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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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BELFAST CROWN COURT

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THE QUEEN

-v-

AARON THOMAS WHITE

GILLEN J

[1] In this matter the accused is charged with the attempted murder of Michael Liam Reid contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983.

[2] The prosecution case is that in the early hours of 11 October 2003 the accused, in the company of other persons including his brother, attacked Michael Reid at an address in street X in Harryville, Ballymena ("address A in Harryville") solely because he was a Catholic by religion. It is alleged that a cable was initially pulled round the neck of Reid, that the accused nodded to another man to get a knife and that the victim was then stabbed a number of times about the ribs, legs, neck and head. When the victim feigned death, the accused and another man set off to obtain something to cut his body up. Mr Reid then managed to escape by tackling the remaining person in the house and another man outside.

[3] The prosecution case has already presented to the court evidence from, inter alia, Michael Reid and Samantha Macaulay. The latter alleged that she knew Aaron White and had seen and spoken to him in street X in Harryville on the evening of 10th October 2003. Her evidence also is to the effect that she was at a party in the house beside address A in Harryville in the early hours of morning of 11 October 2003. She alleged that the accused had come into the house in an agitated manner and had spoken to an Aidy Mitchell. The

witness gave evidence that the accused had said, "Do you want to kill a Taigue" and also "You know the craic here, under no circumstances let anyone in next door".

[4] The victim Michael Reid gave evidence of the matters contained in para 2 above. Whilst he did not purport to identify Aaron White, he did give evidence that a man calling himself Aaron White had been involved in the attack upon him. He described this man as being about 6 foot tall, short dark hair and wearing tinted rounded glasses. A pair of tinted glasses, which the prosecution alleged through the evidence of an optometrist belonged to the accused, were found in the roadway outside address A in Harryville when the police came to investigate the scene after the attack.

[5] The Crown also assert that there will be evidence before me that a mobile phone linked to Aaron White was found in address A in Harryville after the attack, a household where a Johnny Hodges resided and to which Michael Reid had been a visitor at the time he was assaulted.

The Statutory Framework of the Application

[6] The prosecution now apply to the court to admit a statement made to the police by Raymond James Agnew (now deceased). It is made pursuant to Article 18 of the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order"). The relevant articles of that Order in the context of this application are as follows:-

Admissibility of hearsay evidence

> **"18. -** (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –
>
> (a) any provision of this Part or any other statutory provision makes it admissible, . . .
>
> **Cases where a witness is unavailable**
>
> **20. -** (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matters stated if –
>
> (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in paragraph (2) is satisfied.

(2) The conditions are –

(a) that the relevant person is dead; . . .

. . . .

Court's general discretion to exclude evidence

30. – (1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if –

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in due waste of time, substantially outweighs the case for admitting it taking account of the value of the evidence.

(2) Nothing in this Part prejudices -

(a) any power of a court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12) (Exclusion of Unfair Evidence), or

(b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)."

[7] I observe at this stage a statement falling within Article 20(2)(a) gives no discretion to the court, merely providing that a statement "is admissible" if the relevant conditions are satisfied. This is a significant difference from the earlier legislation under the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988 ("the 1988 Order") which rendered all such statements subject to the "interests of justice" discretion, with the presumption being against admission

where it was apparent that the statements in question had been prepared for the purposes of criminal proceedings or a criminal investigation. The court's discretion to exclude statements under Article 20(2)(a) now derives from Article 30 of the 2004 Order and thus Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12) (Exclusion of Unfair Evidence) and the other specific discretions about waste of time, etc.

