R. v. Sawoniuk, Court of Appeal (Criminal Division), 10 February 2000

JUDGMENT

Lord Chief Justice:

On 1 April 1999 a jury at the Central Criminal Court convicted the appellant of two counts of murder. He had earlier been acquitted of two further counts of murder on the direction of the trial judge, Potts J.

The particulars of count one, on which the appellant was unanimously convicted, were that on a day between 19 September 1942 and 27 September 1942 the appellant, "a person resident in the United Kingdom on 8 March 1990, in Domachevo, Belorussia, a town under German occupation, murdered a Jewess in circumstances constituting a violation of the laws and customs of war". The particulars of count three, of which the appellant was convicted by a majority of 10-1, were to similar effect, save that the murder was said to be committed between 19 September and 4 October 1942, and the victim was specified to be a person other than that specified in count one. The two counts on which acquittal was directed were to similar effect, save that each referred to a named Jewish victim and the murders were said to have been committed during different periods in 1942.

All four counts were laid by virtue of the War Crimes Act 1991 which in section 1 provides, so far as relevant:

> "(1) Subject to the provisions of this section, proceedings for murder … may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –

(a) was committed during the period beginning with 1 September 1939 and ending with 5 June 1945 in a place which at the time was part of Germany or under German occupation; and

(b) constituted a violation of the laws and customs of war.

(2) No proceedings shall by virtue of this section be brought against any person unless he was on 8 March 1990, or has subsequently become, … resident in the United Kingdom …".

It was not disputed at the trial that the legal conditions for application of this section were met. The proceedings were for murder. The murders were said to have been committed within the period specified in section 1(1)(a). They were said to have been committed at a place, Domachevo, which was at the time in German occupation. The victims were civilian members of the Jewish population, and their killing (if committed) was a violation of the laws and customs of war. The appellant has for many years before 8 March 1990 been a resident of the United Kingdom. The real issue was defined by the judge at the outset of his summing-up to the jury on 29 March 1999 (at page 30):

> "The stark issue in this case is one of fact. The Crown's case is that the defendant was a willing executioner of Nazi policy, that he shot the Jewess referred to in count one and count [three]. The defendant's case is one of complete denial of either of these charges. He admits to being a policeman, but he says:
>
> "At all times I was a friend of the Jews."
>
> The witnesses, he says, who gave evidence against him are liars in league with the KGB and Scotland Yard. There is the issue, and it is for you to resolve it."

Count one depended on the eye-witness evidence of Alexander Baglay, who at the time was a boy aged about 13. Count three depended on the eye-witness evidence of Fedor Zan, who at the time was aged 20. As the judge rightly observed on the second day of his summing-up (at page 27):

> "This, of course, means that the evidence of Alexander Baglay and Fedor Zan is crucial to the issues raised by these two charges."

The appellant challenges his convictions on counts one and three with leave given by this court at the outset of this hearing.

Background

For many years Belorussia, now Belarus, formed part of the Tsarist Russian empire. In 1921 the territory was ceded to Poland, of which it continued to form part until 1939. When Germany invaded Poland in September 1939 the territory was briefly occupied by German troops, before its cession to Russia pursuant to the Ribbentrop-Molotov pact. For the next two years the territory was under Russian control. When, on 22 June 1941, Hitler launched his attack on the Soviet Union, his central army group advanced through the territory. The advance was rapid, and there was little organised Russian resistance. Domachevo, where these crimes are said to have been committed, is a very small town in the extreme south-western corner of Belorussia. It is about 50 kilometres south of Brest (formerly Brest Litovsk), and lies on the east bank of the River Bug which at that point formed the boundary, during the period of Russian occupation, between Russia and Poland.

The appellant was born in March 1921 in Domachevo, when it was part of Poland. He is now deaf in one ear and nearly blind in one eye. He is a diabetic. He suffers from heart disease and high blood pressure. Some years ago, in this country, he underwent electro-convulsive therapy for a mental condition. He has lived here since 1946, for the last 25 years in Bermondsey.

As a child he lived with his mother, his grandmother and a half brother in Domachevo. His father, not married to his mother, had disappeared and gave the family no support. His mother scraped what living she could by performing menial chores, very largely for members of the majority Jewish population of Domachevo. He also earned what he could. But the family was very poor, and became even poorer when his mother died of cancer just before the war. During the Russian occupation he had no employment. He was in Domachevo when the Germans invaded, for the second time, in June 1941.

The scale and rapidity of the German advance into Russia, coming on top of earlier conquests, posed obvious administrative problems for the conquerors. At first, the conquered territories were administered by military commandants. But soon civil administrations were established. In Domachevo a new mayor named Gwiarzdzinski was appointed. His son was well known to the appellant.

A hierarchy of police operated in these areas. Most respected and feared were the German security police, who included the Gestapo. At a lower level, and very thin on the ground, were the German “order police”, who in evidence at the trial were likened to gendarmes. Lower still in the hierarchy were police recruited from the local population. These were a scratch force, ill-armed, ill-fed, sometimes lacking basic uniform and boots, often (perhaps usually) unpaid. Those recruited were usually young men of about the appellant’s age, often lacking any other employment. The function of the local police force was to combat local crime, to provide protection against partisans (many of them Russian communists who had fled to the forests on the German invasion) and to give effect to the occupation policy of the German state. The appellant joined the local police in Domachevo very shortly after its formation, at the invitation of the mayor’s son, although (according to the appellant) under threat that he might be deported to Germany to work if he did not join. It seems that there were, in due course, about 25 members of the local police in Domachevo. In November 1943 the commander of the force was killed in a partisan attack on the police station in Domachevo, and the appellant then became the senior officer. This he remained until, in July 1944, he fled westward in the face of the advancing Red Army.

At the trial the Crown called impressive expert evidence, directly based on primary sources, to describe Nazi policy towards the Jews. This evidence was not challenged on behalf of the appellant. Briefly summarised, it was to the following effect. As early as 1919 Hitler made plain his rabid hostility to the Jews whom he saw as agents of international bolshevism. After gaining power in Germany in January 1933, his regime introduced successive measures designed to penalise and discriminate against the Jewish population of Germany. As a result, many Jews chose to leave the country. Ironically, the German advances in the east brought a vastly greater number of Jews within the

swollen German domain, particularly in Poland and western Russia. On first seizing towns such as Brest and Domachevo the Germans identified a small number of leading Jewish citizens, often including the local rabbi, and executed them. Thereafter the Jewish population were the subject of oppressive discriminatory measures: their movements were restricted; their property was confiscated; they were confined to ghettos surrounded by wire and guarded by policemen; they were obliged to wear the yellow Star of David on their clothing; and they were required to perform work dictated by the occupier. German soldiers were not held accountable for acts of violence directed at Jewish victims. With the passage of time Nazi policy changed from one of oppression to one of extermination: all members of the Jewish population were to be killed. The task of implementing this policy of mass slaughter was entrusted to *Einsatzgruppen*, who were elite groups of professional killers. These groups moved from area to area, shooting very large numbers of Jewish men, women and children. In this task they were assisted by local police: to them was sometimes delegated the S*chmutzarbeit* (or dirty work) of shooting the children, and also of hunting down and killing any Jews who survived the main massacres.

