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COURT DISMISSES APPEAL AGAINST CONVICTION FOR 1985 OFFENCES

Summary of Judgment

The Court of Appeal[1] today dismissed an application by Paul Pius Duffy to admit fresh evidence relating to his convictions in connection with the murder by the PIRA of Catherine and Gerard Mahon in 1985. The court also said it was satisfied as to the safety of his convictions after pleas of guilty and dismissed the appeal.

On 8 September 1985, Catherine and Gerard Mahon were murdered by the Provisional IRA ("PIRA"). They had been removed from a place of unlawful detention to another address in a taxi where they were then taking into an alleyway by three men and shot dead. The killers went back to the taxi where they were driven away. A short distance later, the taxi broke down and the men, including the driver, made off on foot. Initially, the RUC arrested and questioned a man AB as the suspected taxi driver. He remained silent throughout interview and was released without charge. In March 1991, CD was arrested on suspicion of planting incendiary devices in Belfast and at interview he said that it was Paul Pius Duffy ("the appellant") who drove the taxi (CD subsequently withdrew this with the result that the appellant's trial ran solely on the basis of his confession secured by the RUC).

The appellant was arrested on 24 July 1991 and was questioned for a period of 17 hours over five days. On 25 July he confessed to a role in the murder of the Mahons and made further admissions in the consequent days until he was charged on 28 July. During this time he was not permitted access to a legal representative. By the time his trial began on 20 April 1993, he had reneged on his confession evidence and pleaded not guilty to all the charges before him. A *voir dire* took place at the start of the trial which lasted for 16 days. On the morning of 17 May, the appellant asked to be rearraigned at which time he pleaded guilty to two counts of manslaughter, two counts of false imprisonment, one count of belonging to a proscribed organisation, three counts of possession of firearms with intent, two counts of possession of an explosive substance with intent and one count of conspiracy to murder. He was sentenced to ten years imprisonment for conspiracy to murder to run concurrently with the sentences for the other offences. The appellant did not appeal against his conviction.

In 2023, the appellant made an application to admit fresh evidence consisting of three medical expert opinion reports, interview notes in respect of the arrest and interview of AB, a gist of the complaint files in respect of his interviewing officers in other cases, and affidavit evidence sworn by the appellant. The appellant contended that each aspect of the fresh evidence, taken individually or together, was capable of belief and may afford a ground for allowing the appeal which should ultimately lead the court to query the safety of the conviction.

[1] The panel was Keegan LCJ, Horner LJ and Sir Donnell Deeny. The LCJ delivered the judgment of the court.

The court outlined the limited circumstances in which an appellate court has the power to set aside a guilty plea. The three categories[2] are:

- The first category - where the plea was unintended, compelled by pressure or threats, or incorrect legal advice given.
- The second category - where there was a legal obstacle to an accused being tried (such as an abuse of process) or there was a breach of the accused' right under article 6 ECHR.
- The third category – where it is established that the appellant did not commit the offence as the admission made by the plea was a false one.

In this case, the appellant focussed his argument on the first and second categories.

On the first category, he submitted that his plea was entered on the basis of the trial judge's apparent comment that "neither side will get what they want", claiming this resulted in improper pressure on him and his defence counsel seeking a plea for a lower sentence. The court said this was a difficult argument to make out. It had not been made in the grounds of appeal against the trial judge. The court added that "neither side getting what they want" would not have been such an adverse comment from the trial judge as to compel the appellant's defence counsel to seek an agreement with the prosecutor. This was even more so as the appellant had the benefit of experienced and highly respected counsel (which he himself accepted): "It is patently too great a leap to suggest that the defence counsel, who were well-experienced with the cut and thrust of the trial process, would have been so concerned by what was at most an off-the-cuff comment, that they re-evaluated their entire defence strategy."

On the second category, the appellant pointed to three aspects of the investigation and trial process that he averred amounted to an abuse of process and amounted to a breach of his fundamental right to a fair trial:

- First, the interview process amounted to an abuse of process as made clear by the conclusions of the expert reports.
- Second, there was an abuse of process when the interviewing officers misled the court when viewed alongside the statement-taking process of the RUC and the interviewing officers' denials of coercion or general oppression.
- Third, there was a basic failure to make full disclosure of the relevant materials that were withheld from the DPP, the defence and the trial judge (in relation to the complaint files and the AB interviews).

