

Neutral Citation No: [2022] NICC 10

Ref: SCO11800

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 18/116085

Delivered: 21/03/2022

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING IN BELFAST

THE QUEEN

v

RAYMOND O'NEILL

RULING (NUMBER 6)
ON ADMISSIBILITY OF INFORMATION RE AN ARMY OFFICER

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

SCOFFIELD J

Introduction

[1] On Friday 11 and Tuesday 15 March, I heard legal argument as to the extent to which the defence can question the investigating officer in this case, Detective Sergeant Cairns, about the individual to whom a particular telephone number belongs. That is a telephone number ending in '440' which was given to Jennifer Dornan, ("the deceased") in January 2014 by someone who had contacted her on a different number (ending in '369'); but who, she said, had suggested that she "ring him" on the 440 number. When enquiries were made, the 440 number was registered to a Captain R, an officer in the British Army, living at Catterick Army Base in Richmond, England.

Background to this issue

[2] From late 2013, the deceased had been receiving (what have been referred to as) 'nuisance' calls and texts – but which were essentially sexually harassing communications, some of which contained threats to her life and that of her mother

or threats of sexual violence – from a telephone number ending ‘974’ and, later, from numbers ending ‘369’ and ‘599.’ It was in a text from the ‘369’ number that the ‘440’ number was introduced. The caller who had made the harassing calls was said to speak with an English accent – although in the deceased’s statement to police in relation to this issue, taken in January 2014, she said that she thought this accent might be ‘put on’ and that the same man also sometimes put on a female voice.

[3] The unwelcome calls and texts were initially reported by the deceased in September 2013, although she then advised police that she did not wish to proceed with a complaint. She reported the matter again to police in January 2014, at which time some action was taken. By 30 April 2014, the deceased reported to police that she had received no further texts from any of the known numbers (after the police constable dealing with the matter had called the ‘369’ and ‘599’ numbers and left messages asking them to desist from further contact with the deceased). There is nothing to suggest that the phone calls continued after this period, at any time up to the deceased’s death in August 2015.

[4] There is a large measure of agreement between the parties as to the information which can and should be put before the jury arising out of threats to the deceased’s ex-partner and to her from dissident republicans or dissident republican organisations. I have been provided with draft admissions which the prosecution are prepared to make covering these issues. It is clear that threats had been made to the deceased. It appears likely that those threats were because of the actions of her partner at the time, Martin Smyth – although it is also clear that they extended to the deceased personally. There is nothing to suggest, however, that the threats to the deceased arose on account of anything in particular that she had done. (Mr McDowell QC rightly pointed out that the statements of Ann Marie Crowther which have been elicited in cross-examination of police officers have not been admitted – and were expressly not relied upon by the defence – for the purpose of establishing the truth of those statements: see *R v O’Neill: Ruling (No 3)* [2022] NICC 5). In short, there is no evidence to suggest that the deceased was targeted by dissident republicans because she was considered to be, or suspected of being, an informant.

[5] In the course of exchanges in submissions on this issue, it also became clear that the prosecution do not object to the defence probing with the investigating officer the extent to which the threats, and the harassing calls and messages to the deceased, were investigated, that being a reasonable line of inquiry to be pursued in the course of the murder investigation pursuant to section 23(1)(a) of the Criminal Procedure and Investigations Act 1996 (and the Code of Practice issued under that provision). The issue in contention is really whether, in questioning the police officer about this, the identity (or, more particularly, the employment or profession) of Captain R can be elicited.