There was compelling evidence at the trial that these policies were faithfully carried out in Domachevo. The majority Jewish population were confined within a ghetto which was delineated on a plan before the jury. This was guarded by the local police. Members of the Jewish population were routinely subjected to harsh and brutal treatment. Some days before 20 September 1942 a German S*onderkommando*, perhaps supported by Hungarian auxiliaries, arrived in Domachevo. The Jewish population of the town, so far as they could be found, were marshalled, taken to an area known as the sandhills, adjacent to the ghetto, and shot. According to German records the victims numbered 2,900. This operation was carried out by the S*onderkommando* with the assistance of local police.

The proceedings

The criminal jurisdiction of the English court is, generally speaking, territorial. Until enactment of the War Crimes Act 1991 the appellant could not be tried here for an offence of murder or manslaughter committed in Belorussia since he has never been a British subject and the exception made by section 9 of the Offences against the Person Act 1861 to the ordinary rule of territoriality was confined to offences of murder or manslaughter committed outside the United Kingdom by British subjects. It remains the law that the appellant could not be tried here for acts of violence committed in Belorussia if not causing death.

On 1 and 3 April 1996 the appellant was interviewed at length in the presence of his solicitors by officers of the War Crimes Unit at New Scotland Yard. In the course of those interviews he denied the allegations which found the present indictment and denied knowledge of the main witnesses who were in due course to testify against him. He said he had not been in Domachevo in the autumn of 1942, since he had earlier been sent to Germany to work on the farms. He denied that he had ever served in the police in Domachevo, and denied that there had ever been a locally-recruited police force there; there had only been unarmed look-out men, not in uniform, keeping an eye open for Russian partisans. There had been no ghetto in Domachevo and no restriction of movement had been imposed on the Jewish population.

Charges were preferred and proceedings were instituted. Following a lengthy hearing the appellant was committed for trial and the present indictment was preferred. Before the trial it was formally admitted on behalf of the appellant that

> "Throughout the period of the German occupation he served as a police officer in Domachevo. At one time he was regarded as the senior local police officer stationed in the town."

On 5 November 1998, well in advance of the trial, application was made to Potts J., the assigned trial judge, to stay the proceedings against the appellant as an abuse of process. He refused that application. This refusal gives rise to the first two grounds of appeal. After the jury was empanelled, but before the Crown case was opened, it was submitted on behalf of the appellant that the evidence of two witnesses, Ivan Baglay and Evgeny Melianuk, should be excluded as inadmissible. On 8 February 1999 the judge ruled that the evidence of both witnesses was relevant and admissible, but deferred a final decision whether it should, in the exercise of his discretion, be excluded. This evidence

was accordingly not opened to the jury, but on 26 February 1999 the judge finally ruled that the evidence should go before the jury. His decision on admissibility is the subject of the third ground of appeal.

The core of the prosecution case on count one was contained in the evidence of Alexander Baglay. On the day of the massacre he was at home in Borisy, a very small village on the outskirts of Domachevo. He heard firing from the direction of the massacre site. Two or three days later, with another boy about three years older (and thus about sixteen) he went to the deserted ghetto searching for clothes and shoes. While there the boys were caught by the police and taken to the police station. From the police station the appellant took both boys to a site at the eastern side of the ghetto, close to where an electricity sub-station now stands. There Alexander Baglay saw two policemen, whose names he could not remember, guarding two Jewish men and a Jewish woman. They were standing by a recently dug hole. The appellant told the three victims to undress, which they did, reluctantly on the part of the woman. The witness described the appearance of the men. When they were undressed the victims were lined up and shot by the appellant with a pistol he had with him. He pushed them into the pit with his knee as they fell. The boys then buried the bodies in the pit with spades which were on the site. They were offered the victims' clothes, but declined to take them. They returned the spades to the police station. Alexander Baglay said that his companion, Valodia Melianuk, had died, but gave a date for his death which was shown to be inaccurate. He had not mentioned this incident to the NKVD when questioned immediately after the war. His first account of this shooting was given to the British police in 1996.

The core of the prosecution case on count three was contained in the evidence of Fedor Zan. He lived in Borisy and worked in Brest, travelling to and fro by train via the station at Domachevo. About two or three weeks after the massacre in September 1942 he was returning in the evening from Brest. On this occasion he got off the train at Kobelka, where his sister lived, because he had something to deliver to her. He went to her house and made his delivery, and was then returning through the woods to his home. He said that as he was walking through the woods he heard crying and shouting. He walked in the direction of the noise to see what was happening. He saw a number of Jewish women who were getting undressed. They were told to place their clothes in a pile and then to turn and face a pit. These directions, he said, were given by the appellant. He hid himself in the bushes and observed what happened. The appellant had a submachine gun. The women turned to face the pit and the appellant mowed them down with the machine gun. They fell into the pit. There were, according to him, no policemen present other than the appellant, and no Germans. He estimated there were no fewer than 15 Jewish women, and no men, but he recognised none of them. He was a considerable distance away (during the trial the distance was calculated to be 127 or 128 paces) and watched for 4-5 minutes. Dusk was beginning to gather, but Mr Zan's evidence was that the sun was still in the sky. He said that he recognised the appellant "by his size and by his face. He was famous by that time". Mr Zan first described this incident to British police in February 1996.

At the end of the prosecution case, counsel for the appellant submitted that there was no case fit to be left to the jury on any of the four counts. The judge accepted this submission in relation to counts two and four (on which he shortly thereafter directed the jury to acquit) but held that there was a case for the jury to consider on counts one and three. His rejection of the appellant's submission in relation to count three founds the sixth ground of appeal. Counsel for the appellant then submitted that, two counts having been withdrawn from the jury's consideration, the judge should discharge the jury from giving any verdict on the remaining two counts. The judge rejected this submission. This ruling gives rise to the seventh ground of appeal.

