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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**18/02/2022**

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING IN BELFAST

THE QUEEN

v

RAYMOND O'NEILL

RULING (NUMBER 3)
ON ADMISSIBILITY OF STATEMENTS BY ANN MARIE CROWTHER

David McDowell QC and Michael Chambers (instructed by the Public Prosecution Service for Northern Ireland) for the Crown
Martin O'Rourke QC and Colm Fegan (instructed by McIvor Farrell Solicitors Ltd) for the Defendant

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SCOFFIELD J

[1] The defence yesterday made an application that it be permitted to elicit evidence from two police officers – Constables Sabrina Lindores and Laura Cardwell – in relation to statements made to them by Ann Marie Crowther at the scene of the fire in this case, at 19 Hazel View, at around 5.00 am on 2 August 2015. Ms Crowther lives close to the scene and her son, Sean Crowther, has already given evidence about seeing the fire at the deceased's home from the back garden of the property in which he was living with his mother when he went out for a cigarette; and about making a 999 call.

[2] In her statement, Constable Lindores records the following statement as having been made by Ms Crowther:

> "At this time she also stated, "I don't excuse what she did but she doesn't deserve this" and that she hadn't been in the area long but had been "kicked out" of Aitnamona."

[3] To similar effect, Constable Cardwell has recorded the following in her statement:

> "Ms Crowther went on to say, "I don't condone what Jennifer did but she doesn't deserve this". I also heard her make a reference to Ms Dornan being "kicked out" of an area but I could not make out where she said this was."

[4] The defence wish to elicit in evidence what Mrs Crowther said to these officers. The defendant's brief written submission on this application states:

> "The purpose of this enquiry is not to suggest that the content of the statements is true but that these matters were reported to Police and that in all the circumstances of this case it would appear to the Defence as reasonable lines for the Police to enquire into."

[5] Mr O'Rourke QC's written submission also stated that there will be other evidence in the case that the deceased was forced to leave Aitnamona and that she had been the subject of sustained personal violence and threats by others including a terrorist organisation.

[6] The defence submission is that, in a circumstantial case where the prosecution suggests that the defendant is the only plausible perpetrator, it is appropriate for the defence to elicit the statement of Ms Crowther and to explore with police what they did to investigate this line of enquiry. Part of the defence case will be that there were or may have been other persons in the area with the opportunity to perpetrate the attack on Ms Dornan; and that other persons did or may have had an animus against her, including a paramilitary organisation which had made serious threats to her life. The potential presence of at least some other person in the area has already been raised with Ms Crowther's son in cross-examination by Mr O'Rourke. Any failure to properly investigate or explore this issue will be, the defence submits, relevant to the jury's assessment of the Crown case overall.

[7] The defendant's basic point is that the evidence with which this application is concerned is *not* hearsay, since it is not to be admitted "as evidence of any matter stated" in it; that is to say, it is not to be admitted as evidence of the *truth* of the facts (i) that the defendant had done something which was not to be condoned (or was, at least, not condoned by Ms Crowther); (ii) that the fire at her home was in response to any such act; and/or (iii) that the defendant had been "kicked out" of another area of Belfast, Aitnamona.

[8] I accept Mr O'Rourke's basic submission that – provided the jury is clearly directed as to the use to which the statements may be put – they are not hearsay. They are being elicited as evidence that the statements were made – which ought to have put the police on enquiry – rather than as statements of truth in themselves. A

statement is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made: see Archbold, *Criminal Pleading, Evidence and Practice* (2022) ("Archbold"), at section 11-8. This issue was also examined in *R v Twist* [2011] EWCA Crim 1143, in which Hughes LJ (at para [6]) observed:

> "Most (but not all) communications will no doubt contain one or more matters stated, but it does not always follow that any is the matter which the party seeking to adduce the communication is setting out to try to prove, i.e. that the communication is proffered as evidence of that matter. He may sometimes be trying to prove simply that that two people were in communication with each other and not be concerned with the content at all. On other occasions he may be trying to prove the relationship between the parties to the communication but not be in the least concerned with the veracity of the content of it. And there may, of course, be occasions where what he seeks to prove is that a matter stated in the communications is indeed fact. The opening words of section 114 show that it is the last of these situations which engages the rule against hearsay."

[9] That authority dealt with section 114 of the Criminal Justice Act 2003, which is in materially similar terms to Article 18 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"). Mr O'Rourke does not assert that the statements would be admissible as hearsay (to support the truth of any statement made by Ms Crowther) in light of the circumstances of their making and the fact that Ms Crowther is alive and could in principle be called as a defence witness.

