Judicial Communications Office

22 December 2025

COURT DISMISSES APPEAL BY RAYMOND O'NEILL

Summary of Judgment

The Court of Appeal[1] today, dismissed an appeal by Raymond O'Neill against his conviction for the murder of Jennifer Dornan and arson.

Background

Jennifer Dornan ("the deceased"), aged 30, died after being stabbed three times at her home in Dunmurry in the early hours of the morning of Sunday 2 August 2015. Her home was also set on fire. During the previous evening, Raymond O'Neill ("the applicant") had been socialising with the deceased. CCTV from a neighbouring house showed a man entering the deceased's home at 03:11 hrs, approximately 20 minutes after the deceased had returned home. He climbed over her front fence and went to the rear of the house where he gained access through the back door. He had pulled his coat up over his face and head as he passed the camera. The coat was relatively distinctive in that it had a large square or rectangular pocket with a flap on its lower front. It had no hood and appeared to be light toned.

Over the next hour or so, the intruder was captured on CCTV, appearing outside the deceased's house on a number of occasions. Each time, he returned to the house. He left at 04:18 hrs, just after a source of light could be seen in the upstairs front windows of the house. A few minutes later, flames became visible. Further CCTV showed the man leaving the area. On 10 August 2015, a knife was found nearby which matched the set found in the deceased's kitchen. DNA matching that of the deceased was recovered from its cutting edge. The applicant owned a cream coat which bore similarity to the coat worn by the murderer, and he was wearing that coat on 2 August. That coat was not seen in his possession again and was never recovered. The applicant was seen later that morning without his coat even though it was raining heavily. A witness said the applicant asked for his jumper and jeans – he refused but gave him a Barcelona football shirt that he was wearing under his jumper.

Also, material was the applicant's interaction with his nephew, Shane O'Neill. CCTV showed the applicant arriving at his nephew's home at 05:33 hrs wearing a Barcelona football shirt. Mr O'Neill gave evidence that he was woken up by his uncle who asked him to take him to the shop so he could get some drink. The applicant then went to another house where he stayed the night. Then the applicant left the jurisdiction and travelled to the Republic of Ireland. He was apprehended and extradited to Northern Ireland in November 2018. The applicant gave evidence at his trial. He claimed to have suffered a stroke due to being poisoned by prison staff in Portlaoise with an overdose of methadone in October 2016. He said that, as a result, he had lost his memory of everything that had occurred on the night of the murder. No medical evidence was called to support his claims.

On 8 April 2022, the applicant was convicted by a jury of murder and arson with intent. He was sentenced to life imprisonment with a minimum term of 22 years. A concurrent indeterminate

[1] The panel was Keegan LCJ, McCloskey LJ and Fowler J. Keegan LCJ delivered the judgment of the court.

sentence with a minimum period of seven years was imposed in respect of a count of arson. He sought leave to appeal against his conviction on eight grounds.

Ground 1: Prosecution impeaching its witness

Counsel for the applicant contended that the evidence of Suzanne Hazley, the former partner of Shane O'Neill, ought to not to have been admitted as it offended the common law and section 3 of the Criminal Law Procedure Act 1865) ("the 1865 Act").

This ground of appeal arises in the following context. On 9 March 2022, Mr O'Neill gave evidence at the trial as a prosecution witness. On reading about his evidence on social media, Ms Hazley contacted the police. She said she was present when the applicant had arrived at their home on the night of the murder. She heard the applicant confessing to her partner that he had killed someone, elaborating "… it wasn't him. It was the drink and drugs that made him do it." Mr O'Neill had told her at the time not to say anything of what she had heard. Ms Hazley then heard her partner and the applicant go to the back garden and diesel or petrol containers being lifted and banging off each other. The containers were taken through a gate to the front to the front of the house. She then heard her car leave with Mr O'Neill driving. The following morning, she asked her partner about what had happened and he told her that the applicant thought he had killed someone and they went for a drive to where the man was supposed to have been left, but the man was not there so they assumed he was ok. The following day, they took their young son to a park, and Mr O'Neill drove to a secluded country lane near Lisburn. Ms Hazley said her partner appeared to be looking to see if there was anything on the ground. Her evidence laid the ground for an inference that the applicant and Mr O'Neill had combined to destroy incriminating evidence.

