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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-and-

ROY KERR

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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GIRVAN LJ (giving the reasons of the court)

Introduction

[1] The applicant Roy Kerr sought leave to appeal against conviction on various counts of attempted murder, arson with intent, attempted arson and handling stolen goods. The offences relate to an attempt by the applicant to set fire to the home of a family who were going to give evidence against him in a criminal trial for handling stolen goods belonging to them. The applicant's grounds of appeal included that there was insufficient evidence for the jury to conclude he had an intention to kill or an intention to endanger life; the acts done in relation to the attempted arson were no more than merely preparatory; the jury's verdicts were inconsistent as between him and the co-accused; the applicant should not have been convicted of handling stolen goods; and the judge erred in not discharging a juror after it became known that she knew the applicant's ex-girlfriend. On the hearing before us the applicant abandoned his application to appeal in respect of his conviction for handling stolen goods, namely a Ford car stolen in Scotland. He did not pursue his complaint about the juror. Leave to appeal was refused by the single judge Stephens J on 27 September 2010.

[2] We heard the renewed application for leave to appeal on 1 June 2011 and dismissed the application. We indicated that we would give our reasons at a later date and we set out our reasons in this judgment.

[3] The applicant also sought leave to appeal against the sentence of life imprisonment imposed upon him on the grounds that it was excessive and

wrong in principle but when we dismissed his application to appeal against conviction Mr Kelly QC who appeared with Mr McKenna on behalf of the applicant informed the court that he was instructed to withdraw that application.

The proceedings

[4] The applicant and a co-accused, Tanya Diana Holmes, were jointly returned for trial for the following offences alleged to have occurred on 8 May 2008:

Count 1	Attempted murder of Raymond White.
Count 2	Attempted murder of Aileen White.
Count 3	Attempted murder of David Raymond White.
Count 4	Arson of a wheelie bin and dwelling house thereby intending to endanger the lives of Raymond White, Aileen White and David Raymond White.
Count 5	Arson of a wheelie bin and dwelling house thereby being reckless as to endangering the lives of Raymond White, Aileen White and David Raymond White.
Count 6	Causing grievous bodily harm with intent to Raymond White.
Count 7	Attempted arson of a Jaguar car belonging to Raymond White.
Count 8	Attempted arson of a Renault car belonging to Aileen White.
Count 9	Attempted arson of a Volkswagen car belonging to David Raymond White.
Count 10	Handling stolen goods, namely a Ford car and the contents thereof belonging to John Campbell.

[5] The applicant was arraigned on 20 April 2009 and pleaded not guilty to all counts. The applicant and co-accused were tried before His Honour Judge Miller QC ("the trial judge") sitting with a jury at Belfast Crown Court. The trial began on 29 September 2009 at which time Count 6 was left on the books not to be proceeded with by direction of the judge and Count 5 was not proceeded with. The applicant was convicted by the jury on 8 October 2009 of Counts 1-4 inclusive and 7-10 inclusive.

[6] On 21 December 2009 the judge sentenced the applicant as follows:

Counts 1-3 (Attempted murder)	Life imprisonment Minimum term tariff - 10 years
Count 4 (Arson with intent)	10 years imprisonment (concurrent)

Counts 7-9 (Attempted arson)	3 years imprisonment (concurrent)
Count 10 (Handling stolen goods)	4 years imprisonment (concurrent)

[7] The co-accused was convicted of Count 5 (arson), Counts 7-9 (attempted arson) and count 10 (handling stolen goods). She was sentenced to a total period of three years custody followed by two years probation.

