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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

CHRISTOPHER WALSH

Before Kerr LCJ, Girvan LJ and Morgan J

KERR LCJ

Introduction

[1] This matter comes before the court as an appeal from the decision of Campbell LJ refusing the application of Christopher Walsh for an extension of time within which to apply for leave to appeal against his conviction of the offence of possession of an explosive substance. In the course of the hearing it became clear, however, that what Mr Walsh was seeking was a re-opening of the appeal against his conviction rather than an extension of time within which to lodge a fresh appeal.

Background

[2] On 5 June 1991 at about 1.40pm Mr Walsh was walking along an alleyway that runs between Suffolk Road and Kerrykeel Gardens on the outskirts of Belfast when he encountered an army patrol. Corporal Blacklock, the lead member of the patrol, required Mr Walsh to remove his hands from his pockets. On the trial at Belfast Crown Court before His Honour Judge Petrie QC, sitting without a jury, the corporal gave evidence that when he removed his hands from the pockets of the jacket that he was wearing, the appellant was holding a glass jar in his right hand. According to the corporal he instructed Mr Walsh to place the jar on an adjacent wall. It was later

examined at the scene by an ammunition technical officer and found to be an explosive device, of the type commonly known as a coffee jar bomb. It had a detonator attached.

[3] Another member of the patrol, Private Boyce, was on the same side of Suffolk Road as Blacklock. He gave evidence that he was, at most, twenty feet behind the corporal. He was in or about the middle of the road, crossing towards the right when he saw Corporal Blacklock stopped at the alleyway talking to some person. He claimed that from that time the corporal was always within his sight. As he got closer he saw that the person to whom the corporal was speaking was holding a coffee jar-like device in his right hand. He was told to put it on the wall. Private Boyce searched him and put gloves on him.

[4] Traces of RDX, one of the two chemical components of the coffee jar bomb were found on Mr Walsh's left hand. Dr Murray of the Northern Ireland Forensic Science laboratory gave evidence that this indicated contact between Mr Walsh and an RDX based explosive or a surface contaminated with such an explosive. No traces were found in the left pocket of Mr Walsh's jacket. The learned trial judge considered that this evidence did not assist the Crown case. He commented that there "was no explanation of [the] traces" on Mr Walsh's hand.

[5] Dr Ruth Griffin, a fibres expert from the laboratory, gave evidence that parts of the jar, particularly the exposed surface of the adhesive tape used to secure the detonator, would have been an "excellent" surface for receiving and retaining fibres from Mr Walsh's clothing but none was found on the jar. The judge dealt with this evidence in refusing an application by the defence for a direction of no case to answer at the close of the Crown case. He said that most of the bomb surface comprised a non-receptive surface and that the lining of the pocket was not prone to shed fibres. The carrier of the bomb would be careful to hold it rather than leave it loose in the pocket and this would minimise the risk of contact. The judge concluded, therefore, that the forensic evidence did not support either the prosecution or the defence case.

[6] This being the case, the resolution of the conflict between the account given by the soldiers and that of Mr Walsh became crucial to the outcome of the prosecution. The judge observed that there "appeared to be no reason" that the soldiers should make false allegations against Mr Walsh since he was unknown to them and the security forces. He also found the appellant's account of his movements unsatisfactory for a number of reasons. He had told police that he had walked down the alleyway because it was a short cut. In fact it represented a detour from the normal route to what was Mr Walsh's claimed destination of the Swillybrinn Inn. Secondly, Mr Walsh had insufficient money to go out drinking and claimed that his friend, a Mr Hannoway, was going to fund the evening's drinking. Although Mr

Hannoway purported to corroborate this, the judge was clearly dubious about the claim, describing the arrangement as "a strange scenario". Finally, the judge was strongly influenced by the fact that Mr Walsh gave evidence that another man had walked down the alleyway some fifteen feet in front of him. He found that Mr Walsh had not given this information to police and that the information could have been helpful to him. He therefore drew an adverse inference against the appellant under article 3 of the Criminal Evidence (Northern Ireland) Order 1988.

