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Judgment: approved by the Court for handing down | *Delivered:* **19/06/07**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

CHARLES COLUMBA McMENAMIN

Before: Campbell and Girvan LJJ and Gillen J

CAMPBELL LJ

[1] On 10 May 2007 we allowed this appeal and quashed the convictions. We now give the reasons for doing so.

[2] On 9 February 1979 Charles Columba McMenamin pleaded not guilty at Belfast City Commission to a total of nine counts which were contained in four bills of indictment. He was rearraigned on 14 December 1979 when he pleaded guilty to these offences which were: belonging to a proscribed organisation in 1976 and in 1978; having a firearm with intent on a date unknown in 1976; conspiracy to murder on 28 February 1976; possession of a firearm with intent on 28 February 1976; possession of a firearm and having a firearm with intent between 1 January 1978 and 21 March 1978; collecting unlawful information in 1976 and communicating unlawful information in the same year.

[3] On 14 January 1980 he was sentenced to borstal training in relation to all the counts to which he had pleaded guilty. He did not appeal against conviction or sentence and served the period of borstal training.

[4] In September 2003 Mr McMenamin applied to the Criminal Cases Review Commission for a review of his convictions. The Commission then referred the case to this court under powers contained in the Criminal Appeal Act 1995. The Commission did so because it considers that there are exceptional circumstances justifying referring Mr McMenamin's convictions

to the Court of Appeal even though he has not previously appealed against conviction and pleaded guilty to the offences.

The background

[5] Mr McMenamin was arrested at his home at 5.15 am on 26 March 1978. He was then 16 years and 10 months old and he was taken Strand Road RUC Station in Londonderry where he was interviewed on six occasions between 10.50 am on 26 March and 9.10 pm on 27 March 1978. He was interviewed further on two occasions on 28 March 1978. He was held in custody at Strand Road for 57 hours and 55 minutes and the interviews lasted for a total of 11 hours and 20 minutes. He did not have access to a solicitor or parent or other appropriate adult until 28 March 1978 after he had made the statements of admission during the interviews on 26 and 27 March on which the Crown relied at his trial.

[6] The charges in the first indictment (No. 55/79) were based on two statements made by Mr McMenamin on 26 March 1978. The first of these began at 3.35 pm and finished at 4.13 pm and it was witnessed by Detective Constable Gray and Detective Constable Kilfedder. In this statement Mr McMenamin described being directed to collect a gun, going with three others to kidnap a man in a car and holding the man for an hour while another person took the car. He signed a sketch of the street where this was said to have happened. His second statement was dictated to Detective Constable Gray and witnessed by Detective Constable Webster at an interview on 26 March that commenced at 7.40 pm and terminated at 8.00 pm. This statement related to the offences of membership of a proscribed organisation and formed counts 1 and 2 on this indictment. In the statement he described how he became a member of Fianna Na hÉireann then left and rejoined.

[7] The offences in the second indictment (No. 56/79) were based on the content of a statement made during an interview on 27 March 1978 which began at 10.10 am and ended at 11.15 am. This statement related to an incident on 28 February 1976 when four youths entered a private house and held the occupants at gunpoint while another fired a gun out of an upstairs window. The police made a sketch of the area and Mr McMenamin agreed to dictate a statement about the shooting to Detective Constable Gray who was accompanied by Detective Constable Webster. In the statement he said that he acted as one of the lookouts around the end of February while the gunman tried to shoot a soldier coming out of the sangar at the gate of the police station.

[8] A statement written by Mr McMenamin and witnessed by Detective Constable Webster who was accompanied by Detective Constable Gray at an interview on 27 March 1978 between 8.10 pm and 9.10 pm formed the basis

for the charges in the third indictment (No. 58/79). In this statement he said that some time in February 1978 he had a gun in his house and he and another boy whom he did not name used the gun to try to hijack a car from Horner's Garage. The man at the garage refused to give the boy a car and they went home. A Mr John Joseph Lynch was recorded by the police to have made oral admissions that he committed these offences and a further offence with Mr McMenamin which he said took place on the same afternoon. Mr Lynch refused to make a written statement but he was also charged and convicted as a co-defendant of Mr McMenamin. Although they both confessed to attempting to hijack a car at the garage the police did not recommend that they be charged with an offence in relation to this part of their confessions.

[9] The charges in the fourth indictment (No. 65/79) were based on what was said in a statement dictated by Mr McMenamin to Detective Constable Gray during an interview on the evening of 26 March 1978 with Detective Constable Webster in attendance. In this statement he admitted that he had timed army patrols and stood outside the police station taking car registration numbers and then passed this information to an IRA intelligence officer.