The first argument relied on the conclusion of the expert reports. The court said these can only act as one piece of the puzzle and the experts' ex post facto opinions were undermined by the actual evidence given at trial. Two doctors who saw the appellant when he was being interviewed in 1993 gave evidence that the appellant had not complained of abuse and had declined medical examinations. The appellant contended that he had "complained contemporaneously to the doctor in the police station" but the court said it now knew this to be untrue.

The court also commented that the appellant had not given testimony before it to allow it to be satisfied that he had established a valid case of ill treatment (he had provided a medical certificate

[2] These categories were set out in *R v Tredget* [2022] EWCA Crim 108

warning against him testifying). It said the ill-treatment was inconsistent with the transcripts of evidence and this was not enough to ground a reliable case of coercion. It was therefore obvious that without the benefit of a positive case from the appellant, the expert evidence was not capable of belief in terms of establishing the appellant's individual case and there was therefore no basis to conclude that there was an abuse of process.

The second argument concerned the *voir dire* process itself. The appellant claimed the interviewing officers were "caught out in lie after lie." The court said that, if the appellant was right, this would not have gone unnoticed by his counsel or the trial judge. The re-arraignment happened before the conclusion of the *voir dire* process and the trial judge had not made his ruling on the admissibility of the evidence. The court said there was no doubt that the appellant changed his plea having received fair and frank legal advice from his counsel, but to say that there was an abuse of process because he did not like the direction that the hearings were headed was to ignore the fact that his counsel had the opportunity to cross-examine each of the interviewing witnesses in turn.

The third argument was that the lack of prompt disclosure frustrated the defence's efforts at trial. The appellant highlighted three pieces of evidence: (i) the late disclosure of information from Special Branch of telephone messages from 1985 relating to the murders; (ii) the AB interviews; and (iii) the complaint files of the interviewing officers. He claimed the disclosure of the messages did not happen until three weeks after the commencement of the *voir dire*, however the utility of the information did not become apparent until viewed alongside information disclosed by the PPS on 9 September 2021 about police holding information dating from September 1985 which suggested that the Mahons were taken in a taxi being driven by AB. Viewed in conjunction with other information which named AB as a potential suspect, the appellant contended that his defence team would have been able to establish that damage was caused to AB's taxi and would have placed the defence in a much stronger position to contest the admissibility of the confession evidence by providing an alternative suspect. The submission on disclosure was that the appellant pleaded guilty whilst unaware of material that went to the heart of the credibility of the interviewing officers at trial and provided clear evidence of a viable alternative suspect who had been arrested and interviewed for performing the very role that the appellant's confession related to.

The court was unpersuaded as to the merits of the non-disclosure claim. It said the AB interview material had to be seen in the context that considerable material was available at trial which allowed the appellant to make an informed choice. It said there was no evidence that the DPP or prosecution team withheld vital disclosure and that the additional information was not of such a fundamental nature to establish a case of non-disclosure. In any event, the court observed that this argument could only avail the appellant in relation to the manslaughter charges against the Mahons. It said his other convictions for terrorist offending would not be affected and so overall it could not be said that a miscarriage of justice arose even on the appellant's own case. The court was therefore unpersuaded that this case came within any of the categories which enable a court to look behind a plea of guilty.

The remaining arguments based upon the expert reports also could not avail the appellant. The court accepted the points made in the reports that the questioning and conditions at the time at Castlereagh are open to criticism in various respects. This was not a new argument in the courts, neither was it an argument that can automatically upset a historic conviction of itself without an evidential basis. This is particularly so in a case such as this where a guilty plea was entered. The

court concluded that the expert evidence did not persuade it that the appellant was forced into entering a plea of guilty and that none of the categories to set aside a guilty plea were made out.

The court addressed the questions relating to the test to adduce fresh evidence as follows:

> "The fresh evidence from the experts is on the face of it capable of belief as subjective opinions in relation to historic practice and procedure. However, we do not consider that the fresh evidence affords a ground for appealing. That is because none of the expert reports persuade us as to why we should vitiate a plea of guilty freely given and the appellant himself has not convinced us that he meets any of the tests for when such a plea should be vitiated. Whilst the reports may now be admissible as a subjective opinion as to past events this evidence would not have been available and therefore not admissible at the trial on an issue which is the subject of the appeal. There is no reasonable explanation for the failure to adduce the evidence at the trial for obvious reasons as the reports are an *ex post facto* overview of historic events."