The Factual Basis of the Application

[8] Mr Murphy QC who appeared on behalf of the prosecution with Mr McCrudden, sought to introduce the statement of Raymond James Agnew made to police on 15 October 2003. Mr Agnew (the deceased) had died on 1 November 2003. No issue was raised about proof of death. That statement indicated that after spending the evening at Kernohan's bar in Ballymena and the Tullyglass hotel he had, along with some friends, gone to a party at street X in Harryville at the home of Aidy Mitchell. By that stage, he asserted in the statement, he would have drunk "2 or 3 pints at the darts and 6 or 7 vodkas at the Tullyglass. I would have considered myself rightly on but I knew what was going on". The deceased's statement continues:-

> "I was in a couple of minutes when Aaron White bounced into the door ranting and raving. He stood at the door with both feet in the living room, he had his arms up and was waving them in the air .He shouted, "I'm going to kill a Taig, I'm going to kill a Taig" or something very similar, but definitely, "Kill" and "Taig" was in it. He then walked out. This was the first time I had seen Aaron that night. I have known Aaron for at least 14 years and know he lives up in Lettercree. He was wearing a pair of glasses, they were oval in shape and I think they might have had a tint in them. He was wearing a dark coat, I'm not sure if it was navy or black. It was slightly longer than a bomber jacket. It had a zip up the middle which I think was zipped to the top as I don't remember seeing anything below it. He had nothing in his hands and was wearing dark jeans and I think a pair of trainers on his feet. He was only in the house for a matter of seconds shouting and raving and bounced back out and shut the living room door behind him".

[9] Mr Murphy seeks to have this evidence admitted under Article 20(2)(a) of the 2004 Order on the grounds that the relevant person, namely Mr Agnew, is

dead. He submits that it is in interests of justice that the statement be admitted. It is his assertion that the statement has direct relevance to a central issue in the case namely the presence, demeanour, attitude and intent of the accused.

[10] Mr Murphy submitted that this was not the sole or decisive evidence in the case. His case relies on a number of factors including:

(a) the evidence of Mr Reid who, whilst not identifying Aaron White, gives clear evidence that a man fitting the description of Aaron White and who declared he was Aaron White was involved in this attack upon him,

(b) Ms Macaulay has already given evidence of Aaron White's presence in the area at the relevant time and that he had made comments similar to those suggested by Mr Agnew in Aidey Mitchell's house,

(c) Miss Macaulay had alleged that Aaron White's brother was with him (as does Mr Reid). There is evidence that Aaron White's brother has admitted to being involved in the attempted murder and has already been sentenced by the court,

(d) a pair of glasses matching tinted prescription glasses owned by White were found outside the house in question,

(e) a mobile phone with links to the accused was found at the scene of the attack.

Time limits for application

[11] This application was yet another example of the unfolding saga of applications of this nature under the 2004 Order mounted by the Prosecution Service (PPS) which do not comply with the statutory time limits. In this case Mr Agnew, the maker of the statement, had died on 1 November 2003. The accused was committed for trial on 15 November 2006. The application was not lodged until 12 January 2007. Under the terms of Rule 44O of the Crown Court (Amendment) Rules (Northern Ireland) 2005 ("the 2005 Rules") a prosecutor who wants to adduce such evidence shall give notice in writing in Form 7H of the Schedule and that notice shall be served on the Chief Clerk and every other party to the proceedings within 14 days from the date of the committal of the defendant. In other words the application ought to have been made by 29 November 2006. It was thus made 6 weeks late. There is also a statutory obligation on the defence in this case to have served notice of opposition to such a notice within 14 days of the notice being served upon them. The defence had not complied with this and were thus now 5 ½ months out of time.

[12] Mr Murphy on behalf of the Public Prosecution Service could provide no explanation for the application being late. Similarly Mr Mateer QC, who appeared on behalf of the defendant with Mr Laverty, could proffer no explanation for the absence of any notice on the part of the defendant other than to say that he had been brought into the case at a late stage and the matter had obviously had been overlooked prior to that event.

[13] Under Rule 44O(8)(c) of the 2005 Rules the court may, if it considers that it is in the interests of justice to do so, abridge or extend the time for service of a notice required under this Rule either before or after that period expires. In addition the court may allow the notice to be given orally.

[14] Before me both the defence and the prosecution consented to the applications being made without reference to the failure to comply with the time limit. Given that both were in breach of the time limits, that was perhaps not surprising. In my view that is insufficient to deflect the court from considering the matter.

