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**IN THE CROWN COURT IN NORTHERN IRELAND
SITTING IN BELFAST**

THE QUEEN

v

RAYMOND O'NEILL

**RULING (NUMBER 8)
ON THE ADMISSIBILITY OF SUZANNE HAZLEY'S EVIDENCE**

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 the McIvor Farrell Solicitors Ltd) for
the Defendant

SCOFFIELD J

Introduction

[1] The prosecution wish to call evidence from Suzanne Hazley, who previously provided a relatively anodyne statement to police, but who has recently come forward with significant additional evidence not included in her earlier police statement. In short, she has now told police that, when the defendant attended at the home of Shane O'Neill (her then partner) at 12 Devonshire Close in the early hours of 2 August 2015, she heard the defendant confessing to Shane O'Neill that he had murdered someone. She then gives additional evidence about what she says happened thereafter.

[2] The defendant objects to the admission of Ms Hazley's evidence on two bases: first, that it offends the rule that a party cannot impeach its own witness and, relatedly, that its admission would contravene section 3 of the Criminal Procedure Act 1865 ("the 1865 Act"); and, second, that it should be excluded pursuant to Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE), as its admission would have such an adverse effect on the fairness of the proceedings that

it ought to be excluded. The second ground of the application is related to, but distinct from, the first.

[3] The primary objection arises because, on 9 March 2022, the prosecution called Shane O'Neill as a witness against the defendant. He gave evidence, *inter alia*, concerning the defendant's visit to his home at 12 Devonshire Close on 2 August 2015 (making no mention of the purported confession) and then of giving the defendant various lifts later that morning (to a shop on the Falls Road to obtain alcohol, although unsuccessfully, before taking him on to the home of Paul Smyth and then taking both of them elsewhere to buy beer).

[4] The information since provided by Ms Hazley to police, and recorded in an ABE interview on 11 March 2022, touches on a variety of issues which were neither addressed with or by Shane O'Neill in his evidence. In addition to the purported confession by the defendant to Shane O'Neill of having murdered someone, Ms Hazley's evidence raises a number of further issues in relation to the actions of Messrs O'Neill. These include evidence to the effect that Shane O'Neill threatened Ms Hazley that she was not to mention hearing this confession to anyone; that Shane O'Neill may have assisted the defendant in destroying evidence (since they left 12 Devonshire Close with plastic containers and subsequently Shane O'Neill drove Ms Hazley and their child to a location where people burn things); that Shane O'Neill told Ms Hazley what to say in her police statement given in August 2015; and that she did not come forward before now to tell the truth due, at least in part, to the fact that her relationship with Shane O'Neill had been controlling and abusive and she was fearful.

[5] If the evidence of Ms Hazley is true, the defendant submits, it follows that Shane O'Neill was, or may have been, guilty of a series of criminal offences including attempting to pervert the course of justice; assisting an offender; and/or perjury. He also submits that her recent statements to police are inextricably linked with the reasoning she provides for having failed to make these disclosures previously, that reasoning including allegations of abuse against Shane O'Neill over the last number of years.

[6] Thus, Mr O'Rourke QC submits, for the prosecution to call Ms Hazley and rely on her evidence would be to obviously impeach another prosecution witness, Shane O'Neill, which it is not entitled to do. The impeachment arises both in a general way (in relation to his alleged abusive relationship with Ms Hazley) and in a specific way (in relation to his alleged involvement in assisting Mr O'Neill evade justice or dispose of evidence).

[7] Mr McDowell QC for the prosecution accepts that the way in which the additional evidence from Ms Hazley has come to light is far from ideal and that her being called at this stage, after Shane O'Neill has given evidence for the prosecution, will require to be carefully managed. Nonetheless, he unsurprisingly asserts that her additional evidence – assuming it to be believed – is highly relevant and probative.

If I were to take the view that the evidence cannot properly or fairly be led at this late stage of the trial, the prosecution's further application will be for the jury to be discharged. That, however, should be a matter of last resort, Mr McDowell submits, so that, if it is at all possible to deal with the new evidence fairly (which he submits it is), that should be done.

What does the rule against impeaching one's own witness preclude?

The effect of the general rule

[8] Much of the debate in oral argument before me yesterday focussed on the question of what exactly was, and what was not, precluded by the rule against impeaching one's own witness. The focus of debate was largely on what is meant by the wording of section 3 of the 1865 Act; although for reasons explained in more detail below, I wonder whether this is really the correct starting point.

[9] Section 3 provides as follows:

“A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.”

