



Neutral Citation Number: [2022] EWCA Crim 633

Case No: 202102341 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WINCHESTER
Mr Recorder Tait
T20200161

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 May 2022

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE SWEENEY
and
MR JUSTICE COTTER

Between:

MACMILLAN CANCER SUPPORT
- and -
REBECCA TOOGOOD

Respondent
Appellant

Tamasin Graham (instructed by **Fulchers Solicitors**) for the **Appellant**
John Ojakovoh (instructed by **Edmonds Marshall McMahon**) for the **Respondent**

Hearing dates: 17 March 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10am on 11 May 2022.

Lord Burnett of Maldon CJ:

Introduction

1. On 22 June 2021 in the Crown Court at Winchester before Mr Recorder Tait and a jury, the appellant was convicted of two offences of theft and fraud following a private prosecution by Macmillan Cancer Support. On 26 August 2021 she was sentenced to 18 months' imprisonment suspended for 24 months and an unpaid work requirement of 100 hours for the theft and four months' concurrent imprisonment suspended for 24 months for the fraud. She was ordered to pay compensation of £1,500.00 to Macmillan Cancer Support and a Victim Surcharge Order. The prosecution concerned the disappearance of money raised for the charity by a customer of the public house which the appellant managed. It was her case that her former partner had stolen it. The appellant appeals against conviction with leave of the single judge.
2. Macmillan have their own investigators. The primary investigator was Bob Browell. He was asked questions in cross examination about the possibility of the money being in accounts he had not considered. It was not known whether the accounts even existed. The judge allowed the matter to be further investigated and evidence was given the next day by a different investigator, Lee Duddridge. He had assisted Mr Browell in the investigation.
3. There are three grounds of appeal.

Ground 1: The summing up was prejudicial to the defence in that the judge implied that the defence case was logically contradictory when this was not the case;

Ground 2: The judge should have excluded the late evidence of Mr Duddridge in circumstances which prohibited the defence from properly testing it; and

Ground 3: The prosecution disclosed a significant part of the defence and the defence case statement of the appellant to the key prosecution witnesses, Brad Fisher and Jackie Cooper.

Facts

4. The appellant was the landlady of the Butler & Hops public house in Poole, Dorset. Macmillan Cancer Support is a well-known charity which provides support to cancer sufferers and their families. In October 2019 Darren Johnson, a customer of the pub, decided to take part in a Macmillan "Go Sober" event to raise money via sponsorship by abstaining from alcohol for one month. The appellant helped Mr Johnson to register for the event because he did not have an e-mail address. She also printed off the sponsorship forms, which Mr Johnson completed.
5. Mr Johnson gave some sponsorship money to Jackie Cooper, who at the time was the assistant manager of the pub. She kept that money at her flat until she left her job on 4 November 2019. Rumours began to circulate that Ms Cooper had stolen the money. In response to the rumours Ms Cooper counted the money with her friend Louise Woods and then took it to the pub where she handed it to the appellant.