[6] The prosecution have disclosed to the defence that Captain R has never served in Northern Ireland. He was stationed at Catterick between June 2015 and

June 2016. He had been in Northern Ireland for relatively short periods at Christmas 2014 and Christmas 2015, visiting family in this jurisdiction. When police spoke to him after the deceased's death, he stated that he did not know her; had never been in West Belfast; and had not contacted her in any way. He was unaware of the '369' telephone number which had given his number to Jennifer Dornan. He provided information about financial transactions he had made which supported his statement that he had been in England at the time the murder was committed. Indeed, the defence do not suggest that he himself had any involvement in the murder. The defence theory is that someone may have known about some connection between the deceased and Captain R – or between him and some intermediary who had been in contact with him – and that this might have provided a motive for wanting to do her harm *either* on the basis that the deceased was known or suspected to have been providing information to the military in some way *or*, as the case has more recently been put, simply on the basis that she was known to associate with an army officer in circumstances where, in the community in which she lived, this alone may have been sufficient for her to be threatened. There is, however, presently no evidence whatever of such a motivation to do her harm.

The disclosure exercise in relation to Captain R

[7] The defendant's section 8 disclosure application of 6 November 2019 sought to explore this issue, focusing primarily on the question of whether the deceased may have been an informant. It suggested that Catterick is the home of an Army Intelligence Corp – although I understand Catterick to be the largest British Army base in the world, so that assertion does not take matters very far in my view. The defence then asserted that it appeared "evident ... that the deceased may have been communicating with a British Army Intelligence Officer." The court – at a time when this case was being dealt with by Horner J – ordered that the prosecution respond to the defence's requests for "all material indicating or otherwise suggesting that Captain R was operating at any time as an Intelligence Officer for any State Agency." There was an *ex parte* hearing before Horner J and the prosecution response to the defence, which was approved by the court, was that no duty of disclosure arose in relation to this request.

[8] The judge had also ordered that the prosecution respond to the defence request for "any material indicating that the deceased was or at any time had provided intelligence to any State Agency." Again, the response was that "no duty of disclosure arises." Those responses followed enquiries by the prosecution and were subject to judicial supervision. Mr McDowell submitted that, had there been anything to this issue, either some disclosure would have been provided or there would have been an application for a public interest immunity (PII) certificate, of which the defence would have been aware.

Summary of the parties' submissions

[9] Mr McDowell relied on two bases as to why Captain R's employment should not be elicited in questioning: first, that it was hearsay; and, second, that it was irrelevant. The focus of submissions was primarily on the second of these reasons.

[10] Mr O'Rourke QC submitted that the connection between the harassing communications and an officer in the British Army was a relevant matter of which the jury ought to be aware. What should be made of this was an issue for the jury. He submitted that it was relevant in a number of respects. Firstly, in that it highlighted an inadequacy of inquiry on the part of the police in a circumstantial case where the prosecution now contend that the defendant is the only plausible suspect for the murder. As to this, Mr O'Rourke was particularly critical of the failure to obtain phone records in relation to Captain R and/or the telephone numbers which had been in contact with the deceased (in order to see if there had been any contact between them or any common contacts from the '440' number on the one hand and the '974', '369' and/or '599' numbers on the other). Mr McDowell explained in reply that, by the time this issue was investigated after the deceased's death, relevant records in relation to the pay-as-you-go numbers would simply no longer have been available.

[11] Secondly, Mr O'Rourke submitted that this information raised the possibility that someone was aware of contact between the deceased and Captain R and that this provided a motive for causing her harm – either on the basis of a suspicion that she was providing information or, latterly, simply on the basis that this was an association which would be extremely unwelcome in her community. He pointed out that (as is common case) dissident republicans were seemingly already ill disposed towards the deceased and that, through or in connection with her then partner Martin Smyth, she would or may have had some information which may have been of interest to the security forces.

Consideration

[12] Having heard the initial submissions on this issue, I was inclined to accept the prosecution submission that the employment of the person to whom the '440' number was registered is not relevant and should not therefore be the subject of questioning or be elicited before the jury. It seemed to me that the intention or effect of doing so may be to seek to draw the jury into speculation that the deceased may have been killed because she was an informant. However, there is no evidence that the deceased spoke to Captain R at any time or that she was contacted on, or that she contacted anyone on, the '440' number. She mentioned this number as having been provided to her in a complaint to police about unwelcome communications, of a sexual and harassing nature, which she wished to have stopped. There is also no evidence that Captain R had any role in Army intelligence, much less that there was any connection between him and the deceased relating to the provision of information by her to the Army. That is entirely consistent with the Public

Prosecution Service responses to the defence disclosure requests in November 2019 which, as noted above, were approved by the court.

