

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**BETWEEN:**

**ROBERT FITZSIMMONS**

**Plaintiff:**

**-and-**

**CHIEF CONSTABLE OF THE  
POLICE SERVICE OF NORTHERN IRELAND**

**Defendant:**

**McCLOSKEY J**

**Setting**

[1] The Plaintiff's case is that he was unlawfully arrested and falsely imprisoned by the Defendant's servants and agents on 4<sup>th</sup> and 5<sup>th</sup> October 2005. The total duration of his detention was just under 34 hours. The arrest and detention are admitted by the Defendant. The Plaintiff claims that this infringement of his liberty was unlawful in its entirety. He also puts forward his case on an alternative basis. This is to the effect that insofar as the Court holds that his arrest and initial detention were lawful, the period of his detention was unlawful, being excessive. There is no claim for damages for either personal injuries or financial loss.

[2] It is common case that the reason proffered by the police for the arrest and detention of the Plaintiff was his suspected involvement in a murder of some notoriety, that of Robert McCartney, which occurred on 30<sup>th</sup> January 2005. The police arrested the Plaintiff on the ground that he was suspected of having committed the offences of conspiracy to murder Robert McCartney, the attempted murder of one Brendan Devine, the possession of an offensive weapon and affray.

The Plaintiff was released without charge and has not been charged subsequently with any offence relating to the murder or any kindred matter.

### **The February 2005 Arrest**

[3] The Plaintiff was first arrested by the police in connection with the murder on 26<sup>th</sup> February 2005. The immediate impetus for this (his first) arrest arose when he voluntarily presented himself at a police station, accompanied by his solicitor. He was thereupon arrested and interviewed. The topics upon which his interviews focussed were his movements on the date in question and thereafter; his knowledge of the murder of Robert McCartney and attempted murder of Brendan Devine; his associations with others involved in the commission of these offences; his knowledge of the deceased; and his use of and access to certain motor vehicles. This summary is derived from the pre-interview disclosure record. The Plaintiff's detention on this occasion was of short duration, extending to some hours. He was released unconditionally the same day. There is no claim for damages in relation to this initial arrest and detention.

[4] The Plaintiff's evidence about the impetus for his interaction with the police in February 2005 was unsatisfactory. He claimed that he had learned from his solicitor that the police were "*looking for*" him. He asserted that he then presented himself voluntarily at a police station, accompanied by his solicitor, as he wanted to find out why the police wished to question him. He testified that he secured this knowledge when he was arrested at the police station and interviewing began. He then refused to answer any of the questions put to him. In his evidence, he did not proffer any coherent reason for this refusal. Moreover, the pre-interview disclosure document, dated 26<sup>th</sup> February 2005, recited clearly the topics about which detectives were proposing to question the Plaintiff. I consider that the explanation proffered by the Plaintiff for voluntarily presenting himself to the police at this stage and his immediately ensuing refusal to answer the questions put during the interviews gives rise to an incongruity. The Plaintiff's explanation to this court in his evidence was that he was maintaining that he had nothing to do with the murder and had nothing else to say. I consider that this fails to address the incongruity. Furthermore, this failure is not ameliorated by the representation made by his solicitor during the interviews that he had advised his client not to speak as the pre-interview disclosure "*didn't contain any evidence implicating him in relation to the allegations*" [per interview record number 1]. These facts and factors form part of the background and broader circumstances to be considered by the court in adjudicating on the Plaintiff's challenge to the legality of his subsequent arrest and detention eight months later, given the objective dimension of the test to be applied [see O'Hara v Chief Constable [1996] NI 8, p 18, per Lord Hope].

### **The PONI Statement**

[5] Chronologically, the next significant event consisted of the preparation of a written statement on the part of the Plaintiff. This was made to and received by an

investigator in the employment of the Police Ombudsman for Northern Ireland. The statement consists of some three pages of relatively dense typescript. In brief, in this statement the Plaintiff admits that he was in the company of the deceased and other named persons in Magenniss' Bar during the evening in question; there was a verbal and brief physical altercation between the aforementioned Brendan Devine and another named person inside the premises; this continued outside the premises; (by implication) the deceased was also outside the premises at this stage of the events; the second male person concerned appeared to have been wounded in the hand; the Plaintiff suggested to him that he go to hospital for treatment; more fighting and shouting continued in Market Street, close to its junction with East Bridge Street; it appeared that there were two or three aggressors; it was dark and the Plaintiff could not really ascertain what precisely was happening. According to his statement, the Plaintiff, knowing nothing of either the murder or the assault on Mr Devine, remained in the bar for a period and, in the company of two other males, was then driven to a club in another part of the city for the purpose of consuming further drinks. The statement contains the following passage:

"This is my full and honest account of what I witnessed on the night of 30/01/2005. I wish to state that I am not guilty of the murder of Robert McCartney or the attempted murder of Brendan Devine, nor am I guilty of any affray .....