[15] I repeat what I said recently in R v. Jason King (unreported) (GILC5826) at paragraph 21:-

> "A culture of non compliance with Rules of Court must not be tolerated by the courts. This is one of several cases in the recent past (including R v. Black & Others (2007) NICC4 and a decision of His Honour Judge Lynch in R v. Fulton 05/59433 (unreported)) where the prosecution has failed to comply with time limits without good reason. Time limits require to be observed. The objective of the Rules is to ensure that cases are dealt with efficiently, fairly and expeditiously and this depends upon adherence to the time tables set out. Parliament has clearly intended that the court should have a discretionary power to shorten a time limit or extend it after it has expired. In the exercise of that discretion the court will take account of all the relevant considerations including the furtherance of the overriding objective of the legislation. In R (Robinson v. Sutton Coldfield Magistrates' Court [2006] CR. App R 13 the prosecution gave notice out of time of intention to adduce evidence of bad character. Owen J said at para 16:
>
> "An application for an extension will be closely scrutinised by the court. A party seeking an extension cannot expect the indulgence of the court

> unless it clearly sets out the reasons why it is seeking that indulgence. But importantly I am entirely satisfied that there was no conceivable prejudice to the claimant, bearing in mind that he would have been well aware of the facts of his earlier convictions; secondly, that he was on notice on April 14 that there could be such an application; and thirdly that there was no application for an adjournment on June 16 from which it is to be inferred that the claimant and his legal advisers did not consider their position to be prejudiced by the short notice"
>
> (22) Whilst in this case I intend to exercise my discretion to permit an extension of time, the Public Prosecution Service should be aware that the patience of the court in such matters is not inexhaustible. The public interest in ensuring that this public body complies with statutory obligations and the interests of justice in general may soon become overwhelming factors in the consideration of such applications should it become clear that a culture of non compliance has developed without appropriate attempts to address it. My comments should be drawn to the attention of the Director of the Public Prosecution Service and steps taken forthwith to ensure that time limits are complied with in the future".

[16] Those comments apply with equal strength in this case and I have again directed that my concerns are brought to the Director's attention. The spirit of those comments also applies to defence solicitors and counsel although I have not observed such a similar pattern of breach in defence notices.

[17] The circumstances in this case that I have taken into account include the consent of the parties to the late application and notice being made, the absence of any conceivable prejudice to the accused in the late application, the clear opportunity in terms of time that has been afforded to the accused to make any investigations into the statement of the deceased witness, and the absence of any application to adjourn. These combine to persuade me that I should exercise my discretion under the relevant Rule and extend the time for service of the prosecution notice and accept an oral representation by way of response from the defence.

The principles governing this application

[18] No issue arose in this case as to the proof of the unavailability of the maker of the statement and therefore I do not need to deal with the law on that aspect.

[19] The onus is on the party seeking to have the statement admitted, in this case the Public Prosecution Service, to satisfy the court that "it ought to be admitted in the interests of justice" and I should not exclude it under art .30

[20] In considering the interests of justice, it is proper to have regard to the likelihood of it being possible for the defendant to controvert the statement of the witness by himself giving evidence and by calling the evidence of other witnesses. As in this case, arguments for the exclusion of prosecution evidence typically emphasise the loss of the important right to cross examine the absent witness.

[21] In R v. Cole 90 Cr.App.R478 (Cole's case), in the context of section 23 and 26 of the Criminal Justice Act 1988 (similar to the 1988 Order), the court considered the issue of granting leave for the admissibility of a statement in criminal proceedings where it was of the opinion "that the statement ought to be admitted in the interests of justice". At page 8 Gibson LJ said:-

> "The overall purpose of the provisions was to widen the power of the court to admit documentary hearsay evidence while ensuring that the accused receives a fair trial. In deciding how to achieve the fairness of the trial a balance must on occasions be struck between the interests of the public in enabling the prosecution case to be properly presented and the interests of a particular defendant in not being put in a disadvantageous position, for example by the death or illness of a witness. The public of course also has a direct interest in the proper protection of the individual accused".