[10] It is the first clause of this section on which the defendant relies. The prosecution, having produced Shane O'Neill as a witness, “shall not be allowed to impeach his credit by general evidence of bad character.” Article 17(3) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (“the 2004 Order”) provides that nothing in that Order (which deals, amongst other things, with the admissibility of evidence of bad character) affects the exclusion of evidence under the rule in section 3 of the 1865 Act against a party impeaching the credit of his own witness.

[11] The key question under section 3 of the 1865 Act, therefore, is whether the prosecution calling Ms Hazley and eliciting her evidence would be to impeach Shane O'Neill's credit “by general evidence of bad character.” *Phipson on Evidence* (Sweet & Maxwell) (“Phipson”), at paragraph 22-10, suggests that this prohibition, introduced in the mid-nineteenth century, is likely to have a limited meaning:

“Though there seems to be no authority on the meaning of the phrase “bad character”, it may well carry the *R v Rowton* sense of bad reputation. If so, nothing in section 3 prevents the adducing of evidence of the witness’s bad disposition or discreditable acts, but the common law would then govern, and it seems most unlikely that it would be accepted today that the hostile witness’s disposition may be impugned, even though their reputation may not be.”

[12] Viewed in this way, the strict wording of section 3 may be of little assistance. I do not consider that Ms Hazley’s evidence – at least in the main – is “general evidence of bad character” on the part of Shane O’Neill. Any evidence of his being continually abusive towards her *may* fall within even this restricted definition; but the evidence of his actions on the morning of 2 August 2015 and in the days thereafter would not.

[13] However, section 3 of the 1865 Act was a codification of a common law rule that a party should not impeach their own witness’s credit. It falls to be considered, therefore, whether the common law rule survives and, if so, whether it is of any further or wider application than the terms of section 3. *May on Criminal Evidence* (6th edition, 2015, Sweet & Maxwell) (“May”) describes the position at common law at para 21-11 in the following terms:

“As a general rule, a party is not allowed to impeach his own witness. Thus, for instance, he may not cross-examine the witness or call evidence to show that the witness is of bad character or of bad disposition.”

[14] At para 21-14, May states that section 3 of the 1865 Act restates the common law prohibition against impeaching the credit of a party’s own witness; and that this rule applies to *all* witnesses. “Accordingly, a hostile witness may not be cross-examined about his previous convictions, bad character or disposition.” Finally, May, at para 21-17, states that:

“The section specifically provides that the party cannot impeach the witness’s credit by evidence of bad character. This means that he cannot lead evidence as to the witness’s previous convictions or bad character or disposition.”

[15] Blackstone (2022) at section F6.52 says this:

“Section 3 comprises three rules. The first is an enactment of the common-law rule that a party calling a witness is not entitled to impeach the witness’s credit by evidence of

bad character, i.e. evidence of previous misconduct, convictions, or other evidence designed to show that the witness is not to be believed on oath.”

[16] May and Blackstone therefore treat section 3 of the 1865 Act as reflecting the wider common law position, notwithstanding its limited terms (and contrary to the approach adopted in Phipson). Phipson, on the other hand, assumes that the common law prohibition is wider than that in section 3 and remains in force, notwithstanding the general abolition of common law rules governing the admissibility of evidence of bad character in criminal proceedings in Article 4(1) of the 2004 Order: see para 22-10. Mr McDowell did not suggest in submissions that Article 4(1) has had the effect of abolishing the common law rule against impeaching one’s own witness – and was probably right not to do so. In any event, whether the approach in May and Blackstone or in Phipson is correct, for present purposes I intend to proceed on the basis that the wider common law rule, rather than the more limited wording in section 3, is what governs the present application.

[17] The commentary cited above suggests that the “general rule” that a party is not allowed to impeach his own witness’s credit means in this case that (a) the prosecution may not cross-examine Shane O’Neill (unless he is declared hostile); and (b) may not call evidence *to show* that Shane O’Neill is of bad character or disposition, including by leading evidence of his previous convictions (if any). Mr McDowell accepts that, in addition to these two prohibitions, he would not be entitled to suggest to the jury that Shane O’Neill was deliberately lying. He contends that he will not cross-examine Mr O’Neill (even in the event that he has to be recalled); and that he can and will close the case to the jury without suggesting that Mr O’Neill was deliberately lying.

[18] The central issue for me is whether, in calling Ms Hazley’s evidence, the prosecution would be calling evidence to impeach Shane O’Neill’s credit by showing that he was of bad character or disposition. Mr O’Rourke submits that they plainly would; since the obvious import of Ms Hazley’s evidence is that Shane O’Neill was involved in criminal conduct and/or that he has lied at least by omission (in failing to tell “the whole truth”) in his evidence to the court. In short, Mr O’Rourke says, her evidence is to the effect that Shane O’Neill was ‘up to his neck’ in the murder as an accessory after the fact (if her evidence were to be believed). I am not sure that her evidence, even at its height, goes that far. However, it would certainly suggest that he knew much more than he had told police or the jury.