I make this statement voluntarily and ..... it is a full and honest account of what I witnessed ....."

And in an earlier passage:

"I learned of the death of Robert McCartney and the assault of Brendan Devine the next day. I was totally shocked and disgusted and I couldn't believe what had happened."

This statement is dated 27<sup>th</sup> May 2005, some four months after the relevant events.

[6] This document was repeatedly described by and on behalf of the Plaintiff as his statement to the Police Ombudsman's Office. However, the Plaintiff's evidence about the circumstances in which it was created was unsatisfactory. He claimed that it was generated spontaneously, unprompted by any request, any compulsion or, indeed, any particular consideration. He was unable to explain its timing. He confirmed that he had had no interaction of any kind with any representative of the Police Ombudsman. The statement was neither compiled nor signed in the presence of any such person. This document and these considerations (amongst others) also formed part of the background to the subsequent impugned arrest and detention of

the Plaintiff and the broader circumstances. On any showing, this document raised a plethora of issues and begged a multiplicity of questions

### **The October 2005 Arrest and Detention**

[7] The next material development consisted of the arrest of the Plaintiff giving rise to these proceedings. As the trial developed, it became clear that, in addition to what is rehearsed above, the following material facts were uncontested:

- (a) The Plaintiff was arrested at his home at 08.30 hours on 4<sup>th</sup> October 2005.
- (b) He was conveyed to Antrim Custody Suite, where he remained until his release at 17.49 hours the following day.
- (c) He was accompanied by his solicitor throughout his detention.
- (d) He made no complaints during his detention.
- (e) His solicitor made certain representations, all documented, intermittently.

### **The Plaintiff's Arrest Scrutinised**

[8] The arresting officer testified that he received an oral and written briefing from a named detective sergeant. This was an element of the planned arrest of the Plaintiff. The oral briefing was to the effect that the Plaintiff was suspected of having conspired to murder Robert McCartney and Brendan Devine, having possessed an offensive weapon and having caused an affray at Market Street, Belfast on 30<sup>th</sup> January 2005. The written briefing recounted that the Plaintiff and another named person were suspected of having been "*actively involved, both in the murder of Mr McCartney and the attempted murder of Mr Devine*". It was suggested that this belief had been formed progressively in the investigative activities of the PSNI Major Investigation Team. It continued:

"The two suspects arrested today, namely [XY] and Robert Fitzsimmons are believed to have been deeply involved in these serious offences. This belief is supported by eye witness accounts from the victim, Mr Devine, and a number of other individuals present in and around Market Street at the time of the commission of the murder of Mr McCartney and the attempted murder of Mr Devine ....

Similarly there is also further witness evidence available to place both suspects inside the bar and as

being involved in altercations with the deceased and Mr Devine ....

The nature of this evidence is that the victim, Mr Devine, has named a male person as the person responsible for stabbing him. He also places a second male in Market Street and furthermore states that he identifies this male as the same male who had earlier demanded an apology from him and Mr McCartney whilst inside the bar. Mr Devine alleges that he observed this male assaulting Mr McCartney in Market Street and that at this time there were no other persons near Mr McCartney. **Furthermore, a witness accompanying Mr Devine corroborates his account of events at the initial stages of the altercation at the entrance to Market Street. This witness identified two other males as being present in Market Street at the time, namely [XY] and Robert Fitzsimmons. This witness further alleges that a number of these males were armed with sticks and bottles .....**

Additional corroborative evidence is available which has been obtained from enquiries conducted to date by the enquiry team, centred upon things said by others present both within the bar and outside, actions done by persons in furtherance and contemplation of the murder of Mr Robert McCartney, the attempted murder of Mr Brendan Devine and associated activity which formed the preparatory acts to the killing itself and the disposal of vital forensic evidence. **Further substantive evidence is also available, the nature of which is central to the investigation, such as CCTV footage from various locations near the crime scene and from a local hospital, telecommunication evidence, photographs and evidence of an intelligence and forensic nature."**

**[Emphasis added]**

The arresting officer testified that, based upon the oral and written briefings, he was satisfied that he had reasonable grounds for suspecting the Plaintiff's involvement in the alleged offences. He confirmed that he had no knowledge of the preceding events (*supra*).