[7] A critical part of the soldiers' account related to their approach to the alleyway. Corporal Blacklock gave evidence that he and the other members of the patrol entered Suffolk Road some way to the south of the entrance to the alleyway. This route was confirmed by two other members of the patrol, Private Eames and Private Whillis. Neither of them saw the corporal stop Mr Walsh and did not observe the exchange between them. They were therefore not in a position to confirm or deny the corporal's version that Mr Walsh had removed the coffee jar bomb from his jacket pocket.

[8] The fourth member of the patrol, Private Boyce, gave evidence that the patrol had entered the Suffolk Road at a different point. He claimed that this was through a gate opposite the alleyway. The significance of this evidence was that, had that been the point of entry, Private Boyce would have had a view of the entrance to the alleyway. If, however, the patrol had entered the Suffolk Road at the point where all the other members said they did and Private Boyce had been following Corporal Blacklock at a distance of twenty feet, he would not have been able to see what transpired at the alleyway.

[9] The judge found that the variation in the accounts of the route on to the Suffolk Road between Private Boyce and all the other members of the patrol could be accounted for by the fact that the soldiers "might not have paid close attention to the route before encountering Mr Walsh". He was therefore prepared to accept that there was evidence that Private Boyce could have seen Mr Walsh with the device in his hand.

[10] On 7 December 1992 the appellant was convicted of possession of the explosive device with intent. He was sentenced to fourteen years' imprisonment. Although he has now served his sentence he continues to protest his innocence.

The appeals

[11] Two appeals against the appellant's conviction have been heard and dismissed. The first took place in 1993 and was dismissed on 7 January 1994. The court stated that it had "no doubt that the judge was fully entitled to accept the evidence of the soldiers and conclude that the appellant had this bomb in his pocket".

[12] The second appeal was on foot of a reference from the Criminal Cases Review Commission (CCRC). In advance of the hearing of the appeal the appellant made two applications, pursuant to section 25 of the Criminal Appeal (Northern Ireland) Act 1980, for the reception of further evidence. He was granted leave to call Conor Bradley, Liam Magill and Dr John Lloyd to attend and be examined before the court. When the appeal came on for hearing on 11 June 2001, Dr Lloyd and Conor Bradley were called and their evidence was put before the court, but Liam Magill was not in the event called to give evidence.

[13] Carswell LCJ, delivering the judgment of the Court of Appeal in January 2002, described the evidence of Dr Lloyd in the following passage: -

> "Dr Lloyd, an experienced forensic scientist, had not seen the bomb itself and gave his evidence by way of comment and review on the findings and conclusions expressed by Dr Murray in his evidence given at trial. He considered that it would be difficult to remove all traces of explosives residues from the outside of the coffee jar by cleaning, and that there was no evidence that any cleaning had taken place. He was prepared to accept, however, that a skilled and experienced bomb maker could have assembled the device without contaminating the outside of the jar with residues. He would have expected fibres to have been picked up from the inside of the appellant's jacket pocket and to have adhered to the outside of the jar, and traces of explosives to have been found on the inside of the pocket."

[14] The court did not consider that this evidence raised any doubt about the safety of the conviction. The judgment continued: -

> "We considered that Dr Lloyd's evidence did not add anything to the matters which were before the trial judge and the court on the first appeal. All the issues which he canvassed were then debated, and we did not find anything in his evidence which caused us to doubt the validity of the conclusions reached on those earlier hearings."

[15] Carswell LCJ then outlined the evidence of Conor Bradley: -

> "Conor Bradley stated in his evidence before us that he had been walking up Suffolk Road towards the mouth of the alleyway with Liam Magill. He and Magill were on the same side of the road as the alleyway, about 60 or 70 feet from its mouth. He saw a soldier standing on the footpath at the alleyway. When they were about 15 or 20 yards from the entry a fellow came out of it and turned down Suffolk Road in their direction. The soldier did not stop him, which made Bradley think that he and his companion were likely to be stopped. The soldier instead turned away into the entry. Bradley and Magill turned into the entry and saw there two soldiers and a fellow. One soldier was holding the man against the fence with a hand on his chest, while the other was across the entry on a "wee bit of grass" – he amended this in cross-examination to a "cement triangle". Bradley said that he and Magill walked through the middle of the group. The soldiers stared at them but did not stop them.
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> Bradley said that he heard on the radio about that time that a man had been arrested in possession of a coffee jar bomb on Suffolk Road and realised that he had seen him that day. He did not do anything about it, but in 1996 saw an article in the Irish News appealing for witnesses and recollected that he had been there on the day in question. He accordingly came forward and made a statement to the police."