The appellant gave evidence and was cross-examined at length. He said that no-one in Domachevo was shot immediately following the German invasion in 1941. He had joined the local police, among the first to do so, at the invitation of the mayor's son, but under threat of deportation to Germany. The duties of the local police were to guard the area against Russian partisans. He received no instruction concerning the Jewish population. The Jews in Domachevo were free to go where they liked and do what they wanted, subject to no restriction. He remembered no requirement that Jews should wear the yellow star on their clothing. There was no ghetto in Domachevo. He never saw any Jew being maltreated or killed. The Germans arrived and carried out the massacre on 20 September 1942. He had at the time been away visiting a friend in a neighbouring village. He heard about the massacre on his return. He saw Germans in the ghetto after his return, and inferred that they were looking for survivors. But he himself never saw any Jew in Domachevo after the massacre, and never searched

the ghetto except for clothing. There was no operation mounted by local police to search for and kill Jewish survivors of the massacre and he played no part in any such operation. All the allegations against him were untrue and the prosecution witnesses were lying under instructions from the KGB. He had become the senior officer in the local police, but had left Domachevo at the end of 1943 (a departure from his formal admission). He was asked questions about his activities after leaving Domachevo, which give rise to the eighth ground of appeal. It is evident that the appellant's testimony, although largely consistent with what he had told the police in April 1996 (apart from his now admitted service in the local police) did not in important respects reflect the instructions upon which his case had up to that point been conducted.

The judge summed up the case to the jury over two days, on 29 and 30 March. Criticisms of his summing-up give rise to the fourth ground of appeal, and also a new ground which has been called ground 6(a). It will be necessary to consider certain aspects of the judge's summing-up in greater detail later in this judgment. But it is convenient at this point to indicate the scheme which the judge adopted in reminding the jury of the effect of the factual evidence. First, beginning at page 72 of the transcript of his summing-up on 29 March 1999, he summarised the evidence called by both sides as to life in Domachevo before the war, up to the German occupation and after the German occupation. In this section he referred to the evidence of Mr Blustein, Galina Puchkina, Fedora Yakimuk, Ivan Baglay, Evgeny Melianuk, Alexander Baglay, Mr Hamziuk and Mr Zan. This evidence related to conditions in Domachevo before and after the German invasion, the establishment of the ghetto, the treatment of the Jewish population, the formation of the local police force and the zealous performance of his duties by the appellant who was known (and widely known) by the diminutive of his Christian name, Andrusha. Mr Blustein, who claimed to be a close childhood friend of the appellant, gave evidence of two specific incidents. The first related to a conversation which Mr Blustein said he had overheard between the appellant and a man named Borak, in the course of which the appellant had (as understood by Blustein) expressed pleasure in his anti-Jewish activities. The second incident related to a girl named Rachel Schneider, who had (well before the massacre) been caught by the appellant and another policeman trying to smuggle food into the ghetto; according to Blustein, they had hit the girl and dragged her off to the police station. The judge then, at page 102 of the same transcript, addressed the question: Did the local police play a part in the massacre? He summarised the evidence of Mr Blustein, Galina Puchkina and a witness whose video evidence was adduced by the appellant, Mr Boguszewski. The judge emphasised that there was no evidence at all that the appellant was present or in any way involved on the day of the massacre.

On the second day of his summing-up (at page 5 of the transcript, 30 March 1999) the judge turned to the search and kill operation alleged to have been carried out by the local police after the massacre. He summarised the evidence of the appellant on this issue. He then summarised the evidence of Mr Blustein, who had (he said) concealed himself in a small compartment under the floor of his house when the Jewish population were rounded up on 19 September before the massacre, and so had escaped their fate. The judge summarised the evidence given by Mr Blustein of a conversation which he had, as he said, overheard between two policemen searching the house where he was hiding, one of whom he identified as the appellant because he was addressed by his fellow-policeman as Andrusha. No one else was known by that name. When, some days after the massacre, Mr Blustein left his hiding place, he said that he saw an elderly Jewish scholar named Shaya Idel being attacked by a group of policemen, whom he named, one of whom was the appellant. He had also given evidence, of which the judge reminded the jury, of two Jewish survivors of the massacre, Aharon Kronenberg and Mir Barlas who were, he said, delivered into the custody of policemen who included the appellant; neither of these men did he ever see again. The judge also summarised the evidence of Mrs Yakimuk: she was a friend of the appellant's wife, and known to him, but had nearly suffered execution because an iodine-stained bandage had been mistaken for a yellow star; the appellant, she said, had been standing by and had done nothing to intervene. There was further evidence from Galina Puchkina. Evidence by Ivan Baglay, summarised at this point, related to two particular incidents. The first occurred, in the days after the massacre, when he saw the appellant driving a Jewish woman with a small child along the road. The appellant was carrying a carbine and also a thick birch pole, and he described a heavy assault by the appellant on the woman. The second incident, he said, occurred after the massacre also, when he saw the appellant leading a cobbler named Biumen, his wife and two young daughters along the street. He understood they were being taken to the sandhills, and never saw any member of the family again. The judge then summarised the evidence of Evgeny Melianuk, which was to the effect that some ten days or so after the massacre he saw the appellant and three other policemen herding a group of about ten Jewish men, women and children (he gave their name

as Yankel) into the ghetto and towards the place of execution. He never saw any of these victims again. The judge then summarised, in considerable detail, the evidence of Alexander Baglay and Fedor Zan relating to counts one and three respectively.

Ground 1

The appellant submits that the judge erred in law in failing to stay count one of the indictment on the ground that the continued prosecution of the appellant on that count was an abuse of the process of the court. In support of that submission counsel places reliance, in this court as before the judge, on a number of features of this very unusual case: the passage of over 56 years from the date of the alleged crime to the date of trial; the fact that the sole, unsupported, witness was at the time a boy, who did not mention this incident to the NKVD when interviewed after the war and who made no statement on the subject for over 50 years; the inability of the defence, after this lapse of time, to identify or trace the two other policemen said to have been present at the time of this incident, if indeed it took place; the death of the witness's 16 year old companion, who died in 1986 without communicating his recollection, if any, of this event to anyone; the absence of any other witness able to challenge or dispute the account of Alexander Baglay; and the absence of any scientific support for his evidence.

The judge directed himself in accordance with the principles laid down in Attorney-General's Reference (No.1 of 1990) [1992] QB 630, (1992) 95 Cr. App. R. 296, which he rightly treated as applicable regardless of the 1991 Act. From that decision he derived the following principles:

> "(1) that generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment and, where either demands a verdict, a judge has no jurisdiction to stand in the way of it and therefore the jurisdiction to stay proceedings is exceptional;

(2) a stay should never be imposed where the delay has been caused by the complexity of the proceedings;
(3) it would be rare for a stay to be imposed in the absence of fault on the part of the prosecutor or complainant;

(4) delay contributed to by the actions of the defendant should not found the basis of a stay;

(5) the defendant needs to show on a balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. In other words, the continuance of the proceedings amounts to an abuse of the process of the court."

The judge went on to cite the passage in the judgment of the court (at 644 and 303) in which it was made plain that the prejudice which a defendant would have to show to justify the grant of a stay is prejudice which could not be cured by an appropriate ruling in the course of a trial, or by a judicial exclusion of evidence, or by an appropriate direction to the jury.