Having considered the relevant case law in paras [39] – [53], the court was satisfied that the prosecution's overarching purpose in seeking to elicit evidence from Ms Hazley was to illuminate several highly important factual issues bearing on the conduct of the applicant in the wake of the killing, all of them central to the issue of guilt or innocence. The court was satisfied that, at the stage when Mr O'Neill gave his evidence, the purpose of the prosecution was plainly not to attack the credit of his worthiness or honesty. In a context where this prosecution witness had already given evidence and had done so broadly in accordance with expectations, the prosecution had no reason for seeking to do so. Rather, the primary purpose of adducing the evidence of Ms Hazley was to incriminate the applicant: "The predictive probative value of this evidence was clear beyond peradventure." Furthermore, the course which the prosecution pursued upon receipt of Ms Hazley's account was to seek to adduce this in evidence in accordance with the prosecution duty to adduce all relevant evidence.

The court then considered the effect of Ms Hazley's evidence. It found that her evidence almost certainly cast a shadow over the evidence of Mr O'Neill, but this did not detract from the effect of the evidence to fortify the prosecution case against the applicant. The requirement which had to be observed by prosecuting counsel in his closing presentation was that of avoiding any impeachment of the character of Mr O'Neill. Counsel invited the jury to accept certain aspects of Mr O'Neill's evidence while rejecting other aspects. In making this distinction, counsel did not employ the language of unreliable, untruthful or not credible which the court considered was harmonious with the restrictions to which he was subject by law. The court concluded that prosecution's closing was fair and balanced.

In this case, the contradiction between the evidence of Mr O'Neill and that of Ms Hazley was unrelated to any previous inconsistent statement of his. Rather, the contradiction arose out of critical omissions in Mr O'Neill's witness statements and sworn testimony and was contradicted by the account which became available from Ms Hazley. The omissions related to the applicant's account of having murdered someone and the further conversation between Mr O'Neill and the applicant and the conduct of both. In determining this ground of appeal, the court was satisfied that the fairness of the applicant's trial was in no way impaired by the ruling of the trial judge on this matter or the evidence of Ms Hazley which followed. Whilst the leave threshold was met the court found ground of appeal to be without merit and so it was dismissed.

Ground 2: non–admission of evidence about an army officer

This ground of appeal arose as the applicant contended that the judge erred in prohibiting cross-examination to elicit the employment status of a British Army captain who was registered to a telephone number ending in '440.' From late 2013, the deceased had been receiving sexually harassing communications and threats to her life and that of her mother from telephone numbers ending in '974', '369' and '399.' She reported these calls to police in September 2013 and again in January 2014 at which time she had also received a text from '369' suggesting that she "ring him" on a number ending in '440.' The deceased reported she had not been in contact with the '440' number nor had it been in contact with her. By 30 April 2014, the deceased reported to police she had received no further communications and there was no more contact from any of these numbers up to her death.

There was considerable agreement as to the facts arising from these threats and other threats to the deceased and her ex-partner from dissident organisations that could be placed before the jury. The prosecution did not object to the defence cross-examining the investigating officer concerning these threats. The issue in dispute was specifically whether employment as a captain in the British Army could be elicited before the jury. The defence contended that the fact the number ending in'440' was registered to an army captain was relevant because it raised the possibility that someone was aware of contact between the deceased and the captain which may have provided a motive to cause her harm, either based on suspicion she was providing information, or simply such an association would be extremely unwelcome within her community. The prosecution argued that the captain's employment was irrelevant hearsay evidence.

The judge addressed this issue in a written ruling[2], where he considered that the introduction of the employment of the captain was designed to invite the jury to speculate the deceased may have been killed because she was an informant. He considered there was no evidence to support this and that to introduce this before the jury was simply to invite them into speculation unsupported by evidence. The judge concluded that the captain's occupation was irrelevant to the issues in the case and his connection, if any, was too tenuous to be of any relevance.

The court held that the judge's approach was undoubtedly correct. The judge had allowed the issues surrounding the sexually harassing phone calls and text messages to be explored and weighed in the balance by the jury with only the occupation of the captain excluded as irrelevant hearsay. The court considered the judge's findings in this regard to be unimpeachable and refused leave on this ground.