The Evidence

[8] At approximately 5.30 am on Thursday 8 May 2008 Dr Raymond White, his wife Aileen White and son David Raymond White were asleep in their home in Belfast. Dr White was awoken by the sound of a male voice shouting and on looking out the window of the bedroom which was at the rear of the house he saw flames close to the conservatory doors. Dr White shouted for his son David and then ran downstairs to the conservatory at the back of the house. He was unable to get the back doors opened and then decided to go through the front door and along the side of the house. He observed a wheelie bin on its side right against the conservatory doors and flames were licking the sides of the PVC doors. Dr White kicked the wheelie bin away from the door and shouted for his son to phone for the police. His son arrived with some water which was thrown over the burning bin. Dr White then observed that the tyres were flat on all of the three motor vehicles belonging to the family and that newspaper had been stuffed under the wheel arches of the vehicles. A blue wheelie bin had also been placed directly at the front door which had to be physically pushed out of the way in order to get past. This bin was also stuffed with newspapers and another rubbish bin stuffed with newspaper and a piece of a branch of a tree had been placed at the other exit at the side of the house. A scorched petrol can was lying on the patio at the rear of the conservatory.

[9] David White on being roused by his father's shouts had looked out the front bedroom window and observed a male person running down the driveway at the side of the house followed by a female. He then heard a car speeding off and rang the police.

[10] Police were alerted by staff at the Mater Hospital Belfast that the applicant had attended with burn injuries to his hand. Police attended at 6.15 am and spoke to the applicant and co-accused. Police recovered a vehicle, a green Ford Focus parked immediately outside the entrance to the Mater Hospital in which the applicant and co-accused had arrived. This vehicle had been stolen from a Mr and Mrs Campbell at Coatbridge, Scotland on 27 April 2008 during a creeper burglary at their home.

[11] CCTV coverage from a petrol station at Ballyhackamore showed the applicant and co-accused pulling up at 2.15 am on Thursday 8 May 2008. The applicant exited the vehicle and returned shortly afterwards with a green

plastic petrol can which he placed in the Ford vehicle. A receipt was found in the Ford Focus from the petrol station showing that a Clipper cigarette lighter, a Unipart petrol can and four litres of unleaded petrol had been purchased. The petrol can referred to in the receipt was identified as identical to the one found at the property. Fingerprints of the applicant and co-accused were found on the exterior of the Ford Focus which had been fitted with false number plates.

[12] The applicant had sustained blisters and redness around all the fingers of the back of his left hand and over the left thumb. There was also evidence of petrol vapour and a burn mark on the toe area of his left training shoe.

[13] During police interviews the co-accused gave a no comment interview. The applicant emphatically denied being at the White's home or having anything to do with the incident which had occurred. He said that he had been at a barbeque in Glengormley and received his injuries as a result of an accident whilst putting lighter fuel on the barbeque. He claimed that the Ford Focus car belonged to a friend of his from Scotland.

[14] During the trial the applicant maintained that he was not involved in the offences though he did admit that he had been in Scotland, had broken into the Campbell home and stolen the vehicle there.

[15] On the day the offences were committed, Dr White and Mrs White had been due to attend court to give evidence against the applicant who was to be tried on counts of possession of stolen property and handling stolen goods belonging to Dr and Mrs White arising out of a burglary at their home on 25 May 2006. The applicant had been found in possession of Mrs White's car.

[16] The applicant had also been connected to an earlier burglary at Dr and Mrs White's home on 26 May 2004 when a number of items were stolen and later found in his possession including cheques, driving licences, identification passes and sets of keys. The applicant had also falsified Dr White's RVH identification pass by placing his own photograph on it. He had contested those charges and Dr and Mrs White were witnesses against him. He had been convicted at Belfast Crown Court on 17 June 2005 receiving three years imprisonment in respect of those matters. Following his release from custody on 6 March 2006 the second burglary took place at the White's family home on 25 May 2006.

The grounds of appeal

[17] On the hearing before this court Counsel did not seek to pursue many of the grounds of appeal originally put forward in the applicant's original notice of appeal and in effect the reduced grounds of appeal as argued before this court can be summarised as follows:

(i) There was insufficient evidence for a reasonable jury to conclude the applicant had the requisite intention to kill the members of the White family named in counts 1 to 3;

(ii) The jury gave inconsistent verdicts as between the applicant and the co-accused;

(iii) There was insufficient evidence for the jury to conclude, in relation to the attempted arson of the cars, that the applicant's actions were anything more than merely preparatory to the arson of the cars covered by counts 8 to 10.