[19] Two separate, albeit related, issues flow from this:

- (a) First, and most importantly, would Ms Hazley’s evidence, if permitted, be called by the Crown *to show* that Mr O’Neill was of bad character or discreditable? Put another way, would it represent the prosecution impeaching the witness’s *credit*? Or would that merely be a side-effect of the evidence she was called to give, the central purpose of which would be to

speak to facts in issue in the proceedings (namely, the defendant's confession and attempts to conceal his crime)? If the latter, is that an exception to the rule against impeaching one's own witness?

- (b) Second, is there anything inherently wrong or unfair in the prosecution calling evidence the effect of which will be to suggest to the jury that another of its witnesses had given evidence which was false?

Is there a relevant exception to the rule?

[20] There is support for the proposition that there is an exception to the common law rule that a party may not impeach its own witness's credit where the evidence it calls which is said to do so speaks not simply to the witness's credibility but, rather, to the issues in the case. Mr McDowell's submission was that the rule against impeaching one's own witness's credit does not preclude evidence which speaks to the issues in the case. It relates to impeaching credit by means of evidence *other than* evidence relating to the events with which the trial is centrally concerned.

[21] Section F6.48 of Blackstone (2022) contains the following guidance:

"The general rule is that a party is not entitled to impeach the credit of its own witness by asking questions or adducing evidence concerning matters such as the witness's bad character, previous convictions, bias or previous inconsistent statements. However, the general rule appears to have no application where evidence of a witness's bad character is introduced not to impeach the witness's credit in relation to the testimony, but because it supports some other discrete part of the prosecution case (*Ross* [2007] EWCA Crim 1457)."

[22] Likewise, Phipson suggests, at para 22-11, that there is an important exception to the general rule, typified by the decision in *Ross*:

"An important point about cases where a witness's bad character goes both to the issue and to credibility is shown by *R. v Ross*. There, the prosecution wished to show that the purpose of trips to Europe, by the accused and another, had been to obtain drugs. That other was expected to testify to that effect. The prosecution was allowed to call, in support, evidence of its witness's drug convictions. That witness was also to testify on another, wholly discrete issue in the case. The Court of Appeal affirmed the trial ruling that the possible incidental adverse effect on his credibility on the latter issue did not prevent the drug convictions from being admissible."

[23] In a footnote to the paragraph cited above, Phipson also refers to the case of *R v Cairns*, discussed below, in support of the same proposition, namely that there is an important point where a witness's bad character goes both to *the issue* in the case, as well as credibility.

[24] In *R v Ross*, the facts of which are succinctly stated in the quotation set out at para [22] above, the Court of Appeal of England and Wales (Criminal Division) accepted that it would not have been right for the trial judge to admit the previous convictions of a prosecution witness "when the sole purpose of such admission would indeed be to discredit the evidence which was about to be given ..., which was the point on which the Crown was anxious to call the witness" (see para [32]: my underlined emphasis). It later transpired that that appeared to be the sole purpose, which was therefore irregular (see para [33]). At the time when the convictions were admitted, however, that was not the purpose for the evidence being called and, instead, it was evidence relevant to the issue in the case and the judge was right to look at it in that way and admit the evidence (see para [31]).

[25] It seems to me that the fundamental purpose behind the rule against a party impeaching its own witness's credit (whether in its statutory or common law form), at least in the case of criminal trials, is to avoid confusing the jury by a party at one and the same time calling evidence from a witness but also urging the jury to view that witness as someone whose evidence is deliberately untruthful or inherently unreliable through a propensity to untruthfulness or untrustworthiness. It is a prohibition against impeaching the witness's *credit*; rather than impeaching him in any respect. It is a nonsense to present a witness simultaneously as a witness of truth and a witness on whom no reliance could or should be placed. The adversarial process would be up-ended if a party could call witnesses and then wholly rubbish their reliability. That is the mischief at which the rule is aimed. As discussed further below, the flexibility allowed by the courts to parties, including the prosecution, where conflicting evidence is provided by their witnesses, including where a witness gives testimony upon only part of which the party calling him wishes to rely, is considerable.

[26] Phipson, at 22-10, quoting from *Ewer v Ambrose* (1825) 3 B&C 746 KB, at 750 (*per* Holroyd J), explains the matter thus:

"The law regards a party as implicitly putting its own witness forward as credible, such that:

"it is undoubtedly true, that if a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to shew that that witness is not to be believed on his oath, but he may shew

by other evidence that he is mistaken as to the fact which he is called to prove.”