4. At page 8 Gibson LJ further stated:

> "The decision by an accused whether or not to give evidence or to call witnesses is to be made by him by reference to the admissible evidence put before the court; and the accused has no right, as we think, for the purposes of this provision, to be treated as having no possibility of controverting the statement because of his right not to give evidence or to call witnesses. .

> . . This question however is only one part of a complex balancing exercise which the court must perform. For example the fact that the court concludes that it is likely to be possible for the accused to controvert the statement of the person making it cannot be cross examined does not mean that the court will therefore necessarily be of the opinion that admission of this statement will not result in unfairness to the accused or that the statement ought not be admitted in the interests of justice".

[22] Whilst these comments were made in the context of a different piece of legislation which refers specifically to whether it was likely to be possible to controvert the statement in the absence of the ability to cross examine the maker, nonetheless I think that these general principles have a relevance to the construction and interpretation of the 2004 Order .

[23] The weight to be attached to the inability to cross examine and the magnitude of any consequential risk that admission of the statement will result in unfairness to the accused must depend in part on the court's assessment of the quality of the evidence shown by the contents of the statement. At page 9 of Cole's case, Gibson LJ said:-

> "Thus the weight to be attached to the inability to cross examine and the magnitude of any consequential risk that admission of the statement will result in unfairness to the accused, will depend in part upon the court's assessment of the quality of the evidence shown by the contents of the statement. Each case, as is obvious, must turn upon its own facts. The court should, we accept, consider whether . . . the inability to probe a statement by cross examination of the maker of it must be regarded as having such consequences, having regard to the terms and substance of the statement in light of the issues in the case . . ."

[24] In Grant v. The State [2006] 2 WLR 835 (Grant's case) the Privy Council considered a murder case where at the trial an unsworn written statement of an absent witness had been admitted under the provisions of a Jamaican scheme for receptions of hearsay evidence similar to the current legislation. In the course of a survey of the English authorities and the Strasbourg jurisprudence dealing with the European Convention on Human Rights and Fundamental Freedoms (the Convention) Article 6(3)(d) i.e. the right of an accused person

to examine or have examined witnesses against him, Lord Bingham said at page 10:-

> "While, therefore, the Strasbourg jurisprudence very strongly favours the calling of live witnesses, available for cross examination by the defence, the focus of its enquiry in any given case is not on whether there has been a deviation from the strict letter of Article 6(3) but on whether any deviation there may have been has operated unfairly to the defendant in the context of the proceedings as a whole. This calls for consideration of the extent to which the legitimate interests of the defendant had been safeguarded. "

[25] Before the advent of the 2004 Order (and its English equivalent the Criminal Justice Act 2003), the courts both in Northern Ireland and England have considered the reconciliation of the concept of receiving hearsay evidence with Article 6(3)(d) of the Convention. The use of hearsay evidence for the prosecution does not of itself contravene the "fair trial" provisions of the Convention provided the court retains the power to assess the interests of justice by reference to the risk of unfairness to the accused (see Gokal [1997] 2 CR.App R 266 (Gokal's case) and Thomas [1998] Crim LR 887 (Thomas's case)).

[26] In the Queen v. Geoffrey Singleton (2003) NICA 29 (Singleton's case), in the context of Article 3 of the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988, concerning the admission of a statement of evidence of a child, Carswell LCJ (as he then was) addressed the principles of Gokal's case and Thomas' case at paragraph 18 as follows :-

> "We respectfully agree with the decisions of the Court of Appeal in R v. Gokal and R v. Thomas. The provisions of the 1988 Order are so framed that the court must ensure that the trial will be fair if the statement is admitted. The provisions of Article 6 incorporate the safeguard which appears prominently in the Strasbourg jurisprudence, that the prosecution case must not be founded solely or to a decisive extent upon the statement admitted. In the present case there was other evidence, given orally and subject to cross examination, directly implicating the appellant and Denise Vennard's statement was in our judgment ancillary to that. We therefore consider that the judge was entitled to admit her statement if satisfied that the trial would be fair if it was admitted. That would not in our opinion constitute a breach of

> Article 6 of the Convention . . . We would observe however that the judge did not spell out why he thought that it was interests of justice that the statement should be admitted, and it was preferable that this should be done".