[18] In relation to counts 1 to 3 counsel relied on five points

(a) The placing of paper in the wheelie bins, the locating of the bins at the entrances to the house, the lighting of one bin at the rear of the house, the placing of paper in the wheel arches of the cars, the deflating of the tyres and the bringing of a petrol container to the house amounted to merely preparatory acts insufficient to amount to the *actus reus* of attempted murder. It was significant that the applicant had not lit the other wheelie bins or the paper under the cars and had not introduced a fire accelerant into the house. The applicant had not moved from the realm of preparation into the realm of execution.

(b) The judge gave a misleading direction to the jury when he said:

> "The issue is not whether he was a skilled or even a competent assassin, the issue is did he want nothing less than that that family should die. If you are satisfied so that you are sure that that was his intent, then you may conclude that his actions at the house were sufficient to ground the attempt to murder, and in that case you will be entitled to return verdicts of guilty on each of the three counts – 1, 2 and 3."

Counsel argued firstly that this falsely equated desire with intent and secondly was tantamount to direction that the acts in questions were sufficient to constitute the *actus reus,* which was a matter for the jury and was wrong in law for the reasons given in (a) above.

(c) The jury had to find a specific intent to kill. Count 4 relating to the arson charge had a different and lesser *mens rea.* The jury were likely to have been misled by this difference. The finding of guilt on count 4 must have been on the basis of a finding of that lesser intent and the

two verdicts on attempted murder and the arson count were not consistent.

(d) The judge should have directed the jury in line with the approach in R v Woollin [1999] 1 Crim App R 8 and R v Nedrick (1986) 83 Crim App R 267. There had to be a virtual certainty that death would result from the actions of the applicant.

(e) The acquittal of the co-accused led to the real possibility that the jury had reached an inconsistent verdict as between the two accused.

[19] In relation to counts 7-9 relating to the attempted arson of the cars it was the applicant's case that his actions were insufficient to give rise to the *actus reus* of attempted arson. There was no attempt to ignite the papers. In the absence of that the appellant had not moved beyond the realm of intention, preparation and planning into the area of execution and implementation.

The actus reus issues

[20] In R v Stone [2011] NICA 11 this court considered the application of R v Geddes [1996] Crim LR 894 and concluded:

> "[23] The decision in *Geddes* has been criticised on the basis that it appears to introduce a 'last act' test for liability. We do not accept that there is any such test. As the court said in *Geddes* the question is whether the offender had moved from the realm of intention, preparation and planning into the area of execution or implementation. The learned trial Judge concluded that the appellant's plan was as set out in his interviews with police and his letters posted to the journalists. He clearly made substantial preparations by preparing his armoury and getting himself to the Stormont estate in order to enter Parliament Buildings. Having entered Parliament Buildings the finding was that he had lit the fuse of the explosive device which was to create the diversion which would enable him to enter the Assembly Chamber and kill his intended victims. We are satisfied that the lighting of a fuse can be said to be part of the execution or implementation of the plan to kill Mr Adams and Mr McGuinness and thereby more than merely preparatory to the implementation of that plan. We express no view on whether the acts preceding the lighting of the fuse were sufficient. We

> consider, therefore, that the learned trial judge was correct to conclude that the acts of the appellant were capable of constituting an attempt and that he was entitled to conclude that they did."