[27] One cannot therefore seek to undermine the general reliability of one’s own witness by challenging their credibility. That does not mean, however, that a party is hamstrung with the version of events provided by the first witness they have called who speaks to a particular event. They are entitled to call contradictory evidence, as discussed in further detail in the next section of this ruling. The exception to the general rule against impeachment discussed above makes plain that, where the ‘bad character’ evidence against the first witness is itself directly relevant to the facts in issue and is adduced for that purpose, rather than simply to undo the effects of certain aspects of their evidence by undermining their credibility generally, the rule will not be engaged. The provision of the further evidence promotes the ends of justice, notwithstanding its potential collateral effects, and should be heard.

[28] An analogy may be drawn here with the provision made in Article 3 of the 2004 Order. Although, generally speaking, bad character evidence must satisfy a high threshold for admission in a criminal trial – particularly in the case of evidence of the bad character of a non-defendant – that does *not* apply to wrongdoing alleged in relation to the offence itself or its investigation. That is achieved by means of the following definitional provision:

“References in this Part to evidence of a person’s “bad character” are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which –

- (a) has to do with the alleged facts of the offence with which the defendant is charged, or
- (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.”

[29] With the possible exception of his alleged abuse towards Ms Hazley in the course of their relationship, it seems to me that all of the evidence which the defendant claims would go to impeach Shane O’Neill would fall outwith the definition of bad character for the purposes of Part II of the 2004 Order. Such evidence is *prima facie* admissible to assist the jury in its fact-finding in relation to the offence charged. I do not, of course, suggest that the provision in Article 3 of the 2004 Order has any effect on the common law rule against impeaching one’s own witness. That would run contrary to the provision in Article 17(3)(a) and/or (c) of that Order. Rather, the policy behind Article 3 appears to me to be analogous to the reason for the common law recognition of the exception to the general rule discussed above.

[30] In the present case, I am satisfied that the prosecution are not seeking to call Ms Hazley to show that Shane O’Neill is of bad character or to impeach his credit.

They are not calling this evidence to seek to undermine the testimony he has already given in any material respect (or, in the words of Blackstone at section F6.52, calling evidence “designed to show that the witness is not to be believed on oath”). Rather, they seek to call Ms Hazley to establish important facts relevant to the jury’s assessment of the guilt or innocence of the defendant, particularly his alleged confession to his nephew. In the words of section F6.48 of Blackstone, they seek to rely on the evidence “because it supports some other discrete part of the prosecution case.” Accordingly, I do not consider the general rule against impeaching one’s own witnesses to be engaged.

[31] The prosecution continue to rely on the majority of Shane O’Neill’s testimony, particularly in relation to the defendant’s movements on 1 and 2 August and in the days immediately thereafter, including importantly the evidence that he was wearing his cream coat when he came to 12 Devonshire Close on Saturday 1 August but not wearing it when he arrived at Shane O’Neill’s house on the morning of Sunday 2 August. Mr McDowell identified only two areas for the moment where he was likely to invite the jury to be circumspect about Shane O’Neill’s testimony (relating to whether it was indeed regular for him to do washing for the defendant; and whether it would be normal for him to drive not to Liam McGauley’s house to check whether he was in but, instead, to drive to another location in Lagmore for that purpose, in relation to his evidence about the defendant returning to Lagmore on 2 August). He was conscious about the need not to impeach his witness in addressing these matters with the jury.

Is there an issue with the prosecution calling contradictory evidence?

[32] The second issue raised at para [19] above can be addressed much more easily. There is nothing inherently wrong with the prosecution calling witnesses whose evidence is contradictory in certain respects, provided care is taken to ensure that they do not go so far as to impeach the credibility of one of those witnesses.

[33] It is clear from authority that section 3 of the 1865 Act does not preclude a party calling evidence which is inconsistent with the evidence given by another witness whom he has called. Thus, Phipson at para 12-65, under the heading ‘Contradicting a party’s own witness’, states:

“Notwithstanding the words of the Criminal Procedure Act 1865 s.3, a party may as of right, without obtaining such opinion or leave, contradict his own witness, whether adverse or not, by other evidence relevant to the issue, and thus indirectly discredit him.”

[34] To like effect, May, at para 21-15, states that:

“Section 3 does not affect the right of a party, without the leave of the judge, to call evidence contradicting:

- (a) a hostile witness; and
- (b) (it would appear) an unfavourable witness on matters relevant to the offence charged."

[35] And, at para 21-17, states that:

"[Section 3] does not, despite its wording, affect the right of a party at common law to call evidence contradicting an unfavourable witness ... The party does not need the leave of the judge to call contradictory evidence."