[9] The evidence of the custody sergeant was to like effect. This witness's assessment of the propriety of detaining the Plaintiff was based on an oral briefing

from the arresting officer, coupled with the aforementioned written briefing (the same document). In his notebook entry, the sergeant recorded a briefing from the arresting officer in these terms:

“He informed me that new evidence had come to light in form [sic] of witness statements. The nature of this evidence is that the victim, Mr Devine, has named a male as the person responsible for stabbing him. He also places a second male in Market Street ..... and states he identified this male as the same male who had earlier demanded an apology .... a witness accompanying Mr Devine corroborates his account of the events at the initial stages of the altercation. **This witness identified two other males as being present as the two detained persons. Alleges that a number of these males were armed with sticks and bottles.**”

[My emphasis]

The “*two detained persons*” denote the Plaintiff and XY.

### The Plaintiff’s Interviews

[10] The evidence included a document entitled “Pre-Interview Disclosure in respect of Robert Fitzsimmons”. Having documented briefly the background, this document states:

“Today your client has been arrested for conspiring to murder both Mr McCartney and Mr Devine, together with associated offences. This is as a result of new evidence being made available to the Investigation Team. This new evidence consisting of various witness accounts, some of which are significant, photographic/CCTV evidence and other information which places your client in Magennis’ Bar and connects him to the scene of the murder. It is the intentions [sic] of the detectives investigating this murder to question your client regarding the above and will centre on the following areas:

- (i) His presence within Magennis’ Bar and in Market Street, Belfast on Sunday 30<sup>th</sup> January 2005.
- (ii) His involvement in the murder of Mr McCartney and the attempted murder of Mr Devine.

- (iii) His associations and affiliations with others involved in the murder.
- (iv) His knowledge of the deceased and Mr Devine.
- (v) His movements and contact with others following the murder.
- (vi) His knowledge of and access to certain motor vehicles."

This document is dated 4<sup>th</sup> October 2005.

[11] The evidence also included two documents entitled "Interview Strategy - for Fitzsimmons". This may be linked to the pre-interview disclosure record. These documents disclose a carefully planned and coherent approach to the interviews of the Plaintiff. The court accepts that planned strategies of this kind must be applied in practice with some flexibility, reacting to events and developments as they occur. The strategy documents in particular an intention to put to the Plaintiff his written statement and the statements of six witnesses.

[12] The Plaintiff did not answer any of the questions put to him by police officers during either of his periods of detention. In his evidence to this Court, the justification which he proffered for this was, in terms, that everything he was capable of saying was contained in his written statement. This is encapsulated in the following response made at the beginning of the first of his ten interviews:

"..... I am [sic] absolutely, have nothing to do with any conspiracy on both those people, I had absolutely nothing to do with an offensive weapon, I was definitely not involved in any affray. I have given a six page statement till the Ombudsman relating to the whole case and up until now I have nothing more to say at this moment."

At the outset of subsequent interviews, the Plaintiff, either in his own words or via his solicitor, was adamant that he had nothing to add to his written statement. This is one of the identifiable themes of the ten interviews.

[13] A second recurring theme is that of interventions by the Plaintiff's solicitor which challenged the pattern and conduct of the interviews. Thirdly, the Plaintiff's solicitor advised him not to answer the questions put to him. Fourthly, it was represented by the Plaintiff's solicitor (per the record of the third interview):

“..... Mr Fitzsimmons is a witness and provided a witness statement to the Ombudsman. It may well be that in another forum as a witness he might actually like to help police but he’s been arrested under Section 41 which at this stage ..... wasn’t the proper procedure to elicit responses or clarification in relation to that statement.”

As the interviews progressed, the solicitor repeated that the Plaintiff was willing to be interviewed as a witness but not as a suspect.

[14] It is clear from all the evidence that, during the span of the ten interviews in question, certain pieces of evidence were put to the Plaintiff and he was questioned accordingly. Specifically (though not exhaustively) the interviews and questioning of the Plaintiff unfolded as follows:

**First Interview:**

- (a) In a series of questions the Plaintiff was asked to explain, clarify, illuminate and elaborate upon various aspects of his written statement.

**Second Interview:**

- (b) The Plaintiff was asked, *inter alia*, whether his written statement had been made in his own words and was questioned further about its contents. The questions were clearly designed to elicit the dense detail of the Plaintiff’s account and to fill in various gaps.