[16] The Court of Appeal rejected Mr Bradley's evidence as being unworthy of belief. It was, in the court's estimation, a false account and the members of the court expressed the belief that Mr Bradley was not at the scene at all and added, "[t]he fact that such clearly false evidence was called by the appellant removes support from his case rather than adding it".

[17] The court then dealt with the soldiers' evidence as follows: -

> "The Criminal Cases Review Commission re-interviewed in depth the soldiers who gave evidence at trial and in their statement of reasons set out various respects in which their evidence was not consistent with that given at trial. We had no admissible evidence before us to ground this

> issue and we have disregarded the matters dealt with in the Commission's statement of reasons. There may be cases in which it is proper to bring before the Court of Appeal evidence which tends to show that witnesses in the court below gave false or mistaken evidence. That would, however, have to be established by admissible testimony brought before the court, with leave obtained under section 25 of the Criminal Appeal (Northern Ireland) Act 1980. Unless there is some positive ground to suppose that evidence given was so suspect, we could not regard it as a desirable practice for witnesses to be re-interviewed after a trial by defendants' solicitors to see if their evidence has varied in any respect."

[18] The court concluded that the trial judge should not have drawn an adverse inference against the appellant in relation to his testimony about the man who had preceded him in the alleyway because he had not relied on this evidence as an integral part of his defence or that it was something that he could reasonably have been expected to mention when questioned. Notwithstanding its finding that the judge had erred in drawing the adverse inference, the court did not consider that this made the conviction unsafe. It explained this conclusion in the following passage: -

> "If the evidence had remained as it was at the trial, we might have felt constrained to hold that we could not be satisfied that he must have reached the same conclusion about the appellant's account if he had not drawn the inference. We now have the evidence of Mr Bradley before us, which we have dismissed as a false account. We are satisfied that there was no other man in the entry, as described by him and by the appellant, and that forms a very strong reason for rejecting the appellant's account. Moreover, as we have said, the fact that false evidence is adduced to bolster an appeal in itself undermines the appellant's case. We have little doubt that if the judge had had Bradley's evidence before him he would have had no hesitation in rejecting the appellant's evidence. We consider that the Crown case is such that the conviction is safe, in spite of the judge's incorrect use of Article 3."

[19] On 31 January 2002 the appellant applied for a certificate that a point of law of general public importance was involved in the decision and for leave to appeal to the House of Lords pursuant to Section 31(2) of the Criminal Appeal (Northern Ireland) Act 1980. The application for a certificate was refused and the application for leave to appeal was therefore no longer viable.

The present application

[20] Mr Walsh appeared on his own behalf to move the present application. As we have said, although it was framed as an appeal from the decision of Campbell LJ not to extend time within which to appeal, it quickly became clear that what Mr Walsh was seeking was a re-opening of the appeal because of avowed errors on the part of the Court of Appeal that dismissed the second appeal following the reference by CCRC.

[21] Mr Walsh contended that this court had made grave errors regarding the powers and independence of the CCRC, wrongly describing them in the passage quoted at [17] above as "defendant's solicitors". This led the court, Mr Walsh claimed, to ignore the evidence in relation to the soldiers that had been produced as a result of their having been re-interviewed.

[22] Mr McCrudden, who appeared for the prosecution on the present application, had been counsel for the Crown on the hearing of the second appeal. He was able to tell us that the prosecution had not objected to the receipt in evidence of the new statements of the soldiers. The Crown had not argued that there was "no admissible evidence to ground this issue". The Crown's submission on the soldiers' new statements, Mr McCrudden said, had been to the effect that such differences as existed between the versions given on trial and those contained in the later statements did not raise any doubt as to the safeness of the conviction.

