant, had not cross-examined about motive for good reason: there was none that would stand examination before the jury.
69. At the first trial Daley had been cross-examined to suggest improper motive on two bases, both of which were ultimately abandoned. At the second trial counsel, as his note to this Court shows, had recognised that cross-examination on these lines would not be desirable and would have been, as Mr Sweeney put it, "damningly and incontrovertibly rebutted". As to the suggestion in this Court that movement out of segregation was a viable motive, trial counsel had deliberately decided not to pursue that suggestion for sound tactical reasons. There was no evidence of any compelling need to get out of the segregation unit. Such a suggestion would, in any event, have been inconsistent with the case run at trial, namely that Daley had engineered getting into the segregation unit and stayed there as long as was needed to fake the confession.

70. As to the bad character line of cases, Mr Sweeney submitted that there is no automatic rule that such cases require a specific warning. At its highest, there was a discretion or judgment to be made by the judge as to the directions he would give. The judge had referred, twice, to the need to take great care and had scrupulously rehearsed all points taken against Daley. That, submitted Mr Sweeney, was an appropriate way of dealing with this case.
71. He further submitted that, there being no evidence of improper motive, a direction as to possible factors which might give rise to a danger of false confession, followed by a detailed analysis of the absence of any such factors was likely to be more harmful than helpful to the defence.
72. Mr Sweeney stressed the many details of what had happened which were included in the confession described by Daley. This had led defence counsel at trial to suggest to SMITH BERNAL WORDWAVE Daley that he must have boned up on what was in the public domain so as to be enabled to fit up the defendant.
73. The defence alleged preparation in circumstances where, on any view, it was pure chance that the defendant was placed in the cell next to Daley. Although it was true that the statement was not made until 26th September, both sides knew that Daley had explained that he had wanted to get his uncle's approval that he would not thereby be a 'grass' before making the statement.
74. Mr Sweeney relied upon the passages in the summing-up at pages 12 and 73, which we have already cited. Furthermore, as Mr Sweeney pointed out, the judge accurately rehearsed Daley's evidence twice, initially in his summing-up and later in response to a jury question. In addition, he accurately rehearsed the submissions of counsel for prosecution and defence in relation to Daley's evidence.
75. Mr Sweeney also pointed out that, although Daley's evidence was crucial, it was not by any means the only evidence in the case implicating the appellant. The appellant's appearance was consistent with the e-fit produced by Miss Burchell, the defendant had knowledge of the area, he habitually carried a hammer in his motorcar, and he was prone to using a boot lace tourniquet, such as was found at the scene with Megan's blood on it. Miss Batt saw him in a bloodstained T-shirt and he lied, in interview, in relation to matters succinctly rehearsed by the judge at page 116 of the summing-up: "...his knowledge of the area, he pretended he had none, the hammer, his claim not to carry them in vehicles, the frequency of his use of bootlace tourniquets, his claim to have no hooded top, if you accept the evidence of Batt about the blood on the T-shirt, he has lied in denying that, too, and, finally, the lie in interview that he was telling the truth."