**Third Interview:**

- (c) The same kind of questioning continued. The Plaintiff was asked about, *inter alia*, the positions and movements of various persons; words spoken; verbal intonations; his consumption of alcohol on the date in question; the quality of his recollection; and his reaction to the news of the death. He was also questioned about the contents of a statement made by one particular named person.

**Fourth Interview:**

- (d) The Plaintiff was questioned about the statement made by two particular named witnesses. He was asked whether he would like to add anything to his written statement. He was further questioned about the written statement of a male person, specifically in relation to his presence and movements in Market Street. This statement suggested that the Plaintiff had a role in orchestrating and overseeing sinister events. A further series of questions was formulated arising out of the written statement of another male person. He was also



asked questions based on various photographs of the relevant licensed premises.

**Fifth Interview:**

- (e) Questions relating to the photographs continued. He was also asked about blood on the floor; clean up operations; the topography of the premises; his view outside the premises; and the seating occupied by him. He was further questioned about various matters arising from the written statement of "Witness I". A CCTV recording was played and the Plaintiff was questioned about its contents.

**Sixth Interview:**

- (f) The questioning about the CCTV recording continued. Almost half of this interview was occupied by interventions from the Plaintiff's solicitor and consequential exchanges with the interviewing officers.

**Seventh Interview:**

- (g) During the first third of this interview, the solicitor/interviewing officers axis continued. Thereafter, questions were posed relating to the Plaintiff's statement and that of "Witness I".

**Eighth Interview:**

- (h) The pattern of solicitor's interventions continued during the first phase of this interview. Thereafter, the Plaintiff was questioned about a series of photographs depicting the general locus. His solicitor continued to make intermittent interventions.

**Ninth Interview:**

- (i) The Plaintiff was questioned about a publication in a national newspaper containing a statement attributed to the Provisional IRA. He was asked specifically whether he was [per this publication] one of the "*four men involved in the attacks in Market Street on the evening of 30<sup>th</sup> January*" or "*a fifth person who was at the scene [but] took no part in the attacks and was responsible for moving to safety one of the two people accompanying [the victims] .....*" This prompted a series of interventions by the solicitor. The Plaintiff was further questioned specifically about the kicking and beating of the deceased after he had been stabbed in Market Street; the use of a steel bar; the retrieval and destruction of a knife; the seizure and destruction of a CCTV tape; and the burning of clothing in the aftermath. Other questions related to PIRA "*internal disciplinary proceedings*" and the intimidation of witnesses and the family of the deceased. He was asked whether PIRA had approved his act of submitting a statement

to the Police Ombudsman. He was also asked why he had not handed himself in to the police sooner. There followed extensive interventions by the Plaintiff's solicitor. Further questions based on the Plaintiff's statement were then formulated.

### **Tenth and final Interview:**

- (j) During the initial phase of this interview there were various interventions by the Plaintiff's solicitor. Subsequently, the Plaintiff was questioned about various suggested omissions in his statement. Certain aspects of other witness accounts were put to him. Various questions and suggestions of a "summing up" nature were put to him. Passages from certain witness statements were put to him afresh. Further, the statement of a male person was put to him *in extenso*. It was specifically suggested to the Plaintiff that he had "escorted" two named male persons from Market Street into the bar to ensure that they would not witness what was to occur. There were also some further questions based on the Plaintiff's statement.

[15] I have already outlined in paragraphs [3] - [6] above the relevant background events concerning the Plaintiff's earlier arrest and detention in February 2005 and his written statement made in May 2005. The evidence considered by the Court also included some of the written statements made by others which were put to the Plaintiff during interviews and formed part of his questioning by detectives.

[16] The parties adopted a sensible and pragmatic approach to the reviews of the Plaintiff's detention. It was agreed that these were conducted in accordance with the relevant statutory requirements. In the relevant contemporaneous records, each of the reviewing officers professed himself satisfied that the continued detention of the Plaintiff was necessary for the purpose of obtaining evidence through further questioning in interview, that the Plaintiff's continued detention remained proportionate and that the investigation was being conducted diligently and expeditiously. The further detention of the Plaintiff was authorised on each occasion accordingly. The last of the five reviews was carried out some two hours prior to the Plaintiff's release from detention. Upon his release, the Plaintiff was informed by a Detective Inspector that he would be "*reported for prosecution*".

[17] In his evidence to the court, the Plaintiff was given the opportunity, in both examination in chief and cross examination, to articulate his complaints concerning his arrest and detention. He testified that these were twofold. The first was that he objected to his arrest as he considered himself innocent of any criminal offence. The second was that he was questioned excessively about the contents of his written statement.