Ground 3: Refusing the admission of non-applicant bad character evidence

[2] *R v O'Neill (Ruling number 6*) [2022] NICC 10

Kevin McCaughley was a prosecution witness who lived opposite the deceased's home. Police asked neighbours if they had any CCTV installed and Mr McCaughley said he had but the equipment had been removed before the murder took place. Mr McCaughley provided a statement in which he said he had seen the applicant wearing a cream jacket on the night of the murder. During the trial it became clear that this evidence was incorrect as CCTV footage established that the applicant was wearing a black fleece at the time. Accordingly, the prosecution did not seek to rely on Mr McCaughley's evidence concerning the cream jacket and would have agreed not to call him to give evidence. The defence however required him to testify.

The prosecution disclosed to the defence that Mr McCaughley had four convictions all of which arose out of his connection to the killing of two British Army corporals, Cpl Woods and Cpl Howes, in 1988. The defence sought leave to adduce evidence of his bad character and the fact that he had been founded guilty of grievous bodily harm with intent and false imprisonment of the corporals. Also, that during the trial the judge found him to have told a "flagrant lie" in relation to an aspect of his evidence.

The applicant argued that Mr McCaughley's credibility was an issue of substantial importance in the context of the case as a whole. In addition, he argued that the presence of a person in the locality of the murder who had a propensity to inflict serious harm, particularly on behalf of a paramilitary organisation "could not be ignored." The prosecution submitted that there was no material or evidence to support this assertion and that Mr McCaughley's evidence was not of particular importance and had not intended to call him until required to do so by the defence.

The judge considered that Mr McCaughley's credibility was not a matter of substantial importance[3]. He held that Mr McCaughley was not in the immediate company of the deceased at any material time, nor of the applicant either before or after the murder. The evidence he provided to support the prosecution case was of limited quantity, nature and significance, largely because the prosecution agreed that his evidence was in error and they had not been intending to rely on him. The judge went on to address the question of whether Mr McCaughley's previous bad character, in terms of involvement in the corporals' killing and to lie under oath, was of substantial probative value. He concluded that it did insofar as it revealed a propensity to lie under oath but not in respect of the murder involvement theory.

The court held that the judge's analysis of the statutory provisions and the factual basis for the bad character application were entirely coherent and accurate: "It cannot be said that the evidence of Mr McCaughley, in the context of this case, was of substantial importance." This ground of appeal was unarguable and leave was refused.

Ground 4: Refusal of the renewed application to adduce non-applicant bad character evidence

This ground is interrelated to ground 3. Following Mr McCaughley's evidence at trial, the defence renewed the application to adduce evidence of his bad character. During his evidence he made comments to the effect that he would not lie under oath and that telling the truth would "keep you out of trouble." The defence contended that these comments were made to try and persuade the jury of his creditworthiness and to balance that the jury ought to know that he had previously lied on oath in a murder trial.

[3] (*R v O'Neill (ruling number 5)* [2022] NICC 7.

The court held that the importance of the evidence of Mr McCaughley was not a matter of substantial importance in the context of the case as a whole. Accordingly, this ground of appeal was also unarguable and leave was refused.

Ground 5: The admission of the applicant's bad character evidence

The prosecution sought to introduce the applicant's previous convictions for offences of violence (dated 1990, 2000 and 2010) and fifteen convictions for burglary all of which bar two were of domestic properties which occurred over the period 1996 to 2012. The defence opposed this application. The judge ruled that given the length of time between the commission of the offences of violence and the murder in this case, together with their lack of similarity, it would be unjust to admit them as evidence of propensity and/or that their admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit them. The court considered the judge was correct.

The judge, however, found that the convictions for burglary were clearly relevant and admissible. He observed that the applicant's ability and experience in burgling houses and other premises was a matter which the jury ought to be able to take into account. The court held that the judge was correct to conclude from the applicant's previous convictions that he would have no qualms in entering a person's home in the middle of the night without permission; that the murderer took steps to avoid detection when entering the deceased's home by entering the back door and by covering his head and face with his coat and by climbing the fence to her home at a point furthest away from the CCTV cameras; and by setting fire to the deceased's home after the murder, again taking steps to hide his identity by lowering his head and speeding up as he passed a further CCTV camera. Furthermore, the court considered that the judge was right to find that the applicant's bad character evidence could operate as a further strand in the circumstantial evidence. It did not matter that the evidence did not demonstrate a propensity to murder. The court said the judge's decision were clearly within the margin of appreciation available to him and refused leave on this ground of appeal.