[13] The defence is (of course) able to rely upon the admitted threats to the deceased from dissident republicans; and also on the nuisance and threatening communications the deceased received from unknown persons, including at least one man said to speak with an English accent. Whether anyone was aware of this and thereby concluded or suspected that the deceased was providing information to the security services is entirely speculative and there is no evidence of it. The defence may wish to explore that. They are also entitled to probe with the investigating officer whether the telephone numbers provided to the police by the deceased were appropriately investigated – including by investigating any links between the ‘440’ number and other numbers. However, in light of the circumstances I have identified above, I do not consider the occupation of the person to whom the ‘440’ number was registered to be relevant. In short, it is not logically probative or disprobative of any fact in issue, including any matter the defence may wish to establish, given the limited (if any) link between Captain R and the deceased and the even more tenuous (if any) link between the calls and texts the deceased received and any suggestion that the deceased may have been killed by dissident republicans because of some conception that she was acting as an informant.

[14] I am satisfied that I have a discretion to exclude reference to Captain R’s occupation on the grounds of relevance: see *May on Criminal Evidence* (6th edition, 2015, Sweet & Maxwell) (“May”) at paragraphs 1-12 and, in the context of cross-examination, at paragraph 21-19. Having regard to the discussion of relevance in May at paragraphs 1-13 and 1-14, and for the reasons discussed above, I am satisfied that Captain R’s occupation is irrelevant. It is a fortuitous fact on the part of the defence but, properly viewed, is not probative of anything in issue in the trial. For it to be raised with the jury would simply represent flying a kite.

[15] I should also address the argument – albeit much more succinctly advanced on each side – in relation to hearsay. Indeed, logically, this issue falls to be dealt with first since a valid hearsay objection may prevail even if, contrary to the conclusion expressed above, Captain R’s position in the army was relevant. I accept that evidence from DS Cairns about Captain R’s occupation would be hearsay. He would be reporting what he had been told about that matter. Mr O’Rourke submitted that matters such as someone’s occupation were treated as an exception to the hearsay rule, since they were simply stated as matters of fact. I have no doubt that in the vast majority of cases a matter of this nature would not be contentious and, although constituting hearsay (strictly speaking), would be admitted by agreement or at least not challenged. In this case, however, the prosecution have challenged its admission.

[16] A simple statement of uncontentious fact can still be hearsay – as Article 19(2) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (“the 2004 Order”) makes clear. I also have no doubt that Captain R, or his wife, intended the

investigating officers to believe what was said about his occupation, since that formed part of their explanation of where he was and what he was doing at the time of the deceased's murder. No gateway to the admission of this evidence was relied upon by the defence and, in any event, I would have been minded to exclude it under Article 30(1) of the 2004 Order on the basis that I am satisfied that the case for excluding it, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence. That is for substantially the same reasons as I have given above; and also in light of Mr McDowell's submission that, were it to be introduced, the prosecution would consider that PII issues may then arise and/or that their response to this evidence would be substantially hampered by the operation of the NCND principle.

Does R v Greenwood make a difference?

[17] At the more recent hearing where argument on this issue was revisited, Mr O'Rourke had identified a further authority which he suggested was relevant, which was provided to me, and on which he then strongly relied: *R v Greenwood* [2004] EWCA Crim 1388. In addition, I was provided with a commentary on the case, which is set out at (2005) Crim LR 59.

