

FUNCTION OF THE JURY

Your function as the jury is to determine the facts of this case. You are the sole and exclusive judges of the facts. You alone determine what evidence to accept, how important any evidence is that you *do* accept, and what conclusions to draw from all the evidence. You must apply the law as I give it to you to the facts as you determine them to be, in order to decide whether the Commonwealth has proved the defendant guilty of this charge (these charges).

You should determine the facts based solely on a fair consideration of the evidence. You are to be completely fair and impartial, and you are not to be swayed by prejudice or by sympathy, by personal likes or dislikes, toward either side. You are not to allow yourselves to be influenced because the offense(s) charged is (are) popular or unpopular with the public.

You are not to decide this case based on what you may have read or heard outside of this courtroom. You are not to engage in any guesswork about any unanswered questions that remain in your mind, or to speculate about what the “real” facts might or might not have been.

You should not consider anything I have said or done during the trial — in ruling on motions or objections, or in my comments to the attorneys, or in questions to witnesses, or in setting forth the law in these instructions — as any indication of my opinion as to how you should decide the defendant's guilt or innocence. If you believe that I have expressed or hinted at any opinion about the facts of this case, please disregard it. I have no opinion about the facts or what your verdict ought to be. That is solely and exclusively your duty and responsibility.

In short, you are to confine your deliberations to the evidence and nothing but the evidence.

Commonwealth v. Smith, 387 Mass. 900, 909-910, 444 N.E.2d 374, 381 (1982) (verdict must be based on evidence and not sympathy); *Commonwealth v. Fitzgerald*, 376 Mass. 402, 424, 381 N.E.2d 123, 138 (1978) (verdict may not be based on sympathy for victim or general considerations); *Commonwealth v. Clark*, 292 Mass. 409, 411, 198 N.E. 641, 643 (1935) (jury should be both impartial and courageous); *Commonwealth v. Anthes*, 5 Gray 185, 197-198 (1855) (jury's judgment is conclusive of facts in case); *Commonwealth v. Carney*, 31 Mass. App. Ct. 250, 254, 576 N.E.2d 691, 694 (1991) (approving charge not to use judge's questions or statements to determine how judge feels case should be decided, since judge has no right to interfere with jury's duty to find the facts and determine where the truth lies); *Commonwealth v. Ward*, 28 Mass. App. Ct. 292, 296, 550 N.E.2d 398, 401 (1990).

SUPPLEMENTAL INSTRUCTIONS

1. Prejudice.

Your verdict must be based solely on the evidence developed at trial. It would be improper for you to consider any personal feelings about the defendant's race, religion, national origin, sex or age.

It would be equally improper for you to allow any feelings you might have about the nature of the crime to interfere with your decision. Any person charged with any crime is entitled to the same presumption of innocence, and the Commonwealth has the same burden of proof beyond a reasonable doubt, as I (have discussed) (will discuss in a moment).

The fact that the prosecution is brought in the name of the Commonwealth entitles the prosecutor to no greater consideration and no less consideration than any other litigant, since all parties are entitled to equal treatment before the law. The people of this Commonwealth always win when justice is done, regardless of whether the verdict is guilty or not guilty.

It must be clear to you that once you let prejudice or sympathy, or fear or bias, interfere with your thinking, there is a risk that you will not arrive at a true and just verdict. Your oath as jurors was that you will perform your duty of finding the facts without being swayed by bias or prejudice toward either side. The word “verdict” comes from two Latin words meaning “to tell the truth,” and that is what the law looks to your verdict to do.

Portions of this instruction are adapted from L.B. Sand, J.S. Siffert, W.P. Loughlin and S.A. Reiss, *Modern Federal Jury Instructions* §§ 2-5, 2-11 and 2-12 (1985).

2. Sympathy. In many criminal cases there is an element of sympathy which surrounds the trial. Many incidents elicit sympathy for the alleged victim. And when somebody is charged with a crime, that too elicits sympathy. Here at the trial there are people who are friends and family of the alleged victim, friends and family of the defendant. Obviously, these proceedings have a profound effect on both families. And it may well be that both families are deserving of sympathy, but not in a courtroom and not by a jury, because sympathy is grounded in

emotion and a jury must consider only facts.

You all know that this would be a pretty sad world without sympathy, but the courtroom is not the place for that sympathy. Even more important, your jury room is not the place for that sympathy. When you decide this case, you must decide this case on the basis of the facts as you find them. You must disregard sympathy and emotion, and you must focus on facts and facts alone.

The model instruction is drawn from *Commonwealth v. Harris*, 28 Mass. App. Ct. 724, 733 n.5, 555 N.E.2d 884, 889 n.5 (1990). It may be appropriate where the trial is for a particularly emotional offense, such as vehicular homicide.

3. Juror equality.

No juror is better qualified to determine the truth of the facts in controversy or to deliberate upon a verdict solely because of that juror's occupation or reputation.

G.L. c. 234A, § 70 provides that this instruction must be given upon motion of either party or whenever the court deems it appropriate. *Commonwealth v. Oram*, 17 Mass. App. Ct. 941, 942-943, 457 N.E.2d 284, 285-286 (1983).

4. Judge's questions.

I want to reemphasize my request that you draw no conclusions from the fact that on occasion I asked questions of some witnesses. I intended those questions only

to clarify or expedite matters. They were not intended to suggest any opinions on my part about your verdict or about the credibility of any witness. You should understand that I have no opinion as to the verdict you should render in this case.

5. Sentencing consequences.

Your function as the jury is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. By contrast, my function as the judge is to impose sentence if the defendant is found guilty. You are not to consider the sentencing consequences of your verdict at all, so please put any issues about sentencing out of mind.

Shannon v. United States, 512 U.S. 573, 579, 114 S.Ct. 2419, 2424 (1994); *Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095 (1975).