Ground 6: The admission of forensic gait evidence

At trial the prosecution sought to adduce evidence from a forensic gait analysis ("FGA") expert. She viewed the CCTV outside the deceased's home proximate to her murder and CCTV footage of the applicant on another occasion and testified that there was a significant number of common gait features in the two sources of evidence. She concluded that this provided limited support for the proposition that the figure in the questioned footage was the subject in the reference footage.

On appeal, the applicant contended that the FGA evidence was irrelevant and of no probative value, thereby rendering it inadmissible. It was claimed that it did not advance a positive case of the applicant's guilt and at best it was neutral and therefore irrelevant. The prosecution argued that "limited support" provided some support for the prosecution case rather than 'no support" and was therefore relevant and plainly admissible. The strength of the evidence and the weight to be attached to it were a matter for the jury.

The judge concluded that even if the evidence was of limited value, it positively supported the Crown case both by indicating *some* support for the proposition that the person seen on CCTV outside the deceased's house and the applicant were the same person; *and* by countering any suggestion that they could *not be* the same person (at least as far as the question of gait is

concerned)[4]. He said the contention that FGA evidence should be given little or no weight was a matter for the jury.

The court considered that the judge's conclusion was inescapably correct on the evidence and so leave was refused on this ground.

Ground 7: Admission of expert video analysis evidence

This expert considered the video evidence and had concluded that there were no irreconcilable differences between the jacket, trousers, belt and footwear worn by the offender and that which was worn by the applicant on 1 August 2015. He concluded that this evidence lent limited or no support to the contention that the clothing and shoes were the same.

The applicant contended that the video analysis expert (Mr Matthew Stephens) should have disclosed concerns expressed by a court in another case and the Forensic Science Regulator in England and Wales as this would have impacted the admissibility or weight of his evidence and that the evidence was wrongly admitted. Having examined the matter the court was unconvinced that there had been any material failing in this regard which would affect the safety of the convictions.

In terms of Mr Stephens evidence, the court stressed that it was not controversial and in fact was served by the prosecution on the basis that it may have assisted the defence case. However, the issue on appeal was the methodology employed by the expert to explain his findings. At trial, the applicant applied to exclude the evidence of the expert as it did not "assist or advance" the prosecution case. The judge disagreed and admitted the evidence, concluding that it provided "some positive support to the Crown case" and that the absence of irreconcilable differences was, itself, of some probative value in a circumstantial case[5]. The judge said the jury should be shown the relevant footage and would have to make their own assessment of its evidential value, having been directed how to approach the evidence in the judge's charge at the closing of the case.

The court said the judge's ruling demonstrated that he applied care and attention to the issue, applied the relevant law and, reached a conclusion that was well within his discretionary remit with which this appellate court will not interfere. It held that when properly analysed this ground satisfied the leave threshold but ultimately it must fail on its merits.

Ground 8: The conviction was against the weight of the evidence

The court found that this ground of appeal was unparticularised and added nothing of substance to the applicant's appeal. It was not canvassed at the hearing before the Court of Appeal in oral submissions. The court commented that the case against the applicant was based on a multitude of strands of circumstantial evidence which it summarised in para [173].

The court also stated as follows:

> "Whilst the applicant spills much ink in identifying the alleged weaknesses in the Crown case, all of these matters were put to the jury in the course of closing speeches. The defence made the case

[4] *R v O'Neill (Ruling number 9)* [2022] NICC 30
[5] *R v O'Neill*, Ruling (Number 2) [2022] NICC 2

> that key prosecution witnesses ought not to be believed. Moreover, the trial judge summed up the evidence to the jury over the course of three days and, in doing so, he highlighted the various issues and inconsistencies in the evidence. There is no claim that the judge misdirected the jury in any material respect."

Therefore, the court found that "put simply where there is sufficient evidence to go before a jury, as in this case, it follows that the verdict could not be said to be against the weight of the evidence." This ground of appeal was also unarguable and so it was dismissed.

Overall conclusion

Applying the test in *R v Pollock* [2004] NICA 34, ultimately the simple question for the court was whether the applicant's conviction is unsafe. Having considered all of the grounds of appeal the court was not satisfied that any safety issues arose in relation to the jury's verdict and so the appeal was dismissed on its merits for the reasons given.

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 shortly on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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