[36] The authority cited in May for the proposition that a witness may be called by a party, without the leave of the judge, to contradict the evidence on relevant matters of an unfavourable witness also called by that party is *Greenough* (1859) 5 CB (NS) 786. The authorities cited in Phipson to the same effect are: Stephen, Digest, note xvii; *Ewer v Ambrose* (1825) 3 B&C 746; and, again, *Greenough v Eccles* (1859) 5 CBNS 786, at 806.

[37] In the same vein Blackstone, at section F6.48 (partially quoted above), continues:

"In the case of a witness who is 'unfavourable', i.e. a witness who displays no hostile animus to the party calling him or her but merely fails to come up to proof or gives evidence unfavourable to that party, the general rule prevails: the only remedy available to the party is to call other witnesses, if available, with a view to proving that which the unfavourable witness failed to establish (*Ewer v Ambrose* (1825) 3 B&C 746). Equally, the prosecution may call a witness to give evidence only part of which they consider to be worthy of belief and may adduce other evidence to contradict that part of the witness's evidence which they consider to be inaccurate or false and invite the jury to reject that part of the witness's evidence. That may be done without applying to treat the witness as hostile ... Insofar as the principle in *Ewer v Ambrose* results in two equally credible witnesses directly contradicting each other upon a major fact in issue, it has been said that the party calling them is not entitled to accredit the one and discredit the other; the testimony of both is to be disregarded (*Sumner and Leivesley v John Brown & Co* (1909) 25 TLR 745, per Hamilton J). However, in *Brent* [1973] Crim LR 295 it was held that this dictum does not apply to criminal proceedings, because of the Crown's duty to call all relevant evidence ..."

[38] May, at para 21-11, is again in similar terms:

“However, if the witness is unfavourable to the party calling him, i.e. he fails to prove relevant facts which he was called to prove, that party may call other evidence to contradict him; but he may not cross-examine him or put a previous inconsistent statement to him. In *Sumner v John Brown & Co*, Hamilton J said that if two credible witnesses gave contradictory evidence, the testimony of both must be disregarded. This statement was held to be inapplicable to criminal proceedings because of the duty on the Crown to call all relevant evidence: *Brent*. Thus, it sometimes happens that two prosecution witnesses give conflicting accounts of the same incident. In these circumstances, the jury must decide which account, if either, to believe.”

[39] The mere fact, therefore, that the prosecution may anticipate that Ms Hazley will give evidence which is inconsistent with that of Shane O’Neill is not, of itself, a reason for ruling her evidence inadmissible. Now that the prosecution is (just recently) in possession of the information provided by Ms Hazley, I consider it entirely unexceptional that they should consider Shane O’Neill to have been an unfavourable witness; that is to say, potentially having relevant evidence to provide which he chose not to. There is nothing wrong in principle with the prosecution calling a further witness to seek to fill that gap.

How is the inconsistent evidence to be dealt with?

[40] In terms of how inconsistent evidence called by the prosecution can and should be dealt with, and when it will and will not be considered to breach the rule against impeaching one’s own witness’s credit, I was directed to a trio of cases dealt with by the English Court of Appeal: *R v Cairns* [2002] EWCA Crim 2838; *R v Clarke* [2011] EWCA Crim 407; and *R v Smith & Others* [2019] EWCA Crim 1151. Mr O’Rourke submitted that the present situation was not analogous to that in *R v Cairns*; but Mr McDowell submitted that it was analogous and that that case demonstrated just how much leeway there was for the prosecution to call and rely upon conflicting witnesses, provided care was taken not to impeach the credit of one of them by suggesting that he or she was lying.

[41] In *Cairns*, a defendant who had pleaded guilty gave evidence on behalf of the prosecution inculpatng two other defendants but exculpating two others including his wife. The Court of Appeal examined the obligations of the prosecution in such territory. At paras [34] to [36], it said this:

“If one moves away from the question of whether the prosecution is obliged to call a witness to that of whether it is entitled to do so, the same overriding criterion of the interests of justice must apply to the exercise of its discretion. If the prosecution took the view that a particular witness could give no evidence on which reliance could be placed, then it would normally not be in the interests of justice for that witness to be called by the prosecution. In Kennedy LJ’s words, “his evidence cannot help the jury,” because in the prosecution’s view his evidence is not capable of belief.

But it is not uncommon for there to be witnesses whose evidence is regarded by the prosecution as largely, or in part, worthy of belief and reliable but not wholly reliable. There may be good reason for the prosecution arriving at such a judgment. It is a normal human experience that people sometimes tell the truth about certain matters but may not be reliable about others, as the verdicts of juries from time to time suggest. There is no reason why a jury should not regard part of a witness’s evidence as true but take the position that they cannot rely upon the whole of that evidence. That not infrequently happens and it seems to have happened in the present case.