Section 25 of the 1980 Act

[23] Section 25 (1) of the Criminal Appeal (Northern Ireland) Act 1980 provides: -

> "25. - (1) For the purposes an appeal under of this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice-
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> (a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;

> (b) order any witness who would have been a compellable witnesses at the trial to attend and be examined before the Court, whether or not he was called at the trial; and
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> (c) receive any evidence which was not adduced at the trial."

[24] In deciding whether to exercise its powers under section 25 (1) (c) the court is obliged (by section 25 (2)) to take account of a number of matters: -

> "(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to-
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> (a) whether the evidence appears to the Court to be capable of belief;
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> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
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> (c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and
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> (d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

[25] In *R v Rafferty* [1999] 8 BNIL 8 this court considered this provision and concluded that the power of the court to admit fresh evidence was fettered only by what is necessary or expedient in the interests of justice; the factors listed in section 25 (2) are merely factors which are to be taken particularly into account. It is clear, however, that not only must the court consider these factors but it must also address the question of what the interests of justice require in relation to possible fresh evidence. We consider that this is an obligation which arises when the court is aware of material that might qualify for admission in evidence under subsection (2) or whose receipt might be considered to be necessary or expedient in the interests of justice under subsection (1). In our view the court is empowered to receive such evidence even if no application is made for its receipt and further must consider whether the interests of justice demand that it be received.

Re-opening an appeal

[26] In *R v Maughan* [2004] NICA 21 this court considered the circumstances in which an appeal might be re-opened: -

> "[2] The traditional position was that a judgment of the Court of Appeal could not be altered once it had been pronounced and formally recorded – see *R v Cross* [1973] 2 WLR 1049 per Lord Widgery CJ. In subsequent decisions the Court of Appeal has displayed a more flexible approach to the re-opening of appeals, either on the basis of its 'inherent power' (e.g. *R v Berry (No. 2)* [1991] 1 WLR 125) or 'within the ambit' of the legislation governing appeals. In *R v Pegg* (1987 unreported) it was stated: -
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> > 'What the authorities show is a more general inherent power to re-list for rehearing an appeal where (1) the previous hearing is regarded as a nullity, (2) there is a likelihood of injustice having been done because the court failed to follow the rules or well-established practice or was misinformed as to some relevant matter."
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> [3] In *R v Daniel* [1977] QB 364 Lawton LJ concluded: -
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> > "The court clearly has jurisdiction within the ambit of the 1968 Act and rules to see that no injustice is done to any applicant or appellant. If in any particular case because of a failure of the court to follow the rules or the well-established practice there is a likelihood that injustice may have been done, then it seems to us right, despite the generality of what was said in *R v Cross*, that a case should be re-listed for hearing."

[27] The question was also considered in *R v Pinfold* [1988] 87 Cr App R 15 where the Court of Appeal in England held that once a person convicted of an offence on indictment appeals against that conviction and that appeal has been determined on its merits, the court has no jurisdiction to re-open it on

fresh evidence coming to light. Lord Lane CJ dealt with the feasibility of re-opening an appeal in the following passage: -

> "… it is in the interests of the public in general that there should be a limit or a finality to legal proceedings, sometimes put in a Latin maxim, but that is what it means in English.
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> We have been unable to discover, nor have counsel been able to discover any situation in which a right of appeal couched in similar terms to that, has been construed as a right to pursue more than one appeal in one case. So far as the Criminal Appeal Act 1968 is concerned, there are perhaps two possible exceptions, or apparent exceptions because that is what they are, to that rule: first of all, where the decision on the original appeal, if I may call it that, can be regarded as a nullity. This is more commonly applied where there has been an application to treat a notice of abandonment as a nullity. The second occasion, which may be simply an example of the first, is where, owing to some defect in the procedure the appellant has on the first appeal being dismissed suffered an injustice, where, for example, he has not been notified of the hearing of the appeal or counsel has been unable to attend, circumstances such as that."