Medical examinations

[10] The detention record indicates that Mr McMenamin was examined on at least five occasions during his detention.

- Prior to being interviewed at 6.10 am on 26 March 1978.
- At 5.55pm and 11.55pm on 26 March 1978.
- At 12.35am and 3.00pm on 28 March 1978.

At the second examination at 5.55pm on 26 March Dr Chauhan reported that Mr McMenamin complained that he had had his "hair pulled at questioning and [been] put on the ground and kicked". Dr Chauhan noted that Mr McMenamin had tried to cut his left wrist with a screw which he had taken from a radiator in his cell. The doctor found him to be co-operative and slightly upset. He examined Mr McMenamin's scalp and noted "scalp: small patch of scalp at the front shows freshly avulsed hairs".

[11] The examination at 12.35 am on 28 March 1978 was carried out by Dr Munroe and he recorded that Mr McMenamin had used a plastic cup to try to scratch his right wrist and he reported that he had four or five scratches on the wrist and 19-20 red welts. The wound had been dressed by Mr McMenamin's own doctor.

[12] Mr McMenamin is recorded as having made an allegation during the medical examination by Dr Chauhan at 5.55 pm on 26 March 1978 of assault

in custody. The other medical reports record no further allegations being made.

The subsequent history

[13] On 11 May 1978 Mr McMenamin made an application in the High Court for bail. Counsel who appeared for him indicated to the court that Mr McMenamin was admitting responsibility for the offences to which he had confessed. A further application for bail was made on Friday 10 November 1978 and on this occasion it appears that Brother Lynch of St Patrick's Training School, Belfast gave evidence that Mr McMenamin was in custody at the school on 28 February 1976. This is the date in indictment 56/79 on which he is alleged to have conspired to murder and to have been in possession of a firearm and ammunition with intent in Londonderry. These offences were 'holding' charges and the judge adjourned the application for one week to give the prosecution time to prefer additional charges against Mr McMenamin This was duly done and on Friday 17 November 1978 the judge refused bail as he found no conflict between the evidence of Brother Lynch and the dates of the additional charges that had recently been preferred.

[14] A direction was given by the Director of Public Prosecution on 7 November 1979 that Mr McMenamin was not to be prosecuted for the offences in indictment No. 56/79 as it appeared that he had been detained at St Patrick's Training School on 28 February 1976. Surprisingly this must not have been relayed to prosecuting counsel as Mr McMenamin was convicted on his own plea on the two counts on this indictment, that is to say conspiracy to murder and possession of firearms and ammunition with intent on 28 February 1976.

[15] A further indictment No. 57/79 with counts of conspiracy to murder, conspiracy to wound and possession of a firearm and ammunition between 14 and 17 August 1976 was not proceeded with on 14 January 1980 after a discussion with the representative of St Patrick's Training School. It is assumed that Brother Lynch or another witness from the Training School attended at the hearing and was prepared to give evidence that Mr McMenamin was at the training school between 14 August 1976 and 17 August 1976.

[16] A DPP file (4910/78) contains a report by Detective Constable McArthur dated 26 May 1978 in which he sets out reasons why it was not recommended that a charge should be laid in relation to a confession by Mr McMenamin and Mr Lynch that at 8.44pm on 27 March 1978 they had tried to hijack a car from premises known as Horner's Garage. The report, which has been seen by the court, indicates that no offence of this description was committed.

[17] As already noted Mr McMenamin did not have access to a solicitor until after he had made the statements of admission on which the prosecution case was based. The Judges' Rules in force at that time stated that they did not affect the principle that ,

> "every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so".

In the section of the rules dealing with interrogation of children and young persons it was specified that all children should so far as practicable only be interviewed in the presence of an independent person. This was supplemented by the RUC Code which provided that "police pursuing enquiries involving children and young persons must bear in mind that where at all possible children and young persons should be interviewed in the presence of parent/guardian or other adult friend". At all relevant times Mr McMenamin came within the definition of a young person under the Children and Young Persons Act 1933.

[18] The Commission has referred to paragraph 129 of the Bennett Report as supporting the contention that in Northern Ireland in the 1970's suspects were refused access to legal advice and the presence of an independent adult while in custody. The report noted "it appears that as in the case of access to solicitors, the RUC draws a distinction in fact, if not in principle, between terrorist and non-terrorist cases: in the former the parents appear rarely to be admitted into the interview room, at least when the juvenile is over 15 because of the probability that they will advise silence".