Attention was drawn to Tan v. Cameron [1992] 2 AC 205, (1993) 96 Cr. App. R. 172 at 225 and 184-185, but the effect of that passage is in our judgment simply to emphasise the burden on a defendant seeking a stay to satisfy the court that if the trial goes ahead it will be unfair to the defendant. We were also referred to R. v. Central Criminal Court, ex parte Randle & Pottle (1991) 92 Cr. App. R. 323, a decision given before Attorney-General's Reference (No. 1 of 1990). Reliance was placed on the passage in the judgment of the court at 343 where it was suggested that the strength of the prosecution case may be a relevant consideration. Even if that be so, it does not undermine the overriding principle, which is that the judge must be persuaded, before granting a stay, that continuance of the proceedings will cause serious prejudice to the defendant by denying him a fair trial. In our judgment the judge directed himself in strict accordance with the law.

He did not conclude that the appellant had discharged the burden lying upon him. He regarded it as entirely speculative whether the unavailability of other witnesses represented a detriment to the appellant or a bonus. He was confident that the evidence of the single eye-witness could be properly and rigorously tested within the confines of the trial process, as in the event it was. He had very much in mind not only the points made on behalf of the appellant but also the powers exercisable by him as

the trial judge. In our judgment the conclusion reached by the judge, despite the unprecedented passage of time since 1942, was correct.

Ground 2

The appellant makes a similar submission in relation to the judge's ruling in relation to count three. For reasons already given we do not accept that the judge's self-direction was vitiated by legal misdirection.

In submitting that the continuance of proceedings against the appellant on this count was an abuse and that the judge was wrong to hold otherwise, counsel for the appellant again relies, before us as before the judge, on a number of features: in particular he relies on the fact that this count centred on an unsupported identification made by a single witness well over 50 years ago, at a considerable distance and in an uncertain light. It is submitted that the difficulty in effectively challenging such an identification after this lapse of time is such as to make any trial on this count unfair.

In reviewing this point the judge referred to photographs which had been taken and which would be before the jury. He continued (at page 6 of the transcript of his ruling):

> "The point is made that photographs are no substitute for visiting the scene and that it is not until a person stands in the position identified by the witness that the difficulties in making a reliable identification are demonstrated. Mr Clegg emphasises that if this issue was raised in a trial concerning a crime committed in England then it is unlikely, to say the least, that the judge would refuse a defence request for a view of the scene by the jury. Given the circumstances of this case, practical difficulties would arise if a view was requested. I proceed today to reach a decision on the basis that no view of the scene by the jury could take place. I emphasise, however, that if this matter goes to trial I would consider such an application and decide in the light of the circumstances laid before the court."

The judge was, in short, prepared to consider exercise of his judicial powers to give the jury the best possible opportunity of assessing the reliability of the identification evidence. He went on to make express reference to the applicability of R. v. Turnbull [1977] QB 224, (1976) 63 Cr. App. R. 132 and R. v. Galbraith [1981] 1 WLR 1039, (1981) 73 Cr. App. R. 124. In the event, as we know, the judge and jury did travel to Domachevo, and members of the jury had the opportunity to stand where Mr Zan said he had stood when observing the scene at the massacre site, and also to observe him from that position when he was standing where he said he had seen the appellant stand. In our judgment the judge was fully entitled to hold that any points the appellant might have to make about the reliability of the identification evidence on count three could be fairly accommodated within the confines of the trial process.

Ground 3

The appellant submits that the judge erred in law in admitting the evidence of Ivan Baglay and Evgeny Melianuk. The objection taken at the trial was to the evidence of Ivan Baglay (briefly summarised above) relating to two incidents, the assault on the woman with a birch pole and the incident relating to the Biumen family. The evidence of Evgeny Melianuk was that relating to an alleged assault on a Jewish woman and the incident involving the Yankel family.

When making his first objection on 8 February 1999 Mr Clegg QC for the appellant first submitted that the evidence in question was of no relevance to the issues the jury had to resolve, which were essentially issues of identification, and secondly that in any event the evidence should, if admissible, be excluded in the exercise of the judge's discretion. Sir John Nutting QC for the Crown submitted that the evidence in question was relevant to proving that the appellant was not only a policeman at Domachevo but that subsequent to the massacre he took an active part in the search and kill operation in which certain policemen rounded up and executed Jewish survivors of the massacre, and it was evidence relevant for the jury's consideration in relation to the evidence given by witnesses of specific identification in relation to specific charges. Counsel gave another reason for adducing the

evidence which it appears the judge did not accept. But the judge did express the preliminary conclusion that the evidence in question was relevant to the issue identified by the Crown, namely the level of the appellant's part in the search and kill operation. As already mentioned, the judge declined to make a final ruling on the exercise of discretion at that stage.

When the exercise of discretion was considered again on 26 February 1999, the judge said (at page 66 of the transcript of that day):

> "I have reminded myself and taken into the account the fact that neither the witness Ivan Baglay nor the witness Evgeny Melianuk give evidence in relation to a specific count on the indictment. I have Mr Clegg's forceful argument in that connection very much in mind. I remind myself that this evidence does not relate to specific counts of murder on the indictment. I am satisfied, however, that it would be right to allow this evidence to go before the jury. I am satisfied that it is relevant to the issues raised by this trial. It is of particular relevance, in my judgment, as to the issues raised by the charges of the extent of the defendant's involvement in the search and kill operation … In my judgment, the probative value of this evidence, given the issues raised by this trial, outweighs the prejudicial effect that this evidence is likely to have. I am satisfied that it is admissible and should go before the jury."

When on 19 March 1999, counsel for the appellant applied for the discharge of the jury, he made reference (at page 2 of the transcript of that day) to the "enormously prejudicial" effect of this evidence. The judge pointed out to counsel (at page 8 of the transcript) that there was no admission that the appellant was a member of the search and kill operation, and counsel agreed that that was an issue, although a collateral issue. The judge regarded a conclusion on the appellant's participation in the search and kill operation as not determinative of counts one and three, but as a step on the way to a conclusion on those counts. When giving his ruling on this application (at page 40 of the transcript) the judge adhered to his earlier opinion that this evidence was relevant to the issue whether the appellant had participated in the search and kill operation.

Mr Clegg now submits to us that this evidence, relating to criminal acts against Jews other than the victims in counts one and three, should have been excluded. He suggests that the appellant's membership of a group participating in the search and kill operation was not disputed. This evidence was not probative of his identity as the killer in counts one and three. There were no special features of the case to justify the admission of this evidence, and there was nothing in the circumstances of this case or the evidence to bring it within the special and circumscribed exception relating to evidence of similar facts. Mr Clegg takes his stand on propositions of general principle, which we venture to express in this way. A defendant accused of a criminal offence is entitled to be acquitted unless the tribunal of fact is satisfied that the defendant has committed the offence charged. To convict him the prosecution must prove commission of the offence charged and not some other offence. The prosecution cannot prove the offence charged by relying on the defendant's bad character, or previous record of committing offences of the same kind, in order to show that the offence charged is the sort of offence that the defendant would be likely to commit. The prosecution cannot ordinarily prove the commission of crime A by proving the commission of crime B or vice versa unless the relationship between the evidence necessary to prove the two crimes is such that the evidence on each, if accepted, would so strongly support the evidence on the other as to make it fair to admit the evidence of each in relation to the other despite the prejudicial effect of doing so. Mr Clegg draws our attention to Director of Public Prosecutions v. P [1991] 2 AC 447, (1991) 93 Cr. App. R. 267.