[27] I note that this approach echoes what was said in Luca v. Italy [2003] 36 EHRR 807(Luca's case) where at paragraph 40 of the judgment the court said:-

> "The corollary of that, however, is that where the conviction is both solely or to a decisive degree based on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that it is incompatible with the guarantees provided by Article 6".

[28] However in an obiter statement in R v. Arnold [2004] EWCA Crim 1293, Leveson J, giving the judgment on behalf of the Court of Appeal in the context of section 23(3)(b) of the Criminal Justice Act 1988, added this gloss on the principle set out in Luca's case:-

> "59. The judge rejected the submission for the defence that the last sentence of that paragraph *(i.e. the sentence from Luca's case which I have already quoted in para 30)* could admit of no exceptions. Certainly, if it did, then sections 23 and 26 of the 1988 Act could never apply in a case such as the present where the essential or only witness is kept away by fear. That would seem to us an intolerable result as a general proposition and could only lead to an encouragement of criminals to indulge in the very kind of intimidation which the sections are designed to defeat. Certainly, decisions of this court before the passage of the Human Rights Act 1998, as well as commonsense, suggests that no invariable rule to that effect should be either propounded or followed".

[29] R v. Sellick [2005] 1 WLR 3257 adopted the same approach.

[30] Equally, there is no doubt that there is a distinction between circumstances where a witness may have absented himself through fear generated by the accused and a case such as the present where through no fault whatsoever of the accused the witness has died. Lord Bingham drew attention to this distinction in Grant's case at page 10 in the following terms:-

> "Where a witness is unavailable to give evidence in person because he is dead, or too ill to attend, or abroad, or cannot be traced, the argument for admitting hearsay evidence is less irresistible (*than where a witness is absent through fear)* but there may still be a compelling argument for admitting it, provided always that its admission does not place the defendant at an unfair disadvantage".

[31] An example of this is to be found in R v. Al Kwawaja [2006] 1 CR.App R.9 where the evidence of a witness had been the only evidence going directly to the commission of an indecent assault on her by the defendant whilst he treated her under hypnosis. The witness then died. The prosecution would have had to abandon the case in relation to the charge relevant to her complaint if the evidence had been excluded. In that case however the defendant had been able to attack the accuracy of the statement of the witness by exploring inconsistencies between it and statements made to two witnesses by way of recent complaint and also through expert evidence. The question therefore under Article 6(3)(d) is whether the proceedings as a whole including the way the evidence was taken are fair.

[32] Finally, Cole's case is also authority for the proposition that the court is entitled, and indeed required, to consider how far any potential unfairness, arising from the inability to cross examine on the particular statement, may be effectively counter balanced by a warning and explanation given by the judge in his summing up or, in the case of a Diplock trial, by the judge appropriately reminding himself of these matters. Courts will find a helpful guide in this regard in the judgment of Lord Griffiths in a decision of the Privy Council in Scott v. R [1989] AC 1242 at p 1258 where he said:-

> "In light of these authorities their Lordships are satisfied that the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is, however, a power that should be exercised with great restraint. The mere fact that the deponent will not be available for cross examination is obviously an insufficient ground for excluding the deposition but that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence . . . It will, of course, be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross examination and to take that into consideration when

> considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out the particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross examination: but no rules can usefully be laid down to control the detail to which a judge descend in the individual case".

The submissions on behalf of the accused

[33] Mr Mateer, inter alia, submitted that the court should not admit this statement for the following reasons:-

[34] Counsel argued that the evidence of Samantha Macaulay, which was of similar purport to that of Mr Agnew, was gravely undermined in the course of cross examination. In the absence of that cross examination by counsel Mr Mateer it could not have been predicted that her written account would be at such variance with the evidence which she gave. Areas of insincerity, ambiguity and mis-recollection are therefore unable to be tested if the statement of Mr Agnew was introduced. He therefore indicated that the presence of Miss Macaulay to give her evidence and be subjected to cross examination highlighted the mischief that would be served if Mr Agnew's statement was not similarly exposed to cross examination.