[28] The cases of *Pegg, Daniel* and *Pinfold* were all decided before the Criminal Appeal Act 1995 which established the CCRC. Each of those cases involved consideration of the appeal provisions contained in the Criminal Appeal Act 1968 (the equivalent of the 1980 Act in Northern Ireland). Section 14 of the 1980 Act had provided that the Secretary of State might at any time refer to the Court of Appeal in Northern Ireland the whole case or a point arising therein. If the whole case was referred, the defendant could present the appeal as if it were an appeal against conviction brought by him. By virtue of section 3 of the 1995 Act, section 14 of the 1980 Act ceased to have effect. Thenceforth (under section 10 of the 1995 Act) CCRC was to be the body which would decide whether to refer a conviction to the Court of Appeal for its reconsideration.

[29] It is clear that CCRC may refer a case more than once. Section 10 (1) (a) provides that the reference may be made "at any time". By virtue of section 13 (1) (a) the Commission is not to refer a conviction unless it considers that there is a real possibility that it would not be upheld were the reference to be made but this would not *per se* preclude CCRC from making a second

reference where the first had not resulted in the conviction being quashed. It may reasonably be postulated, therefore, that Parliament's intention in creating the Commission was to use it as the primary body to prevent miscarriages of justice.

[30] The question then arises whether the inherent power of the court to re-list a case where it is perceived that an injustice might otherwise occur has survived the passing of the 1995 Act. A first, albeit prosaic, indication that it has may be deduced from the fact that the Act did not state otherwise. The legislature is to be presumed to have been aware of the decisions in such cases as *Pinfold* when passing the 1995 Act and the absence of any express provision confining reconsideration of convictions exclusively to CCRC references may perhaps signify that Parliament intended that the power of the court to re-list a case should be preserved. As against that the Commission was established precisely for the purpose of ensuring that miscarriages of justice were corrected and one can recognise the force in the argument that it should be the only body to decide whether a case warrants further consideration.

[31] We have concluded that the power of the Court of Appeal to re-list a case has not been removed by the 1995 Act. The occasion for the exercise of such a power will arise only in the most exceptional circumstances, however. In virtually every conceivable case it is to be expected that where the possibility of an injustice is reasonably apprehended, CCRC will refer the case. If it decides not to refer, however, the circumstances in which a challenge to that decision can be made are necessarily limited – *R v CCRC ex parte Pearson* [1999] 3 All ER 498. Where CCRC has been invited to refer a conviction to the Court of Appeal for a second time and has declined, if this court considers that because the rules or well-established practice have not been followed or the earlier court was misinformed about some relevant matter and, in consequence, if the appeal is not re-listed, an injustice is likely to occur, it may have recourse to its inherent power to re-list (or, effectively, re-open) the appeal.

Is an injustice likely to occur if the appeal is not re-opened?

[32] This court, in dismissing the second appeal, stated that it would not have regard to CCRC's reasons for referring the case in so far as they related to the further statements of the soldiers. There was no consideration, therefore, of whether those statements might affect the safety of the conviction. The court declined to consider them because no application had been made to introduce oral evidence of the soldiers or of those who took the fresh statements. But no objection had been raised to the admission of the new statements in evidence. Indeed, submissions had been made by both the appellant and the Crown as to the impact that they had on the safety of the conviction, plainly on the assumption that they would be considered by the court.

[33] In any event, it lay within the power of the court to ensure that the oral testimony of the soldiers or of those who took the statements (if that was indeed required before the issue could be considered) was provided. It appears to us that the court ought to have determined whether to direct that the soldiers should give evidence before deciding not to have regard at all to this critical aspect of the reference. It does not appear to have done so. As a minimum, the appellant should have been alerted to the prospect that, notwithstanding the Crown's attitude to the receipt of the new statements, the court would leave those wholly out of account because an application to receive the oral testimony of the soldiers had not been made. Again, this did not happen and no opportunity arose for the appellants legal advisers to seek leave to call the soldiers or those who had taken statements from them.

[34] We do not intend at this juncture to say anything about the possible significance of the new statements made by the soldiers since this will obviously be a matter of some controversy on which we have not yet heard fully developed argument. We are satisfied, however, that, given the centrality of the original statements to the conviction, an injustice would occur if the appellant is denied the chance to have that issue considered in the context of the safety of his conviction since, in our judgment, if the imperative of section 25 (as we have sought to explain it) is to be fulfilled, he is entitled to have that matter fully examined.

[35] We will therefore allow the appellant's appeal to be re-opened.