### **Consideration and Conclusions**

[18] I remind myself of the main governing principles:

- (a) The onus is on the Plaintiff to establish his case according to the civil standard of the balance of probabilities.
- (b) Given that the Defendant contends that the arrest and ensuing detention of the Plaintiff were legally justified in their entirety, the onus rests on the Defendant to make good this contention, to the same standard.
- (c) The Defendant must establish to the requisite standard that the arresting officer had the suspicion which is proffered as the justification for the Plaintiff's arrest and ensuing detention. This is the subjective element.
- (d) The Defendant must also satisfy the Court that this suspicion was reasonable. This is the objective element.
- (e) Finally, the Defendant must satisfy the Court that it was reasonable to detain the Plaintiff for the entirety of the period in question.

See O'Hara [supra], per Lord Steyn, pp 13-14 and per Lord Hope, p 18.

[19] The Plaintiff has clearly proved his arrest and detention. Hence the onus switches to the Defendant, in the sense explained above. Since the Plaintiff has been deprived of his liberty the court will subject the evidence of the Defendant's witnesses and the relevant documentary evidence, much of it rehearsed in summary form above, to careful scrutiny. In conducting this exercise, I have considered with care the totality of the sworn evidence adduced and the extensive documentary evidence.

[20] Applying this approach, I make the following conclusions:

- (a) As regards the subjective element, I am satisfied that the arresting officer undoubtedly entertained the suspicion which he professed to have, that is to say he suspected that the Plaintiff had committed the offences of conspiracy to murder, possession of an offensive weapon and affray. There was ample material in the oral and written briefings to support his evidence in this respect.
- (b) As regards the objective element, the Defendant has satisfied the Court that the aforementioned suspicion was reasonable. This assessment requires an evaluative judgment on the part of the Court, based on the relevant pieces of evidence which I have rehearsed above. I reject the Plaintiff's contention that there was insufficient precision in the briefing document. I consider that this kind of document should be assessed fairly and *in bonam partem*, with substance prevailing over form and that this is consonant with the doctrinal approach determined in O'Hara [supra] and kindred authorities.

- (c) The Defendant's evidence has discharged the burden of justifying the Plaintiff's detention for the whole of the period under scrutiny. The grounding suspicion clearly endured throughout. There was no wastage of time and there were no inappropriate diversions or delaying tactics. The Plaintiff himself agreed in evidence that the interviews were conducted expeditiously. I consider that there was clear and sufficient justification for detaining the Plaintiff throughout the entirety of the period in question. The interview records and other related documentary evidence disclose a clear and carefully planned strategy and the execution thereof. The successive decisions to detain the Plaintiff during the period under scrutiny were reasonable, properly informed and objectively justified. There is no hint of any misuse of powers or other legally improper motive on the part of the police officers concerned. The various strategic decisions which were made at various stages of the process, from the pre-arrest stage to the ultimate release of the Plaintiff, fell within the margin of appreciation which the law accords to the police in cases of this kind and were not tainted by any vestige of illegality.

[21] It follows that the Defendant has clearly discharged his burden. I would add the following. The present case is one of the more potent ones of its kind from the Defendant's perspective. While decisions concerning the arrest and continued detention of the citizen involve the exercise of discretionary powers, I consider that the police were duty bound to arrest this Plaintiff and to detain him for the period under scrutiny, having regard to their general statutory duties owed to the public under section 32 (1) (d) of the Police (Northern Ireland) Act 2000. The Plaintiff's primary and alternative cases fail accordingly.

[22] I would add that detained persons who choose to adopt the stance which this Plaintiff espoused throughout the entirety of his detention expose themselves to a series of voluntarily assumed risks. These include, in particular, the risk that police suspicions will be fortified, rather than assuaged; the risk that interviews will be justifiably prolonged; and the risk of an adverse inference being made at any ensuing criminal trial. With the exception of the third of these risks, the present case is a paradigm one in these respects.

[23] Finally, it is appropriate to emphasise that this judgment does not speak to questions of guilt or innocence in relation to the dreadful murder of Robert McCartney on 30<sup>th</sup> January 2005 or any associated offence. Rather, the judgment of this court is concerned solely with the question of whether the arrest and ensuing detention of this Plaintiff, Robert Fitzsimmons, were lawful. This court's unequivocal conclusion is that they were. The Plaintiff's action is dismissed accordingly. Thus there will be judgment for the Defendant against the Plaintiff.