76. As to the law, Mr Sweeney submitted that directions of the kind now being considered originated in rules of practice, which became rules of law in cases involving children, sexual offences and accomplices. The warning which the judge had to give was often of great complexity and difficult and spawned analogous cases where a corroboration warning, if not obligatory, was close to being obligatory.
77. These unsatisfactory rules, submitted Mr Sweeney, were swept away for children by section 34 of the Criminal Justice Act 1988 and for accomplices and victims in sexual cases by section 32 of the Criminal Justice and Public Order Act 1994. In *Makanjuola* the old rules of compulsion were replaced by a wide-ranging discretionary judgment to do what the justice of the case requires. The Court made it clear that it was not prescribing what was to happen in every case. Buxton LJ in *R v Muncaster* [1999] Crim LR 409 made it clear that analogous cases were to be seen in the new light and it was a matter for the judge, depending on the circumstances of the case. As to children, *Makanjuola* was applied in *R v L* [1999] Crim LR 489.
78. This Court in *Causley* [1999] Crim LR 57 held there was no inconsistency between *Makanjuola* and *Muncaster* on the one hand and *Spencer* on the other. Mr Sweeney submitted there was a discretion, unless some new prescriptive element has been introduced into the law. He acknowledged that in the light of *Pringle* and *Benedetto*, there is a new prescriptive element in cell confession cases. But, he submitted, that is only when a threshold is crossed. 79. In *Pringle* (paragraph 30) the Privy Council said there may be cases where the correct approach is to treat the prisoner simply as an ordinary witness about whose evidence nothing out of the usual need be said. Examples were where the prisoner witnessed an assault on another prisoner, or witnessed a drugs transaction. That passage, he submitted, made it clear that the mere existence of a possible motive to lie does not automatically require a special direction, although fabrication in such cases might be just as easy. Further, *Pringle* plainly proceeded on the basis that a motive to lie is a prerequisite to the need for a special direction. In *Benedetto* the Privy Council had repeated that it was not possible to lay down fixed rules. The appropriate course is for the judge to identify indications in the evidence. That being so, in the case where the defence has, for good reason, deliberately not asked about motive, it is difficult to know what the judge is supposed to say. The cases of *Causley No 2* [2003] EWCA Crim 1840 and *Price* were cases where motive was pursued in cross-examination and thus were different from the present case.
80. As to the line of authorities on bad character, Mr Sweeney submitted that what Lord Hailsham made clear in *Spencer* was that the Court of Appeal in *R v Bagshaw* [1984] 1 WLR 477 were wrong to hold that there was an obligatory rule. The domestic authorities relied on by Mr Fitzgerald are cases where bad character arose en route to an assertion of improper motive. 81. 82. In Australia a more rigid approach was envisaged in *Pollitt*, but Australia retained the old common law rules about accomplices. The Canadian analysis was founded on the entirely different approach laid down in *Vetrovec* 67 CCC (2nd) 1. In our judgment,

grounds 1 and 2 do not impair the safety of these convictions. Any case involving a cell confession will prompt the most careful consideration by the judge. In the words of Lord Hope in *Benedetto*, at paragraph 31, such evidence calls for "special attention"

83. But the judge's consideration is not trammelled by fixed rules: see Lord Hope in *Pringle*, at paragraph 30, to which we have already referred. Applying the principles in *Pringle* and *Benedetto* we have no doubt that, in what Mr Sweeney described as the case of a standard two line cell confession, there will generally be a need for the judge to point out to the jury that such confessions are often easy to concoct and difficult to prove and that experience has shown that prisoners may have many motives to lie. If the prison informant has a significant criminal record or a history of lying then usually the judge should point this out to the jury and explain that it gives rise to a need for great care and why. The trial judge will be best placed to decide the strength of such warnings and the necessary extent of the accompanying analysis.
84. But not every case requires such a warning. This Court has said repeatedly that a summing-up should be tailored by the judge to the circumstances of the particular case. That principle bears repetition. If an alleged confession, for whatever reason, would SMITH BERNAL WORDWAVE not have been easy to invent, it would be absurd to require the judge to tell the jury that confessions are often easy to concoct. Similarly, for reasons which we shall explain later, in a case where the defence has deliberately not cross-examined the informant as to motive of hope of advantage, the law does not require the judge to tell the jury that, merely because the informant was a prisoner, there may have been such a motive. 85. In the present case, the alleged confession contained many points of detail which it would not have been easy to invent. Some were in the public domain, and others were capable of being deduced from material in the public domain. But the jury heard evidence both as to how much access Daley had to what was in the public domain and enabling them to assess how easy or difficult relevant deductions would have been for him, in the time scale available to him. In the circumstances, a direction that cell confessions are easy to concoct would have served no useful purpose and we reject the submission that it should have been given.
86. The position as to motive was highly unusual. Defence counsel had seen at the first trial what happened when he suggested to Daley that he had been motivated by actual or perceived advantage. Accordingly and, no doubt, wisely, he deliberately avoided any such suggestion at the second trial. In evidence in-chief, Daley said that, before making the statement to the police, he spoke to his uncle about the "criminal code that you don't hurt women and kids and don't talk to the police". His uncle said it would be all right to go to the police and he would not be a 'grass'. This was not challenged in cross-examination. In re-examination, Daley explained, in terms which must have been devastating to the defence, why he was giving evidence: "I just feel guilty sort of thing towards that little girl." 87. If, in the present case, the judge had given a warning about possible motive, he would also have had to remind the jury that the defence could have raised the matter with Daley but had not done so, whereby they had had no chance to see his reaction. He would also have had to