We know of no principle of law or justice which requires the prosecution to regard the whole of a witness’s evidence to be reliable before he can be called as a prosecution witness. If it is open to the prosecutor to form the view that part of a witness’s evidence is capable of belief, even though the prosecutor does not rely on another part of his evidence, then the prosecutor is entitled to exercise its discretion so as to call that witness. That must be so, since part of the witness’s evidence could be of assistance to the jury in performing their task, and it would therefore be contrary to the interests of justice to deprive them of that assistance. The prosecution in such circumstances is not to be prevented from calling such a witness.”

[42] Having considered the case of *R v Pacey*, the court went on at paras [38]-[40] as follows:

“But the prosecution is entitled to call other evidence which contradicts part of the evidence of its witness, while still relying on those parts of his evidence which are not to

be contradicted: see Article 147 of *Stephen's Digest of the Law of Evidence*, approved in *R v Prefas & Pryce*, 86 Cr App R 111. That approach indeed was recognised in *Pacey* where at p 20 of the transcript the court said this:

“It was not open to the prosecutor to attack her credit. All they could do was to point to inconsistencies, if they existed, between her evidence and other evidence or to point to matters upon which her evidence might be unreliable.”

So it is clear, in our view, that the prosecution may properly call a witness when they rely on one part of his evidence but not on another part. Whether they choose to call such a witness is a matter for their discretion, to be exercised on the principles which we have already set out. But that does not amount to an attack on their own witness's credit.

In the present case the prosecution identified a rational explanation for not relying on part of Barry Cairns' evidence, namely his relationship with his wife and with his friend Hussain. That explanation did not cast doubt on his evidence about Chaudhary and Zaidi.”

[43] On the same basis, Mr McDowell submits that it would be contrary to the interests of justice to deprive the jury of the evidence of Ms Hazley and that, where that evidence is inconsistent with that of Shane O'Neill, he is entitled to point to matters upon which Mr O'Neill's evidence may be unreliable, identifying a rational explanation for this (which, in the present case, could be a concern to protect his uncle or, indeed, perhaps himself). The prosecution was permitted to proceed in that way in *Cairns* even though an obvious inference to be drawn from Mr Cairns' evidence was that he was deliberately not being truthful in his evidence. That was not considered to offend the rule against impeaching one's own witness's credit.

[44] *Cairns* was considered in the case of *Clarke*, in which the Court of Appeal addressed similar issues. The judgment of Jackson LJ helpfully discusses the law in this area at paras [30]-[40]. He set out section 3 of the 1865 Act and noted that “it frequently happens that the party calling and relying upon a witness is bound to accept, or possibly even assert, that some parts of the witness's evidence are incorrect.” Reference was made again to article 147 of *Stephen's Digest of the Law of Evidence*, to the effect that a party can contradict one of its own witnesses by calling other evidence. Having discussed the case of *Cairns*, and other authorities, the court set out the following summary of relevant principles at para [38]:

- “i) The prosecution may call a witness to give relevant evidence on some issues in the case, even if his or her evidence on other issues appears to be incorrect.
- ii) If the prosecution witnesses give inconsistent evidence on particular issues, the prosecution may suggest to the jury which evidence on those issues should be preferred.
- iii) However, the prosecution may not explicitly attack the credit of its own witness or suggest that the witness is deliberately lying in parts of his or her evidence, unless the prosecution has obtained the court’s permission to treat the witness as hostile.”

[45] Mr McDowell relies strongly on sub-paras (ii) and (iii) in the above summary as authority for the proposition that, in this case, he could suggest to the jury that they should prefer Ms Hazley’s evidence in the case of any inconsistency between it and the evidence of Shane O’Neill and that he would have considerable leeway in doing so provided that he did not *explicitly* attack the credit of Mr O’Neill or suggest that Mr O’Neill was deliberately lying. He accepted in submissions that this would represent the walking of a tightrope. However, that is not unusual. Indeed, in the next paragraph of Jackson LJ’s judgment in *Clarke*, he said this:

“In some cases the operation of these principles may create a somewhat artificial result. However, the principles have a firm statutory and common law foundation. They can be applied in practice without undue difficulty.”

[46] Applying those principles to the facts of the case in *Clarke*, at para [49], Jackson LJ held that prosecuting counsel was quite entitled to invite the jury to prefer the evidence of one of its witnesses over the evidence of another of its witnesses; but was not entitled to suggest that one was deliberately lying (unless that had been put to him in cross-examination which, in the case of his own witness, would require the witness to have been declared hostile).