For the Crown it is argued that this evidence was admissible but not as evidence of similar facts. It was relevant to prove that the appellant was a policeman involved in the search and kill operation. It was not the criminal nature of his conduct which made the evidence admissible, but the fact that it identified him as a member of the group to which the killer in counts one and three belonged. Thus the effect of the evidence was to identify the appellant as one of the possible killers. The evidence did not identify him, but it supported the identification of the eye-witnesses. The evidence was called to prove not the appellant's propensity for misconduct but his participation in a police operation of which the counts of the indictment were a part.

We would accept Sir John's submissions. But we incline to the view that the admission of this evidence could be upheld on a broader basis. Criminal charges cannot be fairly judged in a factual vacuum. In order to make a rational assessment of evidence directly relating to a charge it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances in which the offences are said to have been committed. This, as we understand, is the approach indicated by this court in R. v. Pettman (unreported, 2 May 1985), approved in R. v. Sidhu (1994) 98 Cr. App. R. 59 at 65 and R. v. Fulcher [1995] 2 Cr. App. R. 251 at 258:

> "Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

This approach seems to us of particular significance in an exceptional case such as the present, in which a London jury was asked to assess the significance of evidence relating to events in a country quite unlike our own, taking place a very long time ago in the extra-ordinary conditions prevailing in 1941 to 1942. It was necessary and appropriate for the Crown to prove that it was the policy of Nazi Germany first to oppress and then to exterminate the Jewish population of its conquered territories in Eastern Europe. This was done by expert evidence, which was very largely unchallenged. No objection was taken to this evidence. But it was not the subject of any formal admission. It was next necessary and appropriate for the Crown to establish that locally-recruited police in areas which included Belorussia and Domachevo played a significant part in enforcing the Nazi policy against the Jewish population. This was proved, partly by expert evidence and partly by the oral evidence of eye-witnesses. There was no objection to this evidence, but nor was there any formal admission, and when in due course the appellant gave evidence he contradicted this salient fact. It was next necessary and appropriate for the Crown to prove that the appellant was a member of the local police in Domachevo. By the date of trial this was admitted. But the appellant had earlier denied it in interview, and when he gave evidence the police force which he described was in important respects different from that described in the Crown evidence. It was necessary and appropriate for the Crown to prove that the appellant, as a locally-recruited policeman, played a leading and notorious role in enforcing Nazi policies against the Jews in Domachevo. This was not admitted, and when in due course the appellant gave evidence he strongly denied it. It was necessary and appropriate for the Crown to prove that, following the massacre of 20 September 1942 (in which the appellant personally was not said to play any part), the locally-recruited police in Domachevo, including the appellant, engaged in an operation to hunt down and execute any Jewish survivors of the massacre. This was strongly denied. The Crown had to satisfy the jury that the killings on which counts one and three were based took place: given the nature of his defence, the appellant did not admit that these events took place at all, but it was plainly incumbent on the Crown to satisfy the jury that they did. Lastly, of course, and crucially, the Crown had to satisfy the jury that the appellant committed the murders specified in counts one and three, which formed part of the post-massacre operation carried out by local police. It seems to us that evidence relevant to all these matters was probative and admissible, even if it disclosed the commission of criminal offences, other than those charged, by the appellant and his colleagues. It has not been suggested that the jury should have been invited to reach a verdict on counts one and three having heard no more than the evidence of a single eye-witness on each; had these gruesome events not been set in their factual context, the jury would have been understandably bewildered.

Despite the powerful submissions of Mr Clegg on this issue, we are not persuaded that the judge fell into error.

Ground 4

The appellant contends that the judge erred in law in failing to direct the jury how to approach the evidence of similar facts and of other crimes not the subject of the indictment, and failing in particular to warn the jury that these matters could not be relied on to prove a propensity to kill Jewish victims. He should have directed the jury along the lines recommended by the Judicial Studies Board in relation to similar fact evidence, and warned them to eschew what Lord Hailsham in R. v. Boardman

[1975] AC 421 at 453 called “the forbidden reasoning”. He should, it is said, have directed the jury on the issues to which the evidence was relevant, and warned the jury against the possibility of collusion. He should have specifically pointed out that it was possible for a number of witnesses to be mistaken or lying, or to be giving evidence which reflected what they had heard from others.

We do not accept those criticisms. The evidence in question was not left to the jury as similar fact evidence, and it would have been inappropriate to give a direction on the basis that it was. On the first day of his summing-up, at page 45 of the transcript, the judge put the matter very plainly:

> “The two charges he faces raise two essential questions for you: “Are we sure that the defendant shot a Jewess as described by Alexander Baglay?” Secondly, “Are we sure that he shot a Jewess as described by Fedor Zan?” These are the murders that the defendant is charged with. He is not charged with devising Nazi policy; he is not charged with being a member of the local police; he is not charged with being a collaborator of the Nazis, because the Crown say – and it is their case – that he was a willing and enthusiastic executioner of Nazi policy and of the unknown Jewesses named in the charges.
>
> All these matters are relevant for your consideration as part of the steps leading up to what the Crown say occurred and what the defendant, as the Crown say, did during the search and kill operation, but it does not follow that because he was a local policeman, he shot the Jews in question. He disputes that. You can only convict him on either count if you are satisfied that that count is made out to the requisite standard of sureness.”

The judge returned to this aspect on the second day of his summing-up when, after summarising the evidence of Evgeny Melianuk, he said (at page 26 of the transcript):

> “Ask yourselves whether you can rely on it. Only if you are sure that that evidence is accurate can you rely on it. If you accept it, then you can take it into account in deciding whether, after this massacre, the defendant was taking part in the search and kill operation, he having told you that he was not, and he having told you, members of the jury, that after the massacre, there was not a single Jew that he saw.”

It is true that the judge did not in terms give a propensity direction, but it seems to us that the direction which he did give adequately explained the basis upon which the jury should consider this evidence.