remind the jury of the damaging explanation of why Daley said he was giving evidence.

88. We reject Mr Fitzgerald's submission that intrinsic concerns about a potential motive to gain advantage with the authorities are so great as to require a direction, even though defence counsel has not alleged any in cross-examination. The submission is inconsistent with the Privy Council's recognition in *Pringle* at paragraph 30 that there will be cases where it is appropriate to treat a prisoner as an ordinary witness about whose evidence nothing out of the usual need be said. The distinguishing feature of the examples given in *Pringle* is that, in each, the prisoner witnessed the acts constituting the offence. But there is no suggestion that in those examples a potential motive to gain advantage with the authorities would be absent.
89. Quite apart from that difficulty, the submission is not supported by the authorities. The passage cited by Mr Fitzgerald from *Beck* refers specifically to cases "where there is material to suggest that a witness's evidence may be tainted by an improper motive." Those words imply an improper motive which has been put to the witness in cross-examination in the normal way. The matter is even clearer in the recent Privy Council *SMITH BERNAL WORDWAVE* decisions. In paragraph 31 of *Pringle*, repeated by Lord Hope in paragraph 34 in *Benedetto*, it is said "indications that the evidence may be tainted by an improper motive, must be found in the evidence". Further and importantly, the language of obligation used in *Beck* does not give rise to an absolute rule. This Court held in *Muncaster* that cases such as *Beck* must be looked at afresh in the light of section 32 of the Criminal Justice and Public Order Act 1994 which abolished the requirement for a full corroboration direction in relation to accomplices and victims of sexual offences. Alongside those rules the courts had identified cases outside those categories, but close to them, which required something less than a full corroboration direction. Mr Fitzgerald submitted that these cases continue to require a special direction. That submission, as was pointed out in *Muncaster*, is inconsistent with the general language used by Lord Taylor of Gosforth CJ in *Makanjuola*. While the corroboration rules were in force, it was natural for the courts to speak of "an obligation" in analogous cases to give something less than a full corroboration warning. But, Parliament having abolished the rule that, in particular categories, a full corroboration warning must be given, it would, in our judgment, be absurd to suppose that the rules for analogous cases have survived so as to impose obligations more onerous than those now applicable to the original categories.
90. Thus, the authorities do not require us to hold that the judge should have given an express warning about a potential motive for Daley to ingratiate himself with the authorities. There remains the potential motive of his own prejudice against "nonces" and the further potential motive of currying favour with fellow prisoners who were similarly prejudiced. This was an area where, in cross-examination, defence counsel, understandably, trod delicately. He elicited that, in Daley's eyes, the defendant was a "scumbag" and in prison the defendant would have every reason to watch his back. This gave Daley the opportunity to remind the jury of what he had said earlier about the criminal code of not hurting women and children.

While repugnance for what had happened to the Russell family might provide a motive for setting up the defendant with a false allegation, it equally might provide a motive for an anti-authoritarian figure such as Daley to tell the police about a confession actually made. The circumstances surrounding this alleged confession, including the unexpected arrival of the appellant in the adjacent cell on the evening of the 23rd, Daley's disturbed state on the morning of the 24th, the test for audibility along the pipe, and the making of the detailed statement on the 26th, tended to support the veracity of Daley. In that context, defence counsel did not cross-examine Daley on the basis that he was motivated to lie. It was, accordingly, conspicuously unpersuasive of trial counsel to suggest in his speech one or possibly two motives for lying and for different counsel before us to suggest another motive.