6. Ms Cooper and Ms Woods disagreed over the precise amount they counted. Ms Woods said it was £515 but Ms Cooper thought £485. The money was not counted again when Ms Woods handed it over to the appellant. No receipt was requested or provided. It was placed in a glass behind the bar. Darren Johnson said he collected another £1,000 or so after Ms Cooper left the pub and that he gave that money to the appellant, who kept it behind the bar in a glass.
7. Towards the end of November 2019, the glass containing the money was put into the pub's safe by the appellant for about a week. The appellant and Mr Johnson concluded that no more money would come in and decided it should be paid into Macmillan's nominated bank account at NatWest Bank. Mr Johnson entrusted the task to the appellant.
8. Ms Cooper raised concerns about the whereabouts of the sponsorship money in May 2020 with Macmillan and Marston's Brewery, the owner of the pub. They were passed at Macmillan to Mr Browell and Mr Duddridge. Macmillan believed that they had not received any funds from the sponsorship.
9. In June 2020 Keith Palmer, a manager at Marston's called the appellant. During the phone call, he enquired about the missing sponsorship monies and the appellant told him they had been paid in and that she had a receipt, so she had proof. He passed that information on to Ms Cooper.
10. Ms Cooper sent the appellant a WhatsApp message asking for a photo of the receipt, saying that it would allay rumours. The appellant confirmed that she received the message but felt that Ms Cooper, who had left the pub on bad terms, was trying to stir up trouble. She did not reply.
11. Brad Fisher explained that he was the appellant's ex-partner. They had separated acrimoniously in 2020. That was common ground. He had worked at the pub with the appellant but denied ever being involved in any banking. He said he was not asked by the appellant to bank the Macmillan sponsorship money and denied the defence suggestion that he had stolen the money. He was categorical that he had never banked the pub's takings while he and she were living at the Butler and Hops pub. It was always the appellant who did the banking.
12. Mr Browell sent four recorded delivery letters to the appellant, but she denied receiving any of them. Mr Browell found a Butler & Hops supporters' account with Macmillan that had been set up in September 2012. Nothing was ever credited to it. He described the four letters he wrote to the appellant seeking information about the whereabouts of Mr Johnson's sponsorship money. They were not returned to him. The paying-slip sent to Mr Johnson had a unique reference number but there was no evidence it was ever used. He had also checked with Macmillan's Christchurch branch, but they had not received the sponsorship money.
13. Lee Duddridge searched the Macmillan database the day before he gave evidence. He searched using several terms and found a single account in the name of Mr Johnson which had a registration for a "Go Sober" event in 2019. There was no record of any donation into this account. He did not search for the name "Brad Fisher" so he could not say if any money was received from him. He also gave evidence about a meeting

on 18 May with the prosecution witnesses Jackie Cooper and Brad Fisher, where further witness statements were taken.

14. The appellant gave evidence. She said that she had helped Mr Johnson register for the “Go Sober” event using her email address and that she printed off sponsorship forms, but did not expect to be involved further. After Mr Johnson had completed the event Louise Woods came to the pub and gave her some of the sponsorship money. She thought it was around £400 but she did not count it. She said the money was placed behind the bar while Mr Johnson finished collecting the outstanding sums. When he had finished it was all placed in the pub safe.
15. The appellant confirmed that on 28 October 2019 she emailed Macmillan asking for a paying-in slip, which arrived a couple of weeks later. Before the money was banked, she counted it and completed the paying-in slip. She said the total amount of sponsorship money collected came to £620, and it was placed into an envelope with the paying-in slip. The pub’s banking was done on a Monday, and on this occasion the appellant asked Brad Fisher to do the banking as she was waiting for a beer delivery. She said he took the pub takings to the Post Office as well as the sponsorship money which was to be deposited in the Macmillan bank account.
16. She agreed that she received a phone call from Keith Palmer who asked about the sponsorship money. She said she told Mr Palmer that the sponsorship money had been paid in and there was a receipt. She believed this to be true and assumed the receipt was with the sponsorship forms. The appellant confirmed she received a message from Jackie Cooper in July 2020 asking for a copy of the receipt, but she blocked Jackie’s number, as she believed she was trying to cause trouble. The appellant started looking for the receipt in October 2020 having learned of the prosecution. She denied receiving or signing for any of the four letters sent by Macmillan investigators.
17. The appellant was of previous good character.
18. The appellant called Simon Houghton, a cleaner at the pub, and her son David Toogood. Simon Houghton gave evidence that he was aware of an occasion where Mr Fisher had taken the pub takings to the bank. He was also certain that Mr Fisher sometimes took the pub’s takings to the Post Office on Monday mornings and that he was sometimes accompanied by David Toogood. David Toogood said that on one occasion he had been to the bank with Mr Fisher.

Relevant Rulings

Mr Duddridge’s Evidence

19. During cross-examination, Mr Browell explained that he had investigated:
 - i) Whether or not a fundraising account for the event had been set up by the appellant or the Butler and Hops pub; and
 - ii) Whether or not money had been received, either directly by Macmillan or through their local branch in Christchurch from the appellant or the Butler and Hops pub.