The judge reminded the jury on at least three occasions in the course of his summing-up of the suggestion made by the appellant that the evidence against him was fabricated by the KGB in league with Scotland Yard, and on two occasions made reference to the suggestion that witnesses from Borisy had put their heads together to give false evidence against him. The judge was able to refer to this alleged Borisy conspiracy in shorthand terms, since it was quite plain to the jury what he was referring to, and he was at pains to point out, when summarising the evidence of individual witnesses, which of them came from Borisy. At the two most crucial points of the summing-up he specifically drew attention to the possibility of honest mistake. At page 37 of the transcript of his summing-up on 30 March 1999, he said:

> “So Mr Sawoniuk is saying: “This incident never occurred. Alexander Baglay I never knew. He is telling lies about me”. You have got to consider that and, of course, if you think that is the case, or may be the case, then disregard anything that Alexander Baglay says. But it does not stop there, ladies and gentlemen. Even if you are satisfied, so as to be sure, that Alexander Baglay was not lying, that he was doing his best to tell you the truth, you would still have to be sure that his evidence was accurate and reliable.
>
> Here, bear in mind that you are considering the evidence of a 69 year old man, speaking about events when he was 13, and you know, as the years pass, that impressions harden and take form in the mind as reality, and people do,

> after a time, speak forcefully of having seen things when close enquiry shows that their recollection must be wrong. We all know that from our own experience, and from what we read and what we know in every day life. So remember that.
>
> If you think that is what has happened here, then, of course you would not rely on Alexander Baglay's evidence …"

In relation to Mr Zan, the judge said at page 54 of the transcript of his summing-up on the same day:

> "Ladies and gentlemen, let me emphasise, please, again, that even if you are satisfied that Mr Zan was speaking – came here intending to speak the truth – if you reject the defendant's assertions that he is a professional liar, if you reject those, you would still have to consider whether the identification that he made of the defendant as the gunman shooting down these fifteen Jewesses is one that you can rely on and act on so as to be sure of guilt.
>
> In assessing that issue, you have regard to all those matters that I mentioned when I gave you a direction at the start of this case concerning identification evidence. You take into account Mr Zan's evidence in this respect, in what you saw yourselves and ask yourselves: "On that evidence, taking into account all those matters, are we sure that this is a reliable identification?""

We do not consider that this jury could have fallen into the trap of inferring that because the appellant had been implicated in other acts of violence against the Jewish population he was the more likely to have committed these two specific offences.

Ground 5

At the trial the appellant sought to introduce into evidence recent photographs taken in London, the object of which was to illustrate the view which would be obtained by an observer separated from what he was observing by the distance which was approximately established as separating Mr Zan from the scene of the execution which he said he witnessed. The judge ruled against admission of these photographs, and the appellant contends that he erred in law in so ruling.

The judge gave his reasons for his decision succinctly:

> "I am satisfied that, were these photographs adduced, they could only mislead the jury. What is visible to the camera when these photographs were taken in Smithfield is one thing; what Mr Zan was capable of seeing from his hiding place in the woods outside Domachevo is another thing. This jury, on the application of the defence, has had the advantage of visiting the scene, of each of them observing the point where Mr Zan says the Jewish women were from the point where he says he was positioned. They have heard Mr Zan examined and cross-examined. These photographs in my judgment are simply not like with like, and I rule against the application."

In placing reliance on the jury's own opportunity to judge the visibility of the appellant (if it was he) to Mr Zan, the judge was in effect echoing what counsel for the appellant had himself said when opening the appellant's case to the jury on 19 March:

> "You know … that it was our application on behalf of the defendant that you should visit Belorussia, Domachevo and, in particular, the forest where the evidence in relation to the Zan count is so crucial. We make no apology for that at all, because whatever physical inconvenience the journey may have caused, in our submission the value to you 11 jurors of going to that town and going into the forest was immeasurable. Each of you has gone and stood where Zan says he stood. Each of you have individually had the opportunity

> to look across the distance that exists, and existed then obviously, to the place to where he says the shootings took place.
>
> We do not shrink from saying that each one of you could answer the question posed by that count on the strength of your visit to Domachevo without recourse to anything else at all. You saw, with your own eyes, the distance, and the opportunity to be able to recognise anyone at that length. We do not shrink from saying that your conclusion, we confidently anticipate, will be that it would be completely impossible to recognise anyone at that distance."

Unfortunately for the appellant, the jury, having heard the evidence of Mr Zan, did not reach the conclusion which counsel had confidently anticipated. We can, however, find no fault in the judge's conclusion that the best evidence on this matter was already before the jury and that further photographic evidence could mislead.

Ground 6

The appellant submits that the judge erred in law in failing to direct the jury to return a verdict of not guilty on count three at the end of the prosecution case. The basis of this submission is that he must have placed improper reliance on similar fact evidence, when the identification evidence standing alone would not have justified his decision.

When rejecting the submission of no case in relation to count three on 18 March 1999, the judge said (at page 123 of the transcript of that day):

> "I turn to count three. As I have indicated, that raises different issues. Fedor Zan has given evidence. He knew the defendant well, he knew him all his life. He has told the jury that he saw the defendant shoot a number of Jewesses. He has described the position that he was in when he observed the defendant carry out the executions in question. He has identified the spot where the executions took place. I of course, have given the most careful attention to the submissions that have been made by Mr Clegg as to distance, and I remind myself … that the distance involved, it has been agreed, is 128 paces. I apply to this issue, as I must, the test laid down by the Court of Appeal in the well-known case of Turnbull. It is unnecessary for me to enunciate that test in any way. It is well known. I have the principle in mind. I give effect to the reasoning behind the court's decision in that case and apply it to the particular facts of this case.
>
> Mr Clegg has submitted that I must assess the weight of the evidence on this charge at this stage. If I am satisfied that that evidence falls below the appropriate standard, I should withdraw the charge from the jury. I have taken that course against the whole of the evidence that the Crown can properly say is relevant to this charge, and I hope overlooking no single item of it. I am satisfied that there is evidence fit to go to the jury. In my judgment, were no further evidence adduced, the jury could safely convict on the evidence of Mr Zan and the other evidence remaining."

It is of course true that if the evidence to which Mr Clegg on behalf of the appellant had earlier objected should not have been admitted, and if the judge relied on it in concluding that there was a case for the appellant to answer on count three, then there would be potent grounds for challenging that conclusion. But, for reasons that we have already given, we have concluded that the evidence objected to was properly admitted and was relevant as implicating the appellant in the search and kill operation conducted by the local police of which count three formed part. There is nothing to suggest that the judge treated that evidence as relevant for any other purpose, nor that he misdirected himself in any way on the test to be applied. He, like the jury, had had the opportunity of viewing the scene and the advantage of hearing the evidence against the background of that experience. We find no reason to criticise his conclusion.

Ground 6a

The appellant complains that the judge failed to direct the jury, in relation count three, what evidence was capable of supporting Mr Zan's identification and what evidence was not. This, it is said, is a departure from the direction required by R. v. Turnbull [1977] QB 224 at 230, (1976) 63 Cr. App. R. 132 at 139, where the court said:

> "The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so."

