

THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

ROBERT J B A CLARKE

RULING ON BAD CHARACTER APPLICATION

HART J

[1] The defendant is charged with two offences relating to the events of 3rd February 1973 when Alfredo Fusco was murdered. He is charged with the murder of Mr Fusco and with possession of two firearms and ammunition with intent to endanger life. Although the Particulars of Offence do not state what type of firearms were used, it is clear that two weapons were used; the first was a .455 calibre revolver, probably a .455 Webley revolver which fired the shots that killed Mr Fusco. Two live 9mm rounds were also found at the scene and a witness described one of the gunmen as carrying a Sterling machine gun.

[2] The prosecution case is that Clarke was one of two gunmen who entered Mr Fusco's ice cream shop on York Road on 3rd February 1973. Clarke was carrying a Sterling and followed Mr Fusco into the back of the premises. Mr Fusco appears to have tried to hold the door against Clarke who was seen trying to force the door by kicking it. At some stage Clarke emerged from the rear of the premises and exchanged the Sterling for the revolver held by the other man. Clarke then returned to the rear of the premises and four shots were fired, some of which went through the door according to Dr Eakins. The intruders then fled.

[3] The evidence against Clarke is that his left index finger and left palm prints were found on the door and that he was therefore the man who pursued Mr Fusco and shot him through the door.

[4] Clarke was subsequently convicted of a number of offences committed on 14th of June 1975 to which he pleaded guilty on 27th February 1976. These

charges relate to a shooting incident when a number of men in a car drove along the New Lodge Road and opened fire on a number of people standing in the street. Clarke subsequently pleaded guilty to one count of murder and four counts of attempted murder as well as possession of several weapons with intent to endanger life, one of which was a Sterling submachine gun. In his statement to the police he admitted taking part in the attack and firing the Sterling, although he said he fired at the walls and not at anybody.

[5] The prosecution seek to have these convictions admitted as bad character evidence as being relevant:

- (1) To the identify of the murderer of Mr Fusco, and;
- (2) Whether Clarke had a propensity to commit these offences.

[6] Mr Fowler QC for the prosecution submitted that the convictions are relevant as showing that the defendant was prepared to take part in a determined attack in 1975 which also involved the use of a Sterling submachine gun. He also argued that these convictions are relevant as showing that the defendant had the ability to use a firearm. This arises because of the evidence of Dr Derek Carson, upon which Mr O'Donoghue QC relies, because the defendant's case is that since an accident in November 1971 in which he lost the terminal segment of his right index finger and the terminal one and a half segments of the adjacent middle finger, he could not fire a revolver of the Webley .455 type without great difficulty (see page 163 of the interviews where essentially he made that point). Dr Carson conducted an experiment in which he asked the defendant to demonstrate how he would attempt to use a similar type of revolver namely a Smith and Wesson .38 and concluded that it was "unlikely that Mr Clarke could have discharged a Webley revolver with this hand and even less likely that he could have fired the four aimed shots which struck Mr Fusco".

[7] Mr O'Donoghue argued that the prosecution application was premature as the prosecution do not yet have a medical report commenting upon Dr Carson's observations. However, I am satisfied that that is not the case for the following reasons:

- (1) Significant though Dr Carson's evidence will undoubtedly be at the trial, he does not say that it was impossible for the defendant to fire such a weapon.
- (2) It is clear that notwithstanding his disability the defendant was able to fire a Sterling submachine gun in 1975.

[8] The defendant's ability to fire a Webley .455 revolver will be a matter for the trial judge to determine, but I am satisfied that the defendant's ability to fire

another weapon in 1975 will undoubtedly be relevant to that issue. That the firearm fired by the defendant in 1975 was a Sterling and that the gunman who shot Mr Fusco in 1973 was initially armed with a Sterling which he then swapped for a Webley .455 revolver is also relevant.

[9] Mr O'Donoghue conceded, correctly in my view, that he could not argue in principle that it was unfair to admit another murder conviction even where that other murder was committed after the murder which is the subject of the present charge. That must be correct (see R-v-Glenn [2006] EWCA Crim 3236 cited by Professor Spencer in the second edition of his Evidence of Bad Character at 4.52).

[10] A related argument advanced by Mr O'Donoghue with which it is convenient to deal at this stage is that even if the 1975 murder conviction is admitted, the circumstances need not all be and he submitted that the indiscriminate nature of that shooting should not be admitted. I accept that Article 6(3) of the Criminal Justice Evidence (Northern Ireland) Order 2004 (the 2004 Order) could require the court to exclude some of the circumstances of the other convictions as, for example, might be the case if the circumstances were wholly irrelevant and/or might be of such an unpleasant nature as to be more prejudicial than probative. That appears to be the course that was taken by the trial judge in Glenn (see the remarks of Lord Justice Pill at paragraph 12).

[11] In the present case, if the 1975 murder is to be admitted I do not see that it would be unfair to admit evidence of the circumstances in which the Sterling was fired because it is beyond dispute that the defendant took part in a determined attempt at sectarian mass murder.

[12] Should the 1975 murder be admitted under Article 6(1)(d) and Article 8(1)(a) of the 2004 Order?

[13] In R-v-Hanson the Court of Appeal stated that there are essentially three questions to be asked in this case:

- (1) Does the history of the 1975 murder involving as it did a Sterling submachine gun establish that Clarke had a propensity to commit the sectarian murder of Mr Fusco, a murder in which a Sterling was also used although the murder weapon was probably a Webley .455? I have no doubt that the answer to that question is yes.
- (2) Does that propensity make it more likely that Clarke was the gunman who shot Mr Fusco? Again I have no doubt that the answer is yes because it is highly relevant:
 - (a) To his willingness to take part in such an attack;
 - (b) To his willingness to press the attack home; and,

- (c) To show that he was physically capable of firing a weapon in 1973 despite his physical disability.
- (3) Is it unjust to rely on the 1975 convictions and will the proceedings be unfair if they are admitted? I am quite satisfied that it is not unjust to admit the evidence relating to each of the convictions relating to the 1975 murder, nor will the proceedings be unfair if they are admitted because for the reasons given at (2) above they are highly probative.

[13] The gap between the two murders is not very great in terms of time nor can it be argued that the prosecution case is otherwise a weak one because the presence of Clarke's finger and palm prints on the door through which the shots were fired, prints which could not have got there in any other circumstances on the prosecution case, create a strong case against him.

[14] For these reasons I grant the application and admit all of the convictions arising out of the 1975 murder, together with the evidence of the facts underlying those convictions as specified in the notice of 22nd December 2009. I will direct that a transcript of this ruling be prepared as soon as possible and it will be provided to the parties.