<u>The law in relation to appeals from old convictions</u>

[19] Section 10(2) of the Criminal Appeal Act 1995 provides that where the Commission refers a conviction to the Court of Appeal the reference is to be treated for all purposes as an appeal against conviction under Section 1 of the Criminal Appeal Act 1980. The test to be applied is whether this court considers a conviction is unsafe. The safety of a conviction is to be judged according to contemporary standards which would be applied in any other appeal under Section 1 of the 1980 Act (*R v Gordon* [2001] NIJB 50 and R *v Bentley* [2001] 1 Cr.App.R.21).

[20] Lord Bingham CJ in *R v King* (2000) Crim. LR 835 said:

> "In looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may

> have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may lacked protections which it was later thought right that he should enjoy. But this court is concerned and concerned only, with the safety of the conviction. That is a question to be determined in the light of all the material before it, which will include the record of all the evidence in the case and not just an isolated part. If, in a case where the only evidence against a defendant was his oral confession which he had later retracted, it appears that such confession was obtained in breach of the rules prevailing at the time and in circumstances which denied the defendant important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would be at least prima facie grounds for doubting the safety of the convictions – a very different thing from concluded that a defendant was necessary innocent."

[21] In *R v. Montague-Darlington* [2003] EWCA Crim 1542 (unreported, CACD 23 May 2003*)* the appellant pleaded guilty to importation of 90 packages of cocaine which she had swallowed. She was advised that she had a defence of duress, but chose to plead guilty. A year later the solicitor to the Customs wrote to her solicitors to inform them of material which had only recently come to the former's attention and to say that if it had been to hand in time he would have regarded it as disclosable but likely to attract public interest immunity. This court was satisfied that the material was disclosable but that rather than disclose it the prosecution would not have been commenced or proceeded with. Kennedy LJ said:

> "This court will only rarely entertain an appeal against conviction where there has been a plea of guilty, but the circumstances in which an appeal may be successful are not confined to those identified by Avory J in *Forde* [1923] 2 KB 400, as is clear from the recent judgment in *Togher* [2001] 1 Cr App R 457. The court has to consider whether the appellant had a fair trial. It is difficult to see how the appellant can be said to have had a fair trial when it is now the case for the prosecution that she should not have been tried at all. Furthermore if, when advising in relation to plea, her legal advisers had access to all of the relevant material it is clear that she would have been strongly advised not to plead guilty, and there is no reason to think that she would have refused to accept that advice."

Mr Mc Menamin's application to the Commission

[22] In his application to the Commission Mr McMenamin claimed that he was physically and verbally abused by the detectives who interviewed him and that as a result he made and signed the confessions that were untrue. He said that he was advised by his lawyers that if he contested the case against him he could receive a sentence of 20 years' imprisonment. He stated that in particular he wanted to plead not guilty to the offences which occurred when he was in St. Patrick's Training School. He was advised that only by pleading guilty could he expect to have some of the charges dropped and receive a much reduced sentence of borstal training. After he had been sentenced he was advised by his solicitor not to appeal as he had received a "good result".

Contemporaneous records

[23] On 21 September 1979 Mr J.W. Patten, a clinical psychologist provided a report to Mr McMenamin's solicitor of an examination that he had carried out on him the day before. He recorded him as having denied taking part in the activities described in his statement (sic) and claiming that he had only signed it to avoid the physical maltreatment with which he had been threatened. He went on to say "If, therefore, as you stated in your letter there is valid evidence that he could not have been present at the time and place, when and where the offences are alleged, this would appear to raise serious doubts regarding the validity of the statement, or his reasons for signing it." The record shows that the solicitors instructed counsel on the bail application on 17 November 1978 when junior counsel (who did not appear at the trial) referred to the custody record handed in by Brother Lynch on the previous Friday. When junior and senior counsel were instructed to appear for Mr McMenamin at his trial it is difficult to understand how the issue about his being in St. Patrick's at the time of two of the alleged offences would not have been drawn to their attention. Taken in conjunction with the failure to bring the direction not to prosecute to the notice of counsel for the prosecution we agree with the Commission that the circumstances are exceptional.

Conclusion

[24] Mr McMenamin was denied access to a solicitor or the presence of an independent adult until after he had made the admissions. This would in itself be a cause for concern. Where an accused has pleaded guilty to an offence which it is accepted by the prosecution he could not have committed and to another offence which it is believed never occurred this inevitably left the court with a significant sense of unease about the correctness of the convictions on the remaining counts to which he had pleaded guilty. Accordingly the court indicated that it did not require to hear any argument on the remaining grounds on which the Commission had decided to refer Mr

McMenamin's convictions and announced that the convictions would be quashed.