On the first day of his summing-up, the judge directed the jury (at page 34 of the transcript):

> "There are two counts on the indictment. Consider them separately. They do not stand or fall together. I illustrate that direction in this way; the nature of the evidence concerning them is quite different: In count one, Alexander Baglay, aged 13, knew the defendant and says he was standing next to him when he, the defendant, shot three Jews. That is a quite different set of facts to count three. Fedor Zan also knew the defendant, but he says he observed him shooting Jewesses from a distance of 127 paces.
>
> In relation to his evidence in particular, it is important to bear this in mind, and this applies to all the evidence in the case which might turn on a person's identification of the defendant doing something. Accurate identification of the defendant and what he was doing is of great importance. It is of crucial importance when you consider the evidence of Mr Zan. There is special need for caution when considering evidence of identification and convicting a defendant in reliance on it.
>
> I appreciate, as you will, that the defendant says of Mr Zan that he is a liar. He has made it all up. Ladies and gentlemen, even if you found that Mr Zan was entirely truthful, even if you rejected the defendant's assertion that Mr Zan was a liar, you would still have to consider whether his evidence identifying the defendant as the gunman who shot down those 15 Jewesses – you would still have to consider whether the identification could be relied on. It is possible that an honest witness may make a mistaken identification. There have been wrongful convictions in the past because of such mistakes. An apparently convincing witness can be mistaken. You have got to bear this in mind particularly in relation to Mr Zan.
>
> So you should examine carefully the circumstances in which the identification and description of Mr Zan was made. You have been to the scene. You have seen it. You have got to consider, on the evidence, how long did Mr Zan have the scene he spoke to under observation. At what distance? Well, you know, 127 paces. At what position? You know his position because you were put into it. In what light? Ask yourselves whether anything interfered, on the evidence, with his observation all those years ago – foliage, for example, trees.
>
> Did Mr Zan, or any witness whose evidence of identification you are considering, know the person involved? Well, in Mr Zan's case you know, according to him, he says he did know the defendant. The defendant said he did not know Mr Zan. Had Mr Zan seen the defendant before? All these things members of the jury may seem to you to be common sense. They are all matters you take into account in assessing the reliability of the identification. If you accept Mr Zan, he knew the defendant, he had known him for some years, they had been at school together; the defendant says "no recollection of that". That is an issue you have to decide.
>
> Mr Zan says "After this incident, I remained in Domachevo for the remainder

> of the German occupation, as did the defendant, and indeed I was ordered to leave Domachevo by horse and cart in June of 1944 with the retreating Germans, as was the defendant". Those are all matters that you take into account in assessing the reliability of the identification evidence. I have not given you an exhaustive list. I hope I have indicated the correct approach."

This was, as it seems to us, a very full and very fair Turnbull direction. But it is true that it did not contain the specific direction indicated in the passage quoted from the judgment. In our experience many Turnbull directions do not contain that element, perhaps because it does not feature in the succinct form of words recommended by the Judicial Studies Board. We cannot think that the omission of this direction was of significance in this case, since the jury must have been left with the clear impression that there was nothing to support the identification of Mr Zan, and it is very difficult to think of any evidence on which the jury could have wrongly relied as supporting that identification. While the point made by Mr Clegg on behalf of the appellant is strictly correct, the omission of this direction cannot in our judgment have been in any way prejudicial to the appellant in this case.

Ground 7

In this ground of appeal the appellant makes three complaints. First it is said that the judge wrongly failed to discharge the jury from giving any verdict at the close of the prosecution case, because of the evidence which the jury had heard relating to counts two and four on which the judge had directed the jury to acquit. Secondly, it is said that the judge erred in concluding that evidence of Mr Blustein was admissible and probative on counts one and three, with the result that he exercised his discretion not to discharge the jury on a mistaken view of the law. Thirdly, it is said that if the judge had exercised his discretion to discharge the jury from returning a verdict on count three, as it is contended he should have done, it should have followed that he would not have permitted the jury to return a verdict on count one alone.

We do not accept the first of these points. When the judge, at the close of the prosecution case, directed the jury to return verdicts of not guilty on counts two and four, he explained in some detail his reasons for doing so. At the outset of his summing-up on 29 March 1999 he returned to this subject: he directed the jury in the clearest terms to disregard the evidence of Mr Stepaniuk on which count two depended, and directed the jury that they could not safely act on the evidence of Mr Blustein concerning a conversation he had said he had had with the appellant concerning Mir Barlas. We feel sure that the jury would have clearly understood the effect of those directions and acted upon them.

In relation to the two remaining counts, counts one and three, the judge directed the jury that the rest of Mr Blustein's evidence remained highly material for their consideration. We have already indicated the brief effect of that evidence above, and in our judgment it was material for the jury's consideration for the reasons given in considering ground 3 above. Significantly, no objection was taken to his evidence before it was given. He was a significant witness, because he had spent the years since the end of the war in Israel, and was accordingly unlikely either to have conspired with the KGB or to have lent himself to any Borisy conspiracy against the appellant. Plainly his evidence, when given in court, was deeply moving to those who heard it, but that cannot render the evidence inadmissible. It did in our judgment relate directly to the appellant's role as a policeman throughout the period, and in particular his role during the search and kill operation which the appellant denied. The appellant accepts that this point can only succeed if his argument succeeds on ground 3.

Since we have concluded that the judge was right to leave count three to the jury as well as count one, the appellant's third point does not arise.

Ground 8

The appellant submits that the verdicts of the jury are rendered unsafe because of cross-examination of the appellant on a German document which was not in evidence. The crux of this complaint is that the only cross-examination of the appellant which was permissible went to his credit, with the consequence that the Crown was bound by his answers, and that in the event the cross-examination went far beyond this point and had an unsettling effect on the appellant.

The facts relating to this ground are a little complex. In the course of investigating this case the police unearthed a series of documents relating to the appellant's service in the Free Polish Army in the closing months of the war. One of these documents contained a statement attributed to the appellant, and recorded in Polish, to the effect that he had served in the German army from 1 August until 11 November 1944. These documents were never formally proved, but were before the jury, by agreement, untranslated as we understand. The police also obtained from the German military archives a missing persons report which contained certain personal details apparently relating to the appellant, and on its face recorded the appellant as going missing from a Waffen SS unit in late November 1944. This document was never proved nor put in evidence, and it was not before the jury.

The last witness to give evidence for the Crown was Detective Sergeant Griffiths. In the course of his cross-examination of this witness Mr Clegg for the appellant invited the attention of the officer to the Polish military records and elicited that, according to them, the appellant had served with the Free Polish Army in North Africa, Italy and Egypt before coming to this country. This was evidence of value to the appellant, since such service would be to his credit and would weaken the suggestion that he was a willing lackey of the German occupying forces in Belorussia. It was, however, thought to leave the jury with a misleading impression, and in re-examination Sir John Nutting elicited that according to the officer's inquiries the appellant had been enlisted or conscripted into the German army immediately after July 1944. The officer made express reference to the Waffen SS missing persons document. There was argument about the propriety of this questioning, which concluded with a direction by the judge to the jury that hearsay was not evidence, that the document to which the officer had referred had not been prepared by him, and that accordingly the document was not evidence.