[21] Geddes was also distinguished in R v Toothill (19 June 1998)(Unreported) which related to the offence of attempted burglary with intent to rape. In that case the English Court of Appeal held:

> "The learned judge ruled that the evidence in the present case was such that a jury could properly consider it to amount to an attempt to commit the offence charged. It is not always easy to discern the point at which preparation matures into the first steps of the actual attempt. Thus, in the context of the present case, driving to the scene, equipping himself with a condom and a knife, and walking round and round the house are all acts which chime with the circumstances in *R v Geddes* (unreported 25 June 1996) in which the activities of that appellant could readily and recognisably be treated as preparatory acts only. …
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> In the present case, the crucial step that this appellant took, as it seems to us, is that he knocked at the door. By so doing, in our judgment, he moved from the preparatory to the executory stage of his plan. No doubt he could still have changed his mind if the door had been answered and retreated; but that was not at all to the fact. By seeking to procure that the door was opened by knocking at it, he took the first step which was designed to bring his plan (as the Crown suggested it was) into effect. It is trite law that a voluntary withdrawal is no defence to an allegation of attempt."

[22] Applying the approach adopted in Stone and in Toothill we conclude that both in relation to the attempted murder counts 1 to 3 and in relation to the arson counts 7 to 9 the applicant had moved from the realm of preparation to the realm of execution. He had started the acts necessary to bring about his plan to murder the members of the White family and burn their cars. Moreover, it is artificial to view the arson counts as distinct from the commencement of the implementation of his murder plan. The acts were all inter-related and the applicant had started the execution of the plan.

The judge's summing up

[23] Having read the trial judge's summing up in its entirety we are satisfied that the judge said nothing untoward in the passage criticised by counsel. The jury were left in no doubt as to the issues which they had to decide. They were properly directed on the question of intent. They would not have been misled by the judge's reference to the issue being whether they felt sure that the applicant wanted the family to die. He fairly left the issue whether in the jury's view the applicant had moved from the realm of preparation into the realm of execution of a plan to kill the members of the family.

The relationship between counts 1-3 and count 4

[24] On count 4 the applicant was charged with arson with intent to endanger the lives of the members of the White family. On counts 1-3 he was charged with attempted murder. The arson charge was a separate if related charge and it was clearly open to the prosecution to prefer such a count. The arson charged as drafted was the most serious arson charge provided for, there being no separate charge of arson with intent to kill. The logic of Counsel's argument in relation to this point would be that a finding of attempted murder would preclude a conviction for the most serious charge of arson available in law. A conviction on count 4 is not inconsistent with a conviction of attempted murder nor is it an alternative lesser charge which would not arise for consideration if the jury convicted on counts 1-3.

The absence of a Woollin Direction

[25] In R v Gilmour, which concerned the throwing of a petrol bomb into a house which caused the death of children inside the house, Carswell LCJ held:

> "Mr Harvey submitted that the case should have been approached by the judge in accordance with the principles contained in *R v Woollin* [1999] 1 AC 82 and that he should have applied the test whether it was a virtual certainty that the consequence of throwing the petrol bomb into the house would be the death of or grievous bodily harm to one or more occupants. We do not consider, however, that it was appropriate to resort to that test in the present case. It is apposite where the defendant does not desire the consequence of his act which in fact occurred, but it is virtually certain that it will happen: cf *R v Nedrick* [1986] 1 WLR 1025 at 1028, per Lord Lane CJ. Where the intention of the accused can be ascertained by ordinary inference from the facts and surrounding circumstances, it is unnecessary and

> confusing to bring in the special *Woollin* direction. That direction, as Lord Bridge remarked in *R v Moloney* [1985] AC 905 at 929, is required only in rare cases."