[10] My attention was also drawn to the distinction between original evidence and hearsay evidence, on the basis of what the statement is elicited to show, in paragraph 3.14 of Spencer, *Hearsay Evidence in Criminal Proceedings* (2nd edition, 2014, Hart); and para 1-04 of *May on Criminal Evidence* (6th edition, 2015, Sweet & Maxwell) ("May").

[11] If it is accepted that the statements are not being elicited as hearsay, the key question becomes one of relevance. Mr McDowell accepted that, in principle, there may be cases where it can be legitimate to test the scope of the investigation. He submits, however, that, in the present case, there was further police enquiry in relation to Ms Crowther's statements and a "dead end" was reached, with her later accepting she had no information to assist the investigation; and that allowing the statements from Ms Crowther to the police officers to be put before the jury would be simply to allow rumour or speculation to go before the jury.

[12] In my view, neither of those points avails the prosecution. In a circumstantial case such as the present, I consider the defendant entitled to explore the question of

what alternative lines of enquiry were pursued. Insofar as there is any doubt about the relevance of this issue, I ought to give the defendant the benefit of that doubt. If, as I understand the prosecution position to be, they are able to call evidence to show that Ms Crowther's statements were followed up appropriately, they will both be able and entitled to put that evidence before the jury. The defence is entitled to probe whether this issue was adequately pursued by police in all of the circumstances of the case. As to the 'mere rumour and speculation' objection, on the basis of what I have been told there is likely to be some evidence, or agreed facts, put before the jury showing that the comments did, or may have had, at least some basis (although I accept that there is nothing to show that Ms Crowther herself had direct or first-hand knowledge of the events).

[13] In particular, the prosecution submission informed me that there was an agreement in principle between the prosecution and defence that evidence such as is mentioned in para [5] above will be introduced (albeit the precise mechanism for its introduction has not yet been agreed). Mr McDowell further accepted in oral submissions that this information could or would provide the defence with a basis to suggest an alternative motive, although one which the prosecution say can reasonably be excluded.

[14] Viewed in this way, the essential issue which the defence wish to explore will be put in issue before the jury and the question of what enquiries the police made to exclude this as an explanation for the deceased's murder cannot be said to be irrelevant.

[15] If the statements are not hearsay and are relevant, I do not consider that I have a free-ranging discretion to exclude them. The power to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 applies only to evidence upon which the prosecution proposes to rely. So too does the common law discretion to exclude recognised in *R v Sang* [1980] AC 402: see May at para 10-02. In any event, I do not consider that the admission of these statements, for the limited purpose for which they are intended to be introduced, will have such a prejudicial effect as to render the trial unfair for the prosecution.

[16] I do not consider that the admissibility ruling of Hart J in *R v Gorski* [2009] NICC 66 requires, or should lead to, a different result. Primarily that is because, in the *Gorski* case, defence counsel was arguing that the "purported confession" (as Hart J referred to it) should be admitted *as hearsay* under various provisions of the 2004 Order; that is to say, as evidence of substance that someone else had in fact committed the murder and had confessed to it: see paras [3] and [5]-[7] of the ruling, summarising the defence submissions. No such application is made here and, indeed, Mr O'Rourke rightly accepts that such an application would lack merit. The facts of *Gorski* are also quite different to what is proposed for admission by the defence in this case.

[17] Finally, I do not consider there to be force in the prosecution objection that the defendant will, in reality, be admitting bad character evidence in relation to a non-defendant, so requiring leave of the court and the satisfaction of a strict test under Article 5 of the 2004 Order. Aside from the oblique reference by way of Ms Crowther saying she did not condone or excuse what Ms Dornan had done, there is no actual misconduct identified. As discussed in exchanges during the course of the application, it is the sad reality that an individual might be intimidated out of certain areas within Northern Ireland for conduct which does *not* amount to misconduct in any way. More significantly, however, if the statements are not admitted to prove the truth of their content, they do not amount to evidence of misconduct on the deceased's part and the jury will be so warned.

[18] By reason of the foregoing, I propose to allow the statements to be admitted, subject to a clear direction to the jury that they are not to be relied upon as supporting the truth of any matter stated by Ms Crowther but, rather, simply as evidence that the police were put on notice of the contents of those statements at an early stage after the death of Ms Dornan. It may also be appropriate to give a short direction to the jury to this effect either shortly before or after the evidence has been elicited, as well as in the charge to the jury, and I will hear counsel on that suggestion.