When the appellant himself gave evidence in chief, his attention was drawn to the Polish army documents and he testified to his service as a Polish soldier in France, Italy and Egypt. Departing from the admission made on his part, and also the basis upon which prosecution witnesses had been examined, the appellant testified that he had left Domachevo at the end of 1943.

When cross-examined by Sir John Nutting, the appellant again suggested that he left Domachevo at the end of 1943 and gave an account of his movements which apparently suggested that he had joined the Polish brigade in France in the early months of 1944, a statement which raised obvious problems. Sir John asked the appellant whether he had ever served in the German army and he replied, very emphatically, that he had not and that he had never said that he had. There was detailed argument on the propriety of questions based on the Polish army record. The judge ruled that these questions were permissible, both because of their bearing on the issues in the case and because of the questions asked of Detective Sergeant Griffiths. The appellant continued to deny that he had ever served in the German army. We do not understand that complaint is made of the judge's ruling on this subject.

The appellant was then asked to look at the German missing persons document and was asked whether he had ever joined a Waffen SS regiment, whether he had gone missing and whether he had been transferred at a specified date. All those questions the appellant answered in the negative and the questions were not pursued. The appellant was then asked a series of questions designed to show that the document contained an accurate record of his personal details. At the end of this series of questions, and after further argument, the appellant was asked how it came about that this document contained these accurate details relating to him. He suggested that the document had been fabricated by the police officers in the case. This prompted an application by the Crown, after the appellant's case had been closed, to call evidence to prove the provenance of the document. The judge rejected this application. In the course of his ruling on 24 March 1999 the judge said, at page 63 of the transcript:

> "It is accepted by the Crown that when the defendant came to deny, as he undoubtedly did with vigour, the suggestion that he was a member of the Waffen SS, then the Crown was bound by that answer. Not surprisingly, given the lapse of time, the Crown is not in a position to call the maker of the document.
>
> Mr Nutting accepts, therefore, this afternoon, at the conclusion of the defence case, that as matters stand, the jury must be directed that the defendant has

denied his membership of the Waffen SS and that the document in question is not evidence that he was a member of the Waffen SS, and that the state of the evidence therefore is that that emanates from the defendant."

The judge went on to consider whether the Crown should have leave to prove the provenance of the document in order to rebut the suggestion of fabrication and said (at page 64 of the transcript):

"I accept the Crown's submission that this application raises a discrete matter from the admissibility of the document itself. The Crown, as I have indicated, accept that they are bound by the defendant's denial that he was ever a member of the Waffen SS …

Mr Clegg makes a number of submissions …

His essential submission, however, is that were the jury to hear this evidence it would lend force to the – to any suspicion that they might have that the contents of the German Waffen SS document were accurate and true evidence in the case. As I have sought to indicate, the document is not evidence in the case, and there is simply no evidence available to the jury as to how the matters recorded in it came to be made.

I ought to say that I entirely understand and see the force of the Crown's submission. It is accepted that I have a discretion in this matter, however, and I have to view this application in the light of the evidence as it stands at this late point in the trial.

I cannot close my eyes to the fact that the contents of this document, were they truly admissible, would, to a layman – and I have to bear in mind that the jury … are laymen – would, to a layman, be capable of having an explosive effect on their consideration of the evidence as a whole.

I also have to bear in mind that the defendant's answers were given on the third day of his evidence, late in the afternoon, when he was obviously highly emotional. I cannot overlook the fact that he is a man of 77 and may, during the course of his evidence, on occasion have said things incautiously. In this connection – of course I emphasise that I have not overlooked the fact that time and again, when asked to account for certain pieces of evidence, he spoke of conspiracies by the KGB.

Crucially, however, it seems to me that if the jury heard that this document came from the source identified by Detective Constable Latham, then there is a serious risk that despite the most careful direction from me they would regard the Waffen SS missing report as evidence in the case which, as I have said, it clearly is not. In those circumstances, I have come to the conclusion, in the exercise of my discretion, that the appropriate course is to rule against the Crown's application."

On the first day of his summing-up at page 43 of the transcript, the judge gave the jury a very clear direction about all these documents:

"Can I say something now about two documents that you heard the defendant asked about? First of all, the Polish Army record. That is the correct description. Item (xii) in that document – you heard questions put to the defendant about that by Mr Nutting. You decide this case on the evidence given in this court. The maker of the record has not been called before you. It would be, perhaps, surprising if he could, given the length of time that has elapsed. Therefore, there is no evidence that the defendant told any Polish officer, whoever it was who made the record, that he served in the Germany army. The defendant himself has denied in evidence that he either served in the German army or ever told anyone that he had done so. The entry in

> question, therefore, is not evidence which contradicts his assertion, and the Crown does not suggest otherwise.
>
> The defendant was asked about a Germany army missing person's document. The defendant, if you remember, agreed that the contents of the document purporting to be a German army missing person's document contained his name, his date and place of birth, and made reference to a woman called "Nina S", and it was suggested to him that that document stated that such person with that name and date and place of birth was a member of the Waffen SS. Again, the maker of this document has not been called. The document and its contents are not evidence that the defendant was a member of the Waffen SS. It does not contradict the defendant's assertion that he was never a member of that organisation."

It is perhaps unfortunate that, in a case with so much else to consider, these peripheral questions should have generated so much argument and questioning. But it was perhaps inevitable, once the Polish army record had been relied on in cross-examination of Detective Sergeant Griffiths to elicit evidence of the appellant's service with the Allies, that questions would be asked (which could have been answered from the same document) to suggest that his record was more questionable. As it is, we are not persuaded that the questioning of the appellant overstepped the proper limits, even if it exploited those limits to the full. In any event, the judge gave the jury the clearest possible direction that there was nothing to contradict the appellant's denial of serving in the German army, and the jury can scarcely have failed to take note of the passion with which the appellant rejected this suggestion.

We do not find the convictions to be unsafe on this basis.

Given the unique circumstances of this case and the grave consequences of conviction to the appellant, we have considered with care whether there is any more general ground upon which these convictions should be regarded as unsafe. For reasons already given, we conclude that the jury was in a very advantageous position, having seen the site and heard the evidence, to form a reliable judgment on count three. On count one we remind ourselves that the conviction rested very largely on the evidence of a witness who was, if his evidence was reliable, standing within feet of the appellant when this murder was committed. It was not a case of an identification made 56 years after the event, but one of contemporaneous recognition to which the witness deposed after that lapse of time. It is not easy to imagine any event which, if witnessed, would impress itself more indelibly on the mind of a 13 year old boy. The jury had to consider whether the witness was honest and reliable. They concluded that he was both. We can see no reason to question the soundness of that judgment.

We accordingly dismiss this appeal.

Order: Question of point of law of general importance certified. Leave to appeal to the House of Lords refused. Order does not form part of approved judgment.