[26] The correct circumstances in which Woollin should be used were further explained in R v Philips [2004] EWCA Crim 112. There the appellant had been convicted of, inter alia, attempted grievous bodily harm of a police officer who was arresting his cousin. On appeal against his conviction, the Court of Appeal said:

> **"[9]** Mr Conning, who appears on behalf of the appellant, submits that those directions were in the circumstances inadequate. He submits that this was one of those cases in which it would have been appropriate to have directed the jury in accordance with the decision of the House of Lords in the case of *Woollin* [1999] 1 AC 82, [1998] 4 All ER 103. He submits that it was one of those exceptional cases where the judge should have directed the jury that in considering the question of intent they should only convict if they were satisfied that anyone would have appreciated that really serious harm was virtually certain.
>
> **[10]** It seems to us that the Recorder was correct not to direct the jury in those terms. The issue to which the direction in *Woollin* is relevant had not been raised in this case. The appellant was not saying that he appreciated that he had in fact done the things which the prosecution say he had done but that nonetheless he had no intent to cause really serious harm; his case was that he did not do that which was alleged by the prosecution at all. The direction that was given by the Recorder was in the circumstances therefore not only the more appropriate direction but also was one which was advantageous to the appellant because it directed the mind of the jury to the appellant's state of mind-in other words what he subjectively considered at the time - and did not seek to suggest to the jury that they could test it by some objective test which could have been to his disadvantage."

[27] R v D [2004] EWCA Crim 1391 concerned the conviction of a mother for the attempted murder of her seriously ill 7 year old child. The issue related to the correct insertion of a naso-gastric tube. Quashing the conviction, the Court of Appeal commented:

> "28. In *Woollin*, as in a number of cases considered in *Woollin*, the House of Lords was concerned with "what state of mind, apart from the case where a defendant acts with the purpose of killing or causing serious injury, may be sufficient to constitute the necessary intention" (page 90), "in the rare cases where the simple direction is not enough" (page 93).
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> 29. In the present case it was the prosecution's case that the appellant had administered the fluid via the tube with the purpose of killing (attempted murder) or causing serious injury (section 18) to her son. A *Woolin* direction, as we have shown, was not appropriate. In this case Mr Holroyde persuaded the judge to give the jury a direction which was more favourable than that which should have been given. *Woolin* is designed to help the prosecution to fill a gap in the rare circumstances in which a defendant does an act which caused the death without the purpose of killing or causing serious injury, but in circumstances where death or serious bodily harm had been a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and the defendant had appreciated that such was the case. *Woolin* is not designed to make the prosecution's task more difficult. Many murderers whose purpose was to kill or cause serious injury would escape conviction for murder if the jury was given only a *Woollin* direction. The man who kills another with a gun would be able to escape liability for murder if he could show that he was such a bad shot that death or serious bodily harm was not a virtual certainty or that the defendant had thought that death or serious bodily harm was not a virtual certainty. (We add for completeness that the late Professor Sir John Smith QC in Smith and Hogan, 10th Edition, page 71 was critical of the requirement that death must in fact be a virtual certainty.)"

[28] We conclude that the trial judge was quite correct not to give a Woollin direction to the jury in the circumstances of this case. Where, as was the case in this instance, the intention of the accused can be ascertained by ordinary inference from the facts and surrounding circumstances, it was unnecessary and, as Lord Carswell pointed out in Gilmour , would have been confusing to bring in the special *Woollin* direction. That direction, as Lord Bridge remarked

in *R v Moloney* [1985] AC 905 at 929, is required only in rare cases of which this is not one. The trial judge's directions to the jury were exemplary in their clarity and we are satisfied that he clearly and fairly directed the jury on the question of intention.

The issue of inconsistent verdicts as between the co-accused

[29] In relation to the applicant's case that there was no distinction in the evidence as between the relative intent of himself and the co-accused and that the objective evidence did not permit any distinction between the two of them in relation to the joint enterprise, it is necessary to bear in mind what Kerr LCJ said in R v X [2006] NICA 1:

> **"[26]** ... The law in relation to inconsistent verdicts was considered by the Court of Appeal in England in *R v G* [1998] Crim LR 483. In that case Buxton LJ cited with approval the following passage from the case of *Clarke and Fletcher*, where Hutchison LJ said: -
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> > 'We approach the present case on the basis that it is for the appellant to show (1) that the verdicts are logically inconsistent and (2) that they cannot be sensibly explained in a way which means that the conviction is not unsafe. Thus an appellate court will not conclude that the verdict of guilty is unsafe if, notwithstanding that it is logically inconsistent with another verdict, it is possible to postulate a legitimate train of reasoning which could sensibly account for the inconsistency'."