[35] It was counsel's submission that on basis of the evidence to date, there was no evidence of any substance to connect Aaron White directly with the attack on Mr Reid or that substantiated the alleged remarks which had been made in Aidy Mitchell's house. He asserted that the only evidence that the Crown put forward was that of Mr Reid and Samantha Macaulay. Mr Reid did not know or purport to identify Aaron White albeit the attacker had styled himself as Aaron White. He criticised the evidence of Samantha Macaulay as weak and contradictory particularly in her assertion as to how she knew the accused. In its final state he alleged that her evidence was wholly unreliable.

[36] The issue of intention is a vital ingredient in this case. Mr Reid had given evidence, inter alia, of the attackers recording some element of surprise when he feigned death. Mr Reid recorded one of them as saying, "Oh shit we have killed him. Is he dead?". Mr Mateer submitted that this militated against any intention to kill the deceased and that hence in light of the unreliability of Miss Macaulay's evidence, the evidence of Mr Agnew potentially becomes decisive on the question of intent.

[37] Counsel drew my attention to R v. M (KJ) [2003] 2 CR.App R322 (M's case). In that case a prosecution witness Timba Bona had not given evidence

through fear and an attempt was made to admit his written statement under sections 23 and 26 of the Criminal Justice Act 1988. The Court of Appeal reversed the decision of the learned trial judge to admit it on the basis that he had failed to attach sufficient weight to the inability of the defendant to go into the witness box to contradict the statement or to challenge the motives and veracity of the statement maker by cross examination. The suspect nature of the evidence in question was apparent at the outset and therefore this statement ought not to have been admitted. In that particular case the witness in question was described by the court as "potentially completely flawed witness". He had initially been approached by the police on the basis that he was suspected of being a member of the group which had carried out the murder and had, in those circumstances, refused to answer any questions. On that view, his evidence would need to be approached with the same caution as that of an accomplice. His apparent change of heart had come at a time when he was himself on bail in respect of a charge of robbery and appears to have been directly motivated by the offer of a reward for information in respect of the murder. He had considerably "improved" his evidence between the time of his giving his first and second statements. There was thus every reason to question his motive and his veracity in pinning the murder on the defendant, a person with a mind of a child who, if involved, was likely to have been no more than a "hanger-on" in a group such as that involved in this offence. Further, this was a case where, being unfit to plead, the defendant could have had no realistic opportunity of going in the witness box and defending himself nor to give coherent instructions as to his advisers.

[38] In the instant case Mr Mateer asserted that there were flaws in the evidence on the papers of Mr Agnew. In the first place he admitted that he had been out drinking. In the course of his statement he stated, "By this stage I would have drunk 2 or 3 pints at the darts and 6 or 7 vodkas at the Tullyglass. I would have considered myself rightly on but I knew what was going on". Secondly Mr Mateer drew attention to the fact that insofar as the statement alleges that Aaron White shouted, "I am going to kill a Taig. I am going to kill a Taig", Mr Agnew adds "or something very similar, but definitely "kill" and "Taig" was in it". He regarded the uncertainty of this statement as rendering Agnew's account potentially flawed as in the M case. Thirdly Mr Mateer characterised the evidence as identification evidence similar to Miss Macaulay and that this is a category that deserves particular scrutiny. For all these reasons he submitted that not only could this evidence be potentially 'sole or decisive,' but that it would be against the interests of justice to admit it.

Conclusions

[39] I have come to the conclusion, having considered my discretion within the terms of Article 30 of the 2004 legislation, that I should not exercise my power to exclude this evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989. I do not believe that it would be in the interests

of justice to exclude this statement. I am satisfied there are compelling reasons to admit it and I consider the trial will be fair if I do admit it. I have come to this conclusion for the following reasons:

[40] Adopting the approach adumbrated by Carswell LCJ (as he then was) in Singleton's case, I do not consider that the prosecution case as it stands now before me is founded solely or to a decisive extent upon the statement of Mr Agnew. There is other evidence given orally and which has been subjected to cross examination implicating the accused in this alleged offence as follows:

(a) The evidence of Mr Reid that a man who styled himself as Aaron White was involved in this incident.