20. He admitted that he had failed to check if a fundraising account had been set up in Mr Johnson's name, or if the sponsorship monies had been received other than as outlined above.
21. The judge allowed the prosecution to investigate this matter further whilst the remaining prosecution witnesses were called. Mr Browell was unable to attend court on the second day and so Mr Duddridge attended to give evidence about the further investigations (see para 13 above).
22. Ms Graham, who appeared then, as now, for the appellant, was given notice of Mr Duddridge's evidence late the evening before he was to be called. Pursuant to section 78 the Police and Criminal Evidence Act 1984 she made an application to exclude his evidence, and also the result of his search of the Macmillan database,
23. Ms Graham submitted that the defence statement clearly stated at para 12 that:

“[t]he defendant assisted Mr Johnson with registering with Macmillan (allowing him to use her email address) and with downloading the fundraising form from Macmillan's website and filling it out.”

Given this information, the investigators could, and ought to, have conducted the searches run by Mr Duddridge before the trial. She submitted that the evidence had been served late, there was a lack of information about the Macmillan database and its reliability. The timing of the evidence gave the defence no opportunity to instruct an expert, and there was no opportunity for the evidence to be properly explored.

24. A copy of the paying-in slip sent to the appellant by Macmillan was not before the court and could not be produced by Macmillan. Ms Graham submitted that the defence could not know the basic parameters of the search needed of Macmillan's systems and database to be sure that the search produced an accurate result. Given the importance of the evidence in establishing whether the money had been received by Macmillan (and thus whether a crime may have been committed), the defence could have instructed an expert to assess both the reliability of Macmillan's system and the sufficiency of the search.
25. The judge declined to exclude the evidence under section 78.
26. Mr Duddridge was asked in cross-examination about a series of hypothetical possibilities, including whether it was possible that the wrong paying-in slip could have been sent out, or the money paid in without a paying in slip. He had not checked whether Mr Fisher or Mr Johnson had independently sent the money to Macmillan or paid it into a different Macmillan account (not linked to the paying-in slip). He was asked whether the money might have been mis-allocated despite the paying-in slip being correct. Mr Duddridge said that paying-in slips were sent out manually and he did not know whether copies were kept. He was asked whether he had checked Mr Fisher's bank account, something, we note, he would have no independent power to do.

Abuse of process

27. At the end of the prosecution case the defence applied to stay the indictment as an abuse of process on the basis that the appellant could not have a fair trial. That flowed from the way in which witnesses had been interviewed following the disclosure of the defence statement.
28. On 18 May 2021 Mr Browell and Mr Duddridge saw Jackie Cooper and Brad Fisher, albeit separately. The background to the meeting was that following the service of the defence statement the solicitors representing Macmillan drafted questions that needed to be asked of the two witnesses in order to produce further witness statements. They summarised the defence statement.
29. Ms Graham submitted that Mr Browell and Mr Duddridge had gone beyond developing reasonable lines of enquiry emerging from the disclosure of the defence statement and:
 - a) influenced their witnesses;
 - b) enabled the witnesses to tailor and adjust their accounts; and
 - c) given them advance notice of the cross-examination that they would likely be subject to.
30. In the alternative she submitted that judicial directions should be given to the jury concerning the fact that the witnesses may have been influenced by Macmillan investigators.
31. The judge ruled that there was nothing improper in prosecution witnesses being advised of the nature of the defence case, or in further evidence being obtained from them to deal with that case. There was nothing in the recorded minutes of the meetings that suggested the witnesses had been coached or encouraged in what to say.
32. The application for a stay was rejected as was the application for judicial directions.