91. We turn to the question of bad character. Mr Fitzgerald submitted that this is another of the cases analogous to those requiring a full corroboration warning, where a rule survives that the judge must give a specific warning albeit not the full corroboration direction. That submission fails for the reasons given in relation to motive. 92. Some judges might have given a stronger warning than was given by the trial judge in this case. But in saying that Daley's background" is that of a crook and you should of course examine his evidence with great care", he was plainly saying that the jury should SMITH BERNAL WORDWAVE examine the evidence with care, because of Daley's bad character. When that is coupled with the judge's careful and repeated rehearsal of the passages in cross- examination where Daley admitted lying when it suited him and defence counsel's submissions on the point, we consider this was an adequate direction. The judge's addition of the words "a bad background does not mean that a witness cannot be telling the truth any more than good background guarantees a witness is telling it" did not, in our judgment, so detract from the force of the point he had already made about character as to amount to a misdirection.
93. Mr Sweeney, in our view, was correct to contend that this case did not cross the threshold so as to require the detailed directions discussed in Pringle and Benedetto. To the extent that the Australian and Canadian authorities go further than the two Privy Council decisions, we agree with Mr Sweeney that they turn on considerations specific to the domestic law of those countries.
94. We add that, if the judge had thought it necessary to give further directions of a cautionary nature, or had given directions of the kind which Mr Fitzgerald submits he ought to have given, he would also have had to remind the jury of the other evidence which implicated the appellant. This showed that the attack was carried out by a car driver with access to a hammer, who was also a drug addict, who used a long knotted shoe lace to raise a vein for drug injection and had short blond hair. The appellant had all these characteristics. In addition, he was familiar with the area, and he also bore sufficient resemblance to the attacker for Miss Burchell to prepare an e-fit which the surviving daughter, Josie, said was consistent with the appearance of the attacker and, at an identification parade, many months later, albeit not making positive identification, Miss Burchell was able to pick out the appellant as looking "very familiar". There was also the evidence of blood on the appellant's

T-shirt, that he had destroyed his clothing and that, in interview, he had told many lies, in particular about his knowledge of the area, carrying a hammer and blood on his shirt. It is also to be noted that there was no evidence from the appellant to contradict what Daley claimed he had said. Grounds 1 and 2 therefore fail.

95. As a footnote, the appellant has a number of previous convictions which were not known to either of the juries which convicted him. If he were being tried today, in the light of the provisions of section 101 of the Criminal Justice Act 2003, some of those convictions, in particular those in 1981, for using a hammer to rob and cause grievous bodily harm, might be admitted in evidence against him (see R v Bradley [2005] EWCA Crim 20 (The Times, 17th January 2005)).
96. As we have sought to explain, there is no reason to regard the appellant's convictions as unsafe. It was for these reasons that, on Wednesday, we dismissed this appeal.
97. THE VICE PRESIDENT: Yes, Mr Fitzgerald?
98. MR FITZGERALD: My Lord, the only further matter is whether your Lordships would be minded to certify a point of law of public importance for the House of Lords?
99. THE VICE PRESIDENT: What might that be? SMITH BERNAL WORDWAVE
100. MR FITZGERALD: Obviously I have not had a full opportunity to consider the implication of your Lordships' judgment, but doing the best I can the two points which I can identify would be in relation, firstly, to the question whether there is an obligation in these circumstances to give a warning as to bad character, and my Lord, my first formulation of it at this stage would be this: "Whether a judge is under a duty to warn the jury of the need to be cautious before convicting on the basis of such an alleged confession of a fellow prisoner [leaving out the such for this moment] where the allegation of an oral confession is made by a person of bad character who admits to lying to get by in life, or who admits dishonesty?" may give it more general... That is to say, is there a duty, particularly in the case of a prison confession being alleged, to give a warning as to the bad character, drawing on the then Spencer line of authority?
101. My Lord, I appreciate your Lordships have given detailed reasons why there is not such a duty but a discretion in the light of the Makanjuola decision and the analogy with other cases in which the duty to give a full corroboration warning has gone. But I would respectfully submit that that does raise a point of law of public importance.
102. THE VICE PRESIDENT: But our judgment is very fact specific, Mr Fitzgerald, in relation to what we described as "the special circumstances" of this case.
103. MR FITZGERALD: My Lord, yes. Can I try to put it this way. If it were an universal rule, as I respectfully submit it is, then there would not be an exception to it. Subject to your Lordships finding that there was in fact some form of a warning because of the reasoning that to approach it with care must have been because of the bad character, I would submit