[47] In the most recent of the cases, *Smith*, the Court of Appeal returned to this area. That was a case in which the defence complained that victims of the attempted murder who had been called as prosecution witnesses had identified persons other than the defendants as the perpetrators and were being contradicted by other prosecution evidence on this issue. The prosecution contended that the witnesses were honest but mistaken on this issue but reliable on other material matters. The Court of Appeal approved the approach taken in *Cairns* (at para [26]) and again summarised the relevant principles, at para [28], in the following terms:

- “(1) Subject to the overall control of the court, the prosecution has a discretion as to what witnesses to call at a trial, but that discretion must be exercised in accordance with the interests of justice and the general duty of the prosecution to put all evidence which it considers relevant and capable of belief before the jury.
- (2) It is open to the prosecution – and indeed the interests of justice may require it – to call a witness to give evidence only part of which the prosecution considers to be worthy of belief.
- (3) In such circumstances the prosecution is in principle entitled to adduce other evidence to contradict that part of the witness’s evidence which the prosecution considers to be inaccurate or false, and to invite the jury to reject that part of the witness’s evidence.
- (4) That may be done without applying to treat the witness as hostile. However, unless the witness is declared hostile, evidence adduced to contradict the witness may not include a previous inconsistent statement of that witness, nor is the prosecution, as the party calling the witness, entitled to cross-examine the witness.”

[48] I accept the submission that what the prosecution proposes to do in the present case does not offend these principles. Most of Shane O’Neill’s evidence which has already been given is, the prosecution would say, relevant and capable of belief. It was therefore entitled, perhaps even required, to put it before the jury. It is open to the prosecution to rely on Mr O’Neill’s evidence even if there is only part of it which they (now) consider to be worthy of belief. In those circumstances, they are entitled in principle to adduce other evidence – that of Ms Hazley – to contradict that part of Shane O’Neill’s evidence which the prosecution consider to be inaccurate, or even false, and to invite the jury to reject that part of his evidence. They may do so without applying to treat the witness as hostile under section 3 of the 1865 Act. However, that being so, the evidence adduced to contradict Shane O’Neill cannot include a previous inconsistent statement of his (which it is not proposed to introduce); nor may the prosecution cross-examine him (which has not happened and which is not being proposed); nor may they suggest that he is deliberately lying (which Mr McDowell says he will careful not to do).

What does fairness to Shane O'Neill require in these circumstances?

[49] I recognise that my decision to permit Ms Hazley to give evidence will result in evidence being given which suggests improper conduct, of a potentially very serious nature, on the part of Shane O'Neill. This evidence will be given at a time after his evidence has concluded and in circumstances where, unless he is recalled, he will have no opportunity to comment upon it or provide an answer in the course of these proceedings. If and insofar as Mr McDowell in due course proposes to invite the jury to prefer the evidence of Ms Hazley on certain matters over the evidence of Mr O'Neill, I accept that this is likely to involve his being impugned before the jury in relation to the substance of his conduct (even if not impeached as to his credit within the meaning of the rule discussed above). Generally, that should not be done without the counsel in question giving the witness a fair opportunity to answer the allegation which is made against him. Indeed, that was the import of my ruling in relation to Mr O'Rourke's cross-examination of David Quinn earlier in this trial.

[50] I will keep this matter under review but presently tend to the view that fairness both to Shane O'Neill and the defendant will require Shane O'Neill to be recalled to give further evidence. This will allow him the opportunity to answer such allegations as may be made against him in Ms Hazley's evidence. It will also allow the defendant the opportunity to cross-examine him in relation to the contents of her evidence.

[51] The Bar Code of Conduct at para 9.16 suggests that the opportunity to answer an allegation which will be relied upon in closing should be given to the relevant witness in cross-examination by counsel who will rely on that allegation. In the present case, it will not be possible for Mr McDowell to do so *in cross-examination* of Mr O'Neill (unless he was later to be declared hostile). However, he could still be given an opportunity to comment on Ms Hazley's evidence by Mr McDowell in further examination-in-chief (although Mr McDowell may be understandably reluctant to ask any further questions in case that elicited evidence expressly impeaching the credit of Ms Hazley); or, perhaps more appropriately, in questions from me; or by means of cross-examination by Mr O'Rourke. In the ruling given in relation to David Quinn's evidence I made clear that if counsel would not give the witness the opportunity to answer the allegation underlying the line of questioning, I would do so myself (although, in the event, Mr O'Rourke was content to do so). I would take the same approach if counsel felt they could not ask the witness the relevant question. In any event, for the moment, it would seem to me prudent that the prosecution, as the party who originally called Mr O'Neill, should advise him of the likelihood of his having to be recalled and also provide him with a copy of the transcript of Ms Hazley's ABE interview so that he may understand how this has arisen. He could also usefully be informed that he is at liberty to seek legal advice if he wishes. It might well be that, in the event that he is recalled, he will require to be advised of his privilege against self-incrimination in certain respects.