[30] Buxton LJ also referred to the case of *Bell* in which Rose LJ said: -

> "There have recently been a number of appeals to this court based on allegedly inconsistent verdicts, and it is perhaps therefore worth emphasising that it is axiomatic that, generally speaking, logical inconsistency is an essential prerequisite for success on this ground: see *Durante* 56 Cr App Rep 708.
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> … there are, of course, exceptional cases, of which *Cilgram* [1994] Crim LR 861 provides an example,

> where a verdict may be quashed because, although there is no logical inconsistency, the particular facts and circumstances of the case render the verdict unsafe. However, it is to be noted that in *Cilgram* this Court, differently constituted, expressly rejected the submission that, where a complainant's credibility is in issue and her evidence is uncorroborated, guilty verdicts must be regarded as unsafe because the jury also returned not guilty verdicts in relation to some of the complainant's allegations."

[31] Commending this analysis, Buxton LJ continued: -

> "As it seems to us, and as it seemed to the court in *Bell*, it does not follow that verdicts are logically inconsistent just because they all depended on the evidence of the same person. A person's credibility, any more than their reliability, is not necessarily a seamless robe. The jury has to consider, as the jury in this case was rightly told, each count separately. It may well take a different view of the evidence as to its reliability in one case rather than the other. Further, it is in our view too simplistic to make the stark distinction between credibility and reliability that was sought to be made in the argument before us. What the jury has to decide is whether on all the matters put before it it is satisfied so that it is sure of the particular matter that was alleged under each count.
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> …
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> In our judgment it does not follow as a matter of logic, any more than in the judgment of the court in *Bell* it followed as a matter of logic, that, even where credibility is in issue and evidence is uncorroborated, guilty verdicts must be regarded as unsafe because the jury also returned not guilty verdicts in relation to some of the complainant's allegations."

[32] Whilst these authorities relate specifically to inconsistent verdicts in relation to a single defendant, similar principles apply in relation to alleged inconsistent verdicts between co-defendants. It was entirely open to the jury to draw lesser inferences against the co-accused from the evidence and conclude as they did that she did not have the same murderous intent as the applicant. The verdicts are not legally or logically inconsistent. Nor is there anything in the jury's verdict in respect of the co-accused to call into question

the safety of the verdict against the applicant which was amply justified by the evidence.

Disposal of the application

[33] For these reasons we dismissed the application for leave to appeal.

Legal aid application

[34] At the conclusion of the hearing counsel for the applicant asked for an order that the applicant be granted legal aid for the leave application.

[35] Section 19 of the 1980 Act provides:

> "(1) The Court of Appeal may at any time when it appears to the court in the case of an appeal under this Part of this Act or proceedings preliminary or incidental thereto that it is desirable in the interests of justice that the appellant should have legal aid and that he has not sufficient means to enable him to obtain that aid assign to the appellant a solicitor and counsel or counsel only in the appeal or proceedings."

[36] When an issue has been decided by a competent court and an application for leave to appeal is brought against that decision an onus rests on the applicant to show that he has an arguable point before it can be said that the interests of justice require that he be granted legal aid. It is on this basis that the Court of Appeal normally declines to grant legal aid until leave to appeal has been given.

[37] In this application the applicant was refused leave to appeal by the single judge who in a careful ruling gave the reasons for refusing leave. The applicant in the hearing before this court established no arguable case. In effect before this court his application was founded on arguments which revealed that he had presented a false and dishonest case in the trial. He has not laid any basis for the proposition that in the interest of justice he should be granted legal aid under section 19. Accordingly we refuse the application for legal aid.