that, if it is right that there is an universal obligation, then the facts of a particular case would not justify the dispensing with that obligation in relation to bad character. My Lord, that is the first point I would respectfully make.

104. My Lord, I appreciate that there may be powerful grounds for saying that given your Lordships' reasoning your Lordships would refuse leave. But I do respectfully submit that that is a point of law of general public importance that does arise in this case, that is to say is there, following Spencer, and my submissions as to how the common law goes, a universal obligation, or is it, in the light of Makanjuola and Muncaster a more flexible discretion? My Lord, that is the first matter.
105. The second matter is in relation to the issue of motive, that is to say whether a trial judge is under a duty to warn the jury to be cautious before convicting on the basis of an alleged confession to a fellow prisoner simply on the basis that the said prisoner/informer is an untried prisoner facing charges and the defendant is alleged to have made an oral confession to the crime of which he is suspected. Again, I do not want to rehearse all the arguments that I put to your Lordships but the essential submission there is: do those bare circumstances form material justifying the obligation or is there need for additional evidence elicited either by cross-examination or from some statement made by the witness himself? It is our submission that the bare SMITH BERNAL WORDWAVE fact that he was an untried prisoner, giving evidence of an oral confession was of itself sufficient to trigger the duty and your Lordships saw that one of the indications identified by Lord Hope in Pringle as attributing the duty in that case was the bare fact that the witness was a prisoner on remand. My Lords, we say that therefore there is a question: does the mere fact that someone is a prisoner on remand and therefore has at least the temptation to make an allegation of an oral confession, does that of itself trigger the duty?
106. Again I appreciate your Lordships have taken a view on the merit of that submission in any event, but I would submit that the question of whether that bare fact does trigger the duty is a point of law of public importance. In other words: is it sufficient? Therefore are we in a situation which is truly analogous to the identification type warning where it is mandatory from the very nature of the situation and the type of evidence an allegation of an oral confession that is being made. Or is it, as your Lordships found, to be treated as something which must be triggered by the particular facts of the case and covered by the need to pass a freshhold of something in addition to those bare facts. My Lord, that is what I would submit is a point of law of public importance which I invite your Lordships to certify subject to, obviously, in relation to the issue of whether leave should be granted. With your Lordships' views on the merits it is obviously likely lead to your Lordships refusing leave. I would submit that at least that gateway to the House of Lords should remain open by the certification of those two points. My Lord, I do submit that there is a bedrock of conflicting legal principle potentially there, between the approach, particularly the approach in Labrador and the approach generally taken in decisions such as Makanjuola and Muncaster.

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107. My Lord, it is on those bases that I invite your Lordships to certify points of law. That may not be the best formulation, but I think it sufficiently identifies the point for your Lordships to decide whether there is a point of law of public importance.
108. THE VICE PRESIDENT: Thank you. (The Bench Conferred)
109. THE VICE PRESIDENT: No, Mr Fitzgerald, we decline to certify either of those questions as being a point of law of general public importance arising from this case. Thank you. SMITH BERNAL WORDWAVE
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