(b) If the evidence of Mr Reid is to be believed, the attack upon him was extremely serious – attempted strangulation and multiple stab wounds – which provides evidence for a submission that the attack amounted to one of attempted murder.

(c) Tinted spectacles matching those of the accused are found close to the scene of the attack. Mr Reid gave evidence that the man who described himself as Aaron White was wearing glasses which were round in shape and tinted.

(d) A mobile phone with links to Aaron White was found at the scene of the attack.

(e) Whilst the evidence of Sarah Macaulay will have to be carefully scrutinised by me, at its height it amounts to an identification of Aaron White being close to the scene of the crime at the relevant time. Her evidence was that she had seen him once per week for a period of two years and had spoken to him in the street in the night in question. In addition she witnessed him in Aidy Mitchell's house asking Aidy Mitchell if he wanted to "kill a Taig" and also asserting that no one was to be allowed into the house next door (where the assault took place). Miss Macaulay did assert that the accused's brother was with the accused that night and that has proven to be correct in that he has pleaded guilty to the charge of attempted murder.

(f) Accordingly the statement of the deceased is ancillary to the other evidence in the case.

[41] Whilst the prosecution case is not yet complete and I have not had the benefit of any submissions from Mr Mateer on the overall state of the case other than in this context - and thus I keep an open mind on any subsequent applications to come before me - I am satisfied that taking the prosecution case

at its current height, Mr Murphy can properly argue that there would be a case to answer even without the evidence of Mr Agnew.

[42] On the evidence currently before me, I see no basis for equating Mr Agnew with the witness Timba Bona in M's case (see paragraph 40 of this judgment). There is no suggestion as yet that Mr Agnew is tainted in the manner that the witness was in M's case. The amount of drink that Mr Agnew had taken can be used to seek to persuade me to undermine his evidence as can his use of the phrase, "something very similar" at the appropriate stage. Provided that I ensure that I warn myself of the dangers of such evidence in the terms outlined by Lord Griffiths in Scott's case, I see no reason why the interests of justice and of the accused cannot thus be protected. That is particularly so in a judge alone case where I have to give my reasons for acceptance or rejection of any witness relevant to the hearing. I must make a proper analysis of the witnesses, and their credibility. In that context I can apply a rigorous scrutiny to the statement of James Agnew when considering the case as a whole.

[43] The accused can still challenge the evidence of Mr Agnew if he wishes either by giving oral evidence himself or for example by calling other witnesses who were present at Aidy Mitchell's house to disprove and challenge the assertions of Mr Agnew. Even if he does not, I will expressly remind myself that the weight which I attach to the evidence of Mr Agnew will be less than if it were oral testimony subjected to cross examination. I will be aware of the risks of reliance on untested evidence. More than a jury I will be aware of any risk of accepting what might be an apparently plausible statement on its face value by an author at the moment whose reliability and honesty I have no extraneous reason to doubt and that it should not be given more weight than the oral evidence that is being heard. I will also be conscious of the context of all the other evidence and if there are discrepancies between the statement and the evidence of other witnesses I will take that into account. I am therefore satisfied that I will be able to ensure the proceedings as a whole, including the way in which the evidence was taken, is fair.

[44] Finally I am satisfied that, the onus being on the prosecution in this matter, it has satisfied me that the statement should be admitted in the interests of justice. I consider that the reasons I have set out for so concluding are compelling. Its admission does not place the defendant at an unfair advantage. I must bear in mind, as the Strasbourg Court has recognised, that there is a need for a fair balance between the general interests of the community and the personal rights of the individual. I must not only safeguard the rights of the individual to have a fair trial, but the interests of the community and the victims of crime must also be respected. It is important that all the relevant evidence in this case be examined and that all the material witnesses who have come forward be given an opportunity to have their evidence heard even where as in this case the witness is now deceased provided the proceedings as

a whole are fair. In these circumstances, I have come to the conclusion that this statement merits admission.