Ground One

33. When summing up the case the judge observed:

“You might think, it’s a matter for you entirely, that she can’t really have it both ways. Either [Mr Fisher] stole it or it’s sitting in a bank account somewhere and it’s never gone missing at all. So, as I say, keep your eye on the ball.”
34. Ms Graham submits that the use of the phrase “have it both ways” suggested to the jury that the defence case was illogical. That was deeply prejudicial. She characterises it as “devastating to the defence”. It was indeed the defence case either that Mr Fisher stole the money or somehow paid it into a Macmillan account. She was not suggesting that it could be both at the same time. Ms Graham further submits that the implication of this comment was that the defence had been wasting the time of the jury.

35. Ms Graham argues that the judge continued what she referred to as his “keep your eye on the ball theme” in further remarks when discussing the evidence of Mr Johnson:

“I asked him, I think it was me, did he know where the NatWest bank in Poole was and he said he hadn’t got a clue, and you might think, it’s a matter for you, but just thinking about [Mr] Johnson, he’s a bit of an old schooler isn’t he? He’s not interested in emails, not interested in the internet and you might think he probably hasn’t got a clue about how you pay money into a bank. So, as I said at the outset, keep your eye on the ball.”

Ms Graham submits that the defence never made any claims that Mr Johnson had paid in the monies raised from the sponsorship himself, although Mr Duddridge was asked whether the money might have reached Macmillan from either Mr Fisher or Mr Johnson, by a route which did not entail use of the paying-in slip.

36. Mr Ojakovoh, for the prosecution, submits that there was nothing offensive about these comments in the context of the way in which the case was argued. Moreover, there is no basis for suggesting that the summing up was so unbalanced or unfair as to call into question the safety of the conviction (see *R v. Gilbey*; unreported 26 January 1990 approved by the Privy Council in *Byfield Mears v. The Queen* [1993] 1 WLR 818 at 882.
37. The judge began by setting out accurately the two main strands of the appellant’s defence as they emerged at trial and then directed the jury appropriately that if, when considering the evidence, they thought that either possibility may be true, then the appellant was entitled to be acquitted. He said:

“...before I pick out what I consider may be the relevant parts of the evidence, keep your eye on the ball members of the jury. It comes down to this really does it not. The Defendant says that she gave the charity money to Brad Fisher. He denies that.

The Defendant says that he, having taken the money to the bank, came back and she believed he had a receipt, although she didn’t look for it until October of last year when she found it wasn’t with the sponsorship forms. That’s one part of the case that is put forward on her behalf that it’s Brad Fisher, naughty man, who’s stolen this money.

On the other hand, it is suggested to you, contrary to that assertion, that the money may well be somewhere in a bank account that nobody knows about or it’s been allocated to the wrong bank account. That seems to be the two possibilities.

Now if when considering the evidence you think that either of those possibilities may be true then this Defendant’s entitled to be acquitted of both of these charges. You might think, it’s a matter for you entirely, that she can’t really have it both ways. Either he stole or it’s sitting in a bank account somewhere and

it's never gone missing at all. So, as I say, keep your eye on the ball.”

38. In our view the judge's comments were designed to focus the jury's attention on the real issues. There was no dispute about the events leading up to the money being placed in the safe at the pub, save for different recollections about the precise amount Mr Johnson had raised. Then the evidence diverged. The appellant said that Mr Fisher set off to the bank with the money and the paying in slip and returned with a receipt of some sort. Mr Palmer gave evidence that the Appellant told him that she had a receipt. Mr Fisher denied being given the money to pay in. The central factual issue for the jury was whether the prosecution had proved that the appellant did not give the money to Mr Fisher. If there was any doubt about that she would have been acquitted. If he had been given the money to pay in there were only two realistic possibilities. The first is that he stole the money. The second is that he had paid it in and had either forgotten he had done so or was deliberately concealing that he had done so. Of course, had he used the paying in slip the appellant says she gave him, then implicit in the first possibility is that the money was not credited as it should have been. Into that mix went the appellant's evidence that Mr Fisher returned with a receipt which, if true, would demonstrate not only that he took the money to the bank, but also paid it in. He said all that was fanciful.
39. Put simply, the central issue for the jury was whether the appellant gave the money to Mr Fisher or not. That was the ball which the judge reminded the jury to keep its eye upon, or as Mr Ojakovoh put it, a colloquial way of reminding them “to focus on the real issues”. Despite Ms Graham's eloquent submissions raised on the use of that phrase there is no substance in this complaint.