[18] In *Greenwood*, the defendant (G) was convicted of manslaughter, on a retrial, there having been a hung jury in his first trial, on an indictment alleging murder. The offence occurred in June 1996. In August 1999, G made detailed confessions to the police as to how he had killed the deceased, a young woman who was a stranger to him, following a chance encounter. He also confessed to cellmates, members of his family and a priest. The confessions were the only evidence against him. His defence was that the confessions, though made, were not true; and that certain matters he related were consistent with the facts as reported in the media. There was psychiatric evidence that G suffered a depressive illness which might explain why he would have made the confessions. At his first trial the judge admitted evidence concerning two men, P and H, who knew the deceased and were in the area at the time when she was killed. P had been the deceased's boyfriend and had been violent towards her; and had in his possession her bloodstained underwear. Neither P nor H was charged with any offence relating to her death, though both had been interviewed about it. The Crown made admissions concerning the evidence about P and H which was before the jury in the first trial. At G's retrial however, although the Crown referred to this evidence in opening, a different judge ruled, following submissions on a *voir dire*, that the evidence was inadmissible.

[19] The Court of Appeal of England and Wales (Criminal Division) allowed G's appeal. The trial judge had referred to the evidence implicating P or H as relevant only to some secondary defence. The Court of Appeal considered that, although G could not prove that P or H killed the deceased, in considering whether G killed her, material that pointed to P or H being the killer was relevant. The judge had admitted certain evidence which he found relevant to the *res gestae* concerning H but

there was no real distinction for these purposes between the material relating to P (which was excluded) and that relating to H (which was before the jury), since both of them had been in the vicinity of the murder and had had contact in H's case, or tried to make contact in P's case, with the victim that night. The Court of Appeal held that G should have been permitted to adduce the evidence in relation to P. In broad terms, the defendant in the present case relies on this authority to the effect that he should be permitted to adduce evidence pointing to someone else being the deceased's murderer.

[20] Waller LJ gave the judgment of the court. He examined the decision of the House of Lords in *R v Blastland* [1986] 1 AC 41 and, at para [39] of his judgment, considered that it was of some importance that in *Blastland* certain evidence relating to another potential culprit was given and properly given, by way of formal admissions on the part of the prosecution. This evidence was put before the jury as relevant and admissible material which they could be invited to weigh in the scales against the powerful case adduced by the Crown in deciding whether it might have been some other person, not the appellant in *Blastland*, who committed the murder. In short, although *Blastland* is viewed as a restrictive authority in relation to the provision of defence evidence which falls foul of the hearsay rule, in that case it was balanced by the making of prosecution admissions as to evidence which was relevant and admissible as pointing towards someone else being responsible for the crime.

[21] At para [40] of his judgment, Waller LJ said this about the practice of prosecution admissions in this vein:

"The practice of the Crown being prepared to make admissions in relation to facts which "might" point to a third party having committed the crime, which the defendant denies having committed, is long-standing. Such evidence is relevant and admissible to be weighed in the scales against the evidence adduced by the Crown that it was the defendant they have charged. Of course the Crown cannot be forced to make admissions if they do not accept that the admission points to the possibility of a third party being the perpetrator. Furthermore, if they are prepared to make an admission they can seek other admissions from the defence or put in evidence of their own in order that the admission can go fairly in its context before the jury."

[22] Summarising the position in this area, at para [41], the Court of Appeal set out the following propositions:

- "(i) If there is no issue that there has been a murder and the person on trial is saying that he did not do it,

then he must by inference be asserting that someone else did. There is no obligation on a defendant to establish that someone else did the murder but, if he has evidence which proves that someone else did the murder, he must be able to adduce it. If he has any evidence that points to another person having a motive to do it he must be entitled to produce evidence of that motive. If he has any other evidence that would point to the possibility that another person might have done the murder he should be entitled to produce it.

- (ii) The fact that material of the above description comes from disclosure by the Crown has placed prosecutors in the past and will continue to do so under some obligation to make admissions, insofar as those admissions are relevant to the issue, whether the defendant committed the crime, of evidence which might tend to show that someone else did it.
- (iii) There was no obligation on the Crown in this case to call [P or H] but if the evidence pointing to them was powerful enough the Crown may have to call evidence to rebut the same and in this case, for example, they could (if they thought it necessary) have called the alibi evidence which they would have asserted exculpated [P].
- (iv) On the whole, the question of what admissions the Crown are prepared to make, or what evidence the Crown should call, should be left to the prosecution. Clearly the judge is entitled to express a view on whether evidence is admissible or relevant, but the evidence which the Crown are prepared to put forward should on the whole be left to them ..."