The court did not consider that the fresh evidence, if it had been given at trial, could reasonably have affected the decision of the trial jury to convict. It said it was therefore not necessary or in the interests of justice to admit the fresh evidence and refused the applications. The court had considered the transcripts of the trial in detail and its firm view was that the materials from the trial did not help the appellant as it did not consider this was a case of coercion by virtue of alleged ill treatment or that undue pressure brought to bear by the judge was made out. Additionally, the complaint files added nothing of substance:

> "Rather, as we have stressed, the undeniable truth is that the appellant made his own free choice to plead guilty having been offered reduced charges. He may regret his choice now many years later but that is not sufficient to overturn a conviction."

Finally, the appellants affidavit could not found a valid basis for an appeal.

In summary, the court found:

- The appeal must be seen in the context of a lengthy challenge to the admissions in a *voir dire* lasting 16 days. The appellant was represented by senior counsel, no complaint was made as to the timing or nature of the advice, nor that there was pressure applied by counsel or interference from the trial judge. In particular, the appellant had been cross-examined in the *voir dire* for a lengthy period and was fully aware of the issues involved and the relative strengths and weaknesses of the respective prosecution and defence case.
- The trial judge had not made a ruling in respect of the *voir dire* and, therefore, this was not a case where an adverse (and erroneous) ruling was made. This made it legally impossible or very difficult to maintain a defence.
- The appellant was not denied disclosure of material. The prosecution provided a gist of the material in order to supply the appellant with information as to who else had been named as the driver of the taxi and in what circumstances. Further, there was no evidence that the DPP or prosecution team withheld vital disclosure or that the appellant sought to make further requests for disclosure.
- Whilst there was no evidence that AB's interviews were disclosed it was reasonable to assume that the appellant's then counsel, once provided with the gist of the intelligence material would have enquired with the prosecution or raised the issue with the court as to

whether the persons named were interviewed by police. There were numerous detectives questioned over many days who undoubtedly had the appellant's case put to them and any matters arising from the disclosure could have been put to witnesses or into evidence.

- Whilst the appellant complained about the absence of disclosure of complaints in respect of the interviewing officers, none of these complaints were ultimately established. In addition, the appellant did not provide credible and comprehensive evidence of complaints at the time. Therefore, it was not likely that the trial judge would have placed significant or any weight on untested allegations.
- In respect of the expert evidence, at the time of trial this would not have been in existence. There is no issue of non-disclosure as the methods of interrogation deployed were not uncommon at that time.
- The appellant could have elected to continue with the challenge to his admissions but made a tactical decision to approach the prosecution with regard to pleas to manslaughter; this approach conferred a significant benefit to him with regard to sentence.

Conclusion

The court made the following comments in dismissing the appeal:

> "The interests of justice require that those who are involved in the criminal process should make their case at their trial. Where a guilty plea is entered it is only in highly circumscribed circumstances that it can be vitiated. This preserves the certainty of the justice system. In parallel to preserving certainty all courts must be alive to the fact that miscarriages of justice can occur. We have kept this possibility clearly in mind when deciding this case. As such we have considered all of the arguments made with great care and decided this case on the basis of its own facts. Having done so we do not consider that there was any unfairness in this case by reason of any failure of disclosure or alleged coercion which would lead us to vitiate the guilty plea.
>
> The outcome in cases of this nature will depend on the facts. Critically, in this case we know that the appellant was represented by experienced counsel in whom he had complete confidence. No appeal was advanced or recommended by the lawyers representing the appellant, most likely because he received a much-reduced sentence in not having to face the murder charges. The appellant took no further steps for some 25 years and cannot now come into court to try to revoke a choice freely made to plead guilty to a series of offences.
>
> Therefore, equipped with the full facts, we as a full court do not find a sound basis for extension of time for appeal. Additionally, we do not consider the applications to admit fresh evidence should succeed. For the reasons we have given we are satisfied as to the safety of these convictions after pleas of guilty. Accordingly, we dismiss the appeal."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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