Ground Two

40. The judge refused the application to exclude the evidence of Mr Duddridge because the matters that gave rise to it had not been raised in the defence statement and only emerged under cross-examination of Mr Browell. Mr Duddridge was giving evidence about business records on which Ms Graham could cross-examine and make any available points in her closing speech.
41. Ms Graham is critical, with some justification, of the initial failure by Macmillan's investigators to check against Mr Johnson's name and registration details. She submits that Mr Duddridge's evidence that nothing had been credited to his fund-raising account should have been capable of being checked by a suitably qualified expert, who could explore the systems operated, both by the bank and by Macmillan, for ensuring that any money paid in is credited appropriately. She argues that the defence was unfairly hampered in the cross-examination of Mr Duddridge, which revealed numerous failings/insufficiencies in the due diligence of the investigation and which an expert witness could potentially have been able to challenge. She submits that the fault in this matter lay with the prosecution, but that it was the defence that was incorrectly penalised for it by the learned judge when he failed to grant the section 78 application.
42. At both the Magistrates' Court and at the Plea and Trial Preparation Hearing in the Crown Court the appellant indicated that the money had been taken by her ex-partner.

43. By a letter dated 27 April 2021 the solicitors with conduct of the prosecution wrote to the appellant's solicitors reminding them of the need to serve a defence statement and the further disclosure that might flow from it.

44. The unsigned defence statement was served late. In its first paragraph it said:

“This Defence Case Statement is made pursuant to section 5 of the Criminal Procedure and Investigation Act 1996 (CPIA 1996). This document should not be taken as a detailed statement of the complete defence case. It is designed to highlight the issues of the case with a view to assisting the prosecution to consider whether there is further information to disclose in accordance with their statutory obligations under the CPIA 1996.”

It continued by stating:

“6. The defendant is of good character.

7. The defendant denies the charges categorically.

8. The defendant believes the money to have been stolen by Brad Fisher, the defendant's then partner.”

45. Under the rubric “Defendant's account of events” it continued:

“The defendant assisted Mr Johnson with registering with Macmillan (allowing him to use her email address) and with downloading the fundraising form from Macmillan's website and filling it out.”

and

“On the Monday concerned, the approximately £620 of monies gathered from Mr Johnson's fund-raising activities were taken from the safe by the defendant, along with the public house's cash takings, and given to Mr Fisher to pay into the bank. In the case of the public house's takings, the money was to be paid into the Post Office. The money for Macmillan was to be paid into NatWest.

The defendant naturally assumed that the monies had been paid into Macmillan's account and thought nothing further of it.”

46. The Defence statement requested further disclosure of a wide-ranging nature. Much of it related to Mr Fisher, including his grandfather's medical records so as to determine whether he was a cancer sufferer supported by Macmillan, all correspondence between Marston's and Mr Fisher and documents relating to a separate allegation made by the appellant against Mr Fisher. It expressly included a request for:

“(a) copies of all correspondence, application forms and any other information received by Macmillan Cancer Support relating to Mr Johnson’s GoSober fundraising event;

(b) a copy of the email submitted by Ms Cooper through the Marston’s Recruitment portal on 6 May 2020.”

There was no request for documentation,

- (a) concerning the payment in of money by either Mr Fisher or Mr Johnson, or
- (b) the banking process at the Poole branch of the bank or internal processes at Macmillan.

We note that category (a) refers to documents *received* (as opposed to sent) by Macmillan. It would not have covered records relating to, or a copy of, the paying-in slip sent to Mr Johnson (on which Mr Duddridge was cross-examined). It would also not have covered the Macmillan database, the adequacy and/or reliability of which was subsequently raised during the trial.