[23] Waller LJ went on to say that it did not seem to the court that the Crown were saying that evidence in relation to P's proximity to the murder was irrelevant or inadmissible. The judge's ruling that this evidence was in his view exculpatory – since it placed P some distance away from the scene – seemed to the Court of Appeal to have been to take a matter away from the jury, which the jury should have been entitled to consider. The fact that something may arguably have amounted to an alibi should not have prevented G being entitled to put before the jury that P was, in fact, two-thirds of a mile away from the murder scene on the morning of the murder,

and was a person who had previously had a relationship with the victim and had a motive in the sense of having been violent towards the victim in the past.

[24] As regards the victim's underwear having been found in P's possession, the court stated that it may have been the case that admissions in relation to the same, without further evidence which discounted their relevance, would have given the jury a misleading impression. That, the Court of Appeal thought, was very much a matter for the Crown. However, the court could see the possibility that if the defence were not prepared to act in a way which avoided the jury being given a misleading impression, the circumstances might have arisen where the judge would have to make some ruling. That is really the territory in which I consider this case to fall.

[25] At para [41](vi), it was emphasised that "the important point is that it cannot have been right to take away from the jury's considerations *all aspects of*" the evidence in relation to P [my emphasis], including that he had been the victim's boyfriend and had acted violently to her in the past, and indeed was in the vicinity on the evening of her murder.

[26] In my view, *Greenwood* does not avail the defendant in relation to the matters dealt with in this ruling. Here, Captain R is not directly implicated as a suspect in the deceased's death (as P and H were in that case). There is no evidence pointing to Captain R being the killer and there is evidence (the financial information he provided to police) plainly pointing away from that. His situation and that of P in the *Greenwood* case – who knew the deceased, had motive, had a history of violence towards her, had opportunity and was in proximity to the scene – are very different. In light of those factors – and the fact that the prosecution in the *Greenwood* case was quite prepared for the information about P to go before the jury again in the second trial, as it had in the first – it is unsurprising that the Court of Appeal reached the decision which it did.

[27] Here, the prosecution is resolute that allowing the jury to be told of Captain R's occupation, when there is nothing to show they were ever in contact, goes beyond what is proper to expect them to admit; and would be used simply to give rise to an improper invitation to the jury to speculate. Even applying care to ensure that defence evidence is not misclassified as irrelevant, I still conclude that Captain R's occupation is irrelevant in this case, for the reasons already given and elaborated upon below.

[28] It is already established that dissident republicans appear to have had a motive to do the deceased harm. The defence may wish to try to establish that there was another or different or better basis for that motive other than by virtue of initial *animus* towards Mr Smyth but Captain R's connection to the deceased (if any) and to any supposed motive that she be targeted as an informant is too tenuous for his occupation to be relevant. It is not "reliable evidence" relating to the motivation of dissident republicans who may have wished to cause the deceased harm. The phrase "reliable evidence", relied upon by Mr McDowell, is to be found in the

Criminal Law Review commentary on the *Greenwood* case: “If reliable evidence exists relating to a third party, which renders it less likely that G is guilty of the killing, it would seem to be *prima facie* relevant.” Although this phrase finds no expression in the text of the judgment itself in *Greenwood*, I accept Mr McDowell’s submission that there must be some limit on relevancy grounds to the evidence the defence is permitted to introduce to seek to suggest that someone else was or may have been the culprit. In Mr McDowell’s colourful phrase, this is not a licence for a defendant to raise “every mad theory.”