Article 76 of PACE

[52] I can deal with the defendant's reliance on Article 76 of PACE much more succinctly.

[53] The defendant submits that none of the allegations now canvassed by Suzanne Hazley have been put to Shane O'Neill; and that fairness requires that, if a witness is being accused of criminality, he should be afforded the opportunity to answer the allegations. In support of this submission, Mr O'Rourke relies on my earlier ruling that he was obliged to provide David Quinn with the opportunity to comment on a suggestion which was likely to be put to the jury that he, David Quinn, may have been involved in the murder. However, that arises principally as a matter of fairness *to the witness*. The mere fact that Shane O'Neill has not had an opportunity to comment on Ms Hazley's allegations against him does not render the trial unfair from *the defendant's* perspective, provided he has an opportunity to test and challenge her evidence. As to the question of fairness to the witness, I have addressed this above.

[54] Even assuming Mr O'Neill is recalled and asserts his privilege against self-incrimination, which remains to be seen, provided the defendant has the usual facilities available to him to challenge Ms Hazley's evidence, which he will do, its admission would not on that account be unfair. She will be available for cross-examination and a range of third party disclosure issues have been dealt with at speed to ensure that the defence are properly equipped in this regard. The defence concern is that, in circumstances where Shane O'Neill did assert privilege, it would be difficult to avoid an adverse inference by the jury that his failure to challenge Ms Hazley's evidence represented an implicit acceptance of what she says. I do not accept the defendant's submission that this issue (if it arose) could not adequately be addressed by means of a direction to the jury and/or would be sufficient to warrant the exclusion of Ms Hazley's evidence.

[55] The defence also complain that, if Shane O'Neill does challenge Ms Hazley's allegations, they have no means of knowing in advance what evidence he has to give or what material he may have which may be relevant to those issues. I accept Mr McDowell's submission that the trial process itself is equipped to manage these issues and ensure fairness. That is achieved principally by the opportunity to challenge Ms Hazley's evidence in cross-examination and that of Shane O'Neill, assuming he is recalled. Although counsel may prefer to know in advance what answer a witness is likely to give in cross-examination, that is not (nor could it ever be) an essential element of fairness. There is nothing to suggest that Shane O'Neill has any relevant documentation or communications in relation to these issues (which now occurred many years ago) but he could in any event be asked about that. The defendant will have an opportunity to test and challenge the new evidence against him. He also, of course, has the facility to give his own evidence on these matters, should he so choose, when the time comes. The most significant aspects of Ms Hazley's intended evidence may be thought to concern Raymond O'Neill's

conversation with Shane O'Neill when he arrived at 12 Devonshire Close early in the morning of 2 August 2015. He is in a position to give instructions in relation to that and to give evidence in relation to it, should he so wish.

[56] Ms Hazley's evidence is potentially highly probative. The prosecution described it as potentially of the utmost importance. I would not consider that its prejudicial effect outweighs its probative value such that it should be excluded; nor that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Conclusion

[57] The position we have reached in this trial is unusual and, I think all parties agree, far from ideal. The trial is now in its sixth week and Ms Hazley's new evidence has only recently emerged. This is also in the context of a case which, for a variety of reasons, is at trial over six years after the death with which it is concerned. Mr McDowell made clear that if it was not permissible for Ms Hazley's evidence to be admitted at this stage of the trial, his application would have been for the jury to be discharged and a retrial held (albeit that some of the issues addressed above may arise in a materially similar way in any retrial in any event). I would have been sympathetic to such an application, since it seems to me that the new evidence falls within a category which the interests of justice plainly require to go before the jury. For his part, Mr O'Rourke indicated that any application that the jury be discharged would be contested and that the defendant was opposed to this, much less seeking it. In my judgment, the triangulation of interests engaged in criminal proceedings strongly favours the trial continuing, if this can be done fairly and lawfully. For the reasons set out in detail above, I accept Mr McDowell's submission that this can be achieved. Had I not been persuaded of that, I would not have permitted Ms Hazley's evidence to be given.

[58] The result of this ruling is that I refuse the defence application that Ms Hazley's evidence be excluded. The prosecution is entitled to call her. The issues raised by her evidence, and its late production, will have to be managed carefully and kept under review. If there comes a point where I am persuaded that it is in fact not possible to continue with the trial fairly, a different approach may then be required.