47. The matters which must be included in a defence statement are set out in section 6A of the Criminal Procedure and Investigation Act 1996, the relevant provisions of which are:

“(1) For the purposes of this Part a defence statement is a written statement—

(a) setting out the nature of the accused’s defence, including any particular defences on which he intends to rely,

(b) indicating the matters of fact on which he takes issue with the prosecution,

(c) setting out, in the case of each such matter, why he takes issue with the prosecution,

(ca) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence, and

(d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

48. The Attorney General’s Guideline on disclosure [2020] states:

“121. Defence statements are an integral part of the statutory disclosure regime. A defence statement should help to focus the attention of the prosecutor, court and co-defendants on the relevant issues in order to identify material which may meet the test for disclosure. The defence must serve their defence

statement in a timely manner, in accordance with any court directions made.”

49. It is striking that the defence statement did not join issue with the prosecution case that Macmillan did not receive Mr Johnson’s sponsorship money. The defence statement should have made it clear if that was the case: *R v. Rochford* [2011] 1 Cr. App. R. 11. The reality is that the defence statement focused on what was always the main issue: did the appellant give the money to Mr Fisher to pay into the bank?
50. The essential reason why the judge concluded that the prosecution should be able to investigate the issues raised in cross-examination of Mr Browell was that they had not been flagged in the defence statement and it was thus reasonable to enable further inquiries to be made overnight. He refused to exclude the subsequent evidence of Mr Duddridge because there was no unfairness. Ms Graham was able to explore in cross-examination various hypothetical possibilities which allowed the money to have been paid in by Mr Fisher (and even by Mr Johnson) but to have been lost in either the system of the bank or Macmillan.
51. The possibility that the money had been paid into the bank by Mr Fisher, rather than stolen by him, was first raised in the cross-examination of Mr Browell on the afternoon of the first day of trial. It does not appear to have been canvassed with Mr Fisher that he paid the money into the bank and provided the appellant with a receipt. We think it was entirely appropriate for the judge to allow the further investigations and to conclude that the evidence should be laid before the jury. We are also not persuaded that the appellant suffered any prejudice at the hands of the prosecution through an inability to instruct an expert. There is an air of unreality about the possibility of expert involvement. If money had been paid in using the correct paying in slip then, in the usual way, the bank’s automatic system should credit the funds to the account identified and with the reference identified. Of course, things go wrong from time to time, but it is difficult to envisage what an expert could have said about the efficacy of the bank’s automated paying in systems. That would have been well outside the scope of any trial. To look, with or without the help of an expert, at some other supposed mishap would depend upon a credible evidential basis from which to start. The real problem here was that there was no such basis. We come back to the appellant’s case that she gave the money and the payslip to Mr Fisher and he returned with a receipt; and his evidence that no such thing happened.
52. The judge was right to reject the application to exclude the evidence of Mr Duddridge.

Ground 3

53. In Mr Fisher’s first witness statement he said that the Macmillan investigators had told him on 11 November (the date that he first became involved in the case) that it was the appellant’s defence that he was responsible for the missing money. He accepted during cross-examination that the Macmillan investigators had taken him through the appellant’s defence statement in a meeting held on 18 May 2021, although not given him a copy or read it to him. The statement contained considerable detail of what was said by the appellant to have occurred: see para 45 above.

54. A document entitled “64. Meetings Note 18 May 2021 JCandBF.pdf”, which was part of the prosecution’s unused material, records that both witnesses (Ms Cooper and Mr Fisher) were given a summary of the appellant’s defence (rather than the defence statement itself).
55. The argument advanced by Ms Graham before the judge was that this confirms that at least a significant portion of the defence statement must have been disclosed to Ms Cooper and Mr Fisher, with the result that the Macmillan investigators:
- a) influenced Mr Fisher and Ms Cooper;
 - b) facilitated Mr Fisher in tailoring and adjusting his accounts; and
 - c) gave Mr Fisher and Ms Cooper advance notice of the cross-examinations that they would likely be subject to.