[29] The search for a principled and workable dividing line in relation to the relevance of defence evidence pointing towards another as the culprit is not straightforward; and the assessment of what is or is not relevant will be intensely fact and context specific. As the author of the Criminal Law Review commentary on *Greenwood* (Professor Ormerod) points out, that case does not in fact “represent any great retreat” from what he considered to be the (overly) strict approach to relevance that formed the *ratio* of the *Blastland* case – which is, of course, of the highest authority. In *Blastland*, the question was whether the defence evidence was of “direct and immediate relevance to an issue in the trial.” Even accepting that *Greenwood* suggests a more lenient approach by focussing on the matters which were the subject of admissions in *Blastland*, *May on Criminal Evidence* appears to suggest that such defence evidence, which would otherwise be inadmissible, “would require a high degree of probative value to be admitted” (see *May*, at para 8-80). Archbold (2022) likewise emphasises the strict application of the test of relevance (or “logical probativeness”), including to defence evidence (see paras F1.13 and F16.5) in this context. Mr McDowell’s suggested formulation was that there must be a “reasonable basis” in either evidence or information for the defence theory to be supported by the disputed evidence.

[30] In the present case, I consider it particularly significant that the nuisance calls appear to have stopped well in advance of the deceased’s murder; that she never purported to have contacted the ‘440’ number, nor that it contacted her; that there is no evidence she knew of Captain R, nor that anyone else knew of any purported contact with him; and that the ‘440’ number was only traced to him, and his identity and occupation then discovered, well after the calls stopped and, indeed, after her death. It is also strange that the other telephone messages came from pay-as-you-go telephone numbers, whilst the ‘440’ number was a registered number, rendering it less likely that this was a number associated with the anonymous caller who had been in contact with the deceased. As I have already mentioned, each of the numbers involved were highlighted by the deceased to police in the context of a complaint of unwanted anonymous communications, rather than as numbers of persons she had knowingly or wilfully communicated with.

[31] Turning back to the summary provided in para [41](i) of the English Court of Appeal’s decision in *Greenwood*, the evidence of the owner of the ‘440’ number being a member of the armed forces is plainly not “evidence which proves that someone else did the murder.” It would only be “evidence that points to another having a

motive” to commit the murder if the deceased was in fact in contact with Captain R and if she or someone else knew he was a member of the armed forces and if that came to the attention of someone who was prepared to murder her for that reason. All of that is entirely speculative. Captain R’s position does not amount to evidence of motive. Nor, in my view, is it evidence which points “to the possibility that another person might have done the murder” since it is so far removed from the circumstances of the murder itself. Without seeking to define the precise parameters of the test to be applied in such circumstances, I am satisfied that the occupation of the person to whom the ‘440’ number was registered is not sufficiently probative (in the sense of rendering it more likely that someone else committed the murder and, so, less likely that the defendant did so) to render it relevant.

[32] In this case, the prosecution might, as occurred in *Blastland*, have made further admissions in relation to the issue of dispute in this ruling but they are unyielding in the position that they will not do so – even after having been given an opportunity to reconsider that issue in light of the defence’s reliance on the *Greenwood* case (and having regard to the comments at paras [38]-[40] and [41](ii)-(iv) of the judgment). That being so, strictly speaking, I consider their position to be correct that they are entitled to object to the evidence of Captain R’s occupation being adduced. As the summary of principles in *Greenwood* makes clear, on the whole, the question of how far the prosecution will go in relation to admissions of this type should generally be left to them.

Conclusion

[33] I accordingly rule that the occupation of the person to whom the ‘440’ number was registered should not be introduced. It is inadmissible as hearsay and the Crown cannot be compelled to make an admission in respect of it. In any event, in contrast to the position in *Greenwood*, I would consider this evidence to be so far removed from the question of who committed the murder as to be irrelevant. There is no prospect, therefore, of it being admissible as hearsay under one of the bases set out in Article 18 of the 2004 Order.

[34] The result of this ruling and the admissions proposed to be made by the prosecution is that the defence (i) is entitled to probe the extent of the enquiries made in relation to the ‘440’ number and/or in relation to the person to whom it was registered; (ii) is entitled to probe the investigation of the line of inquiry relating to threats from dissident republicans and what might have been behind those threats, including by reference to the fact that the deceased had been receiving calls and messages from someone who was said to have spoken with an English accent; but (iii) is not entitled to elicit, or seek to elicit, evidence of the occupation of the person to whom the ‘440’ number was registered.