She submitted that that the jury could no longer reliably assess the truthfulness of Mr Fisher because he had been “irrevocably tarnished as a witness through advance and detailed knowledge of the defence case about him”. She argued that the prejudice to the defence was plain and obvious. Ms Graham did not identify any specific problems with the evidence of Ms Cooper. Alternatively, she submitted that a special warning should be given by the judge.

56. She argues before us that that this was particularly significant in relation to Mr Fisher given the nature of the defence case and that:
- a) Mr Fisher had been made aware by Macmillan’s investigators from the outset that it was the appellant’s belief that he had stolen the money; and
 - b) Macmillan’s investigators subsequently went through significant parts of the appellant’s defence statement with Mr Fisher prior to him giving his second witness statement.

57. Giving his reasons for rejecting the application the judge stated:

“The purpose of this meeting was to gather further evidence, which if appropriate could be put into witness statements and that is what subsequently happened.”

and

“So, I see nothing in those notes or in the evidence that I have heard which suggests that there has been any impropriety at all as far as the witnesses were concerned. As I say, in my experience this is commonplace to meet Prosecution witnesses to discuss matters with them to see if they can add further to the evidence they have already put into witness statements and that, in my judgment, is what happened in this case.”

and

“Alternatively, the Defence submit that I should give judicial directions to the jury about the fact that the witnesses may have been influenced by the Macmillan’s investigators and the impact of these difficulties on the proper preparation and conduct of the Defence and that I should direct the jury to take these fully into account before deciding whether the evidence demonstrates the Prosecution case has been proved. I reject that invitation as well. I see no reason to give any directions along those lines having already come to the conclusion that the investigators have done nothing improper and that what they did was just simply following proper lines of enquiry in the conduct of their investigation.”

58. Mr Ojakovoh submits that the meeting notes do not suggest that all, or a significant portion, of the defence statement was disclosed to Ms Cooper. Rather, each witness was given an “unobjectionable, short summary of the defence”.
59. One of the purposes of a defence statement is to enable the prosecution to pursue reasonable lines of inquiry. Indeed, it is the duty of the prosecution to do so, not least because further inquiries may produce evidence that undermines the prosecution. The exercise may involve raising issues disclosed within it with prosecution witnesses and seeking evidence from them, which is then reduced into further witness statements. It may lead to approaches to new witnesses. For example, the defence statement now covers the ground formerly found in alibi notices which should be investigated; so too details supporting a defence of self-defence.
60. Ms Graham’s concerns focus on Mr Fisher and the detail found within the defence statement that went beyond the high-level assertion that he took the money. We agree with the judge that it was entirely appropriate for evidence to be obtained from Mr Fisher concerning the detail of what the appellant said occurred on the day in question and more generally on arrangements for the banking of the pub’s taking. This is in substance no different from taking a witness statement from a complainant in a case of violence when details are given of a defence of self-defence.
61. Ms Graham relied on the decision of the Court of Appeal in *R v. Momodou and another* [2005] 2 All ER 571. In that case it was agreed that there had been inappropriate witness coaching. At para. 61 Judge LJ said:

“... This is the logical consequence of the well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness: see [authorities cited]. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. [...] An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered

perception of events. A dishonest witness will very rapidly calculate how his testimony may be “improved”. ... ”

The appellant’s concern is different. The complaint is not that prosecution witnesses colluded or shared information with the risk of influence upon each other’s evidence, rather that witnesses were informed of the nature of the defence case so that they could make further statements. There was nothing improper in that. There is no question of an abuse of process; nor was a direction needed, of a sort that was necessary in the *Momodou* case.

Conclusion

62. There is no merit in any of the grounds of appeal either individually or cumulatively. The conviction is safe. The jury was sure that the appellant’s account of giving the money to Mr Fisher to pay into the bank and his returning with a receipt was a fabrication. There was no other plausible explanation available to explain the disappearance of the money raised for Macmillan by Mr Johnson other than that the appellant stole it. The appeal will be dismissed.