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*(subject to editorial corrections)**

THE CROWN COURT IN NORTHERN IRELAND

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ANTRIM CROWN COURT

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THE QUEEN

-v-

HENRYK GORSKI

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(Ruling on admissibility)

HART J

[1] This morning I heard an application on behalf of the defence to admit as hearsay evidence under the provisions of the Criminal Justice Evidence (Northern Ireland) Order 2004 (the 2004 Order) a recording of a telephone call made by way of the 999 system on 3rd October 2006 to the police in Ballymena. The relevant portions of the transcript are as follows, and I have added the identity of the police and the caller to make it clear what is being said.

> "Caller: Hello. If I was to admit to the murder of Shirley Finlay, would yous remand me straight away or what would happen?
> Police: Jeremy Finlay?
> Caller: That wee girl that was strangled.
> Police: Right.
> Caller: Mount Street.
> Police: Right.
> Caller: Conscience, conscience, conscience.
> Police: Right.
> Caller: I'll go here now.
> Police: And, right. Well, where are you sir? You, you...
> Caller: Can't, just can't tell you.

> Police: Right. Would we remand you straight away? Well someone would want to speak to you right away.
> Caller: Oh, right, right."

At this point the transcript is unclear but the caller appears to continue:

> "I'm here but I'll be back in about five minutes.
> Police: Right,... skipper."

[2] Before turning to the grounds upon which this is sought to be admitted it is necessary to identify exactly what it amounts to. I describe it not as a confession but as a purported confession because it does not contain a clear admission that the caller had murdered Shirley Finlay because he says, "If I was to admit to the murder of the Shirley Finlay...." That falls short of an admission sufficient to amount to a confession although it is clearly very suspicious.

[3] In his submissions, Mr Devine for the defendant laid some emphasis on the caller saying, "Conscience, conscience, conscience" as an indication of the caller's credibility and therefore veracity. However, there is nothing to show that the caller has any knowledge of the murder of Shirley Finlay other than that which was already in the public domain, because a number of witnesses have testified that they learnt of the identity of Shirley Finlay from media reports on the television and newspapers and, as Mr Moore expressly stated, from posters giving her appearance and identity which were displayed around the town.

[4] There is nothing in this call that demonstrates that the caller had any knowledge of the circumstances surrounding her death which would have pointed to the caller being the murderer. As Mr Weir, in my view correctly, pointed out, there is no way of knowing from the call itself whether the caller is genuine, or someone who is not genuine but drunk, mentally ill, a mischief maker or perhaps a person of the type sadly not unknown who makes or contemplates making false confessions. Therefore the content of this call in my view cannot be regarded as a confession, but at the very highest it would be put forward as a purported confession. It is much less credible than, for example, the statements made by the witness in the Blastland case to which I will refer, statements which were excluded from evidence.

[5] Mr Devine put forward three grounds upon which he said this qualified for admission under the 2004 Order. First of all, he contended that the recording itself was a document within the meaning of Article 21. He submitted that the recording was made by the police officer who received it in the course of his office and that the maker of the call therefore came within Article 21(2)(b). I have concluded that this is not a document which falls to be considered under Article 21. Article 21 contemplates that a record has been compiled by someone who not

only has knowledge of the contents of the record which may be regarded as reliable because of their position, but that person cannot now remember the events recorded or cannot be identified. It appears to me very questionable whether the recording can properly be considered as falling within Article 21, but in any event I consider that the provisions of Article 21(1)(a) make it clear that it does not apply because the content of the recording is only admissible as evidence if it were to be given in oral evidence. But, as I shall demonstrate I hope, an extrajudicial confession of this sort is not admissible, certainly not as a matter of right. I therefore conclude that Article 21 does not apply to the circumstances of this case.

[6] The second ground upon which Mr Devine sought to persuade me that it should be admitted was that because it constitutes part of the *res gestae*, and therefore is admissible under Article 22(4). These remarks were made long after the events that they purport to relate to and cannot be said to be made in circumstances of spontaneity or involvement in the event that they purport to relate to. They cannot be said to have been made in circumstances that enable the possibility of concoction be disregarded. The speaker was clearly long detached in time from the events referred to and therefore had every opportunity to construct or adapt his account. It falls outside the category of evidence that is admissible as part of the *res gestae* as determined in R v Rattan [1972] AC 378 as can be seen from the discussion of this case and the appropriate principles in *Archbold* 2009 at 11-75.

[7] This brings me to the third basis upon which Mr Devine sought to demonstrate its admissibility namely Article 18(1)(d) of the 2004 Order. That provides that:

> "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, … (d) the court is satisfied that it is in the interests of justice for it to be admissible."

[8] Article 18(1)(d) must be looked at in the context of the way the common law developed and I have already referred to the decision in R-v-Blastland [1985] Cr App R 266. The speech of Lord Bridge of Harwich at p. 270 contains the following statement of principle:

> "To admit in criminal trials statements confessing to the crime for which the defendant is being tried made by third parties not called as witnesses will be to create a very significant and, many might think, a dangerous new exception."

[9] In the 10th edition of *Murphy on Evidence* at 7.4 and 7.4.1 the learned author considers the extent of the principle laid down in Blastland and in the earlier Privy Council case of Sparks v R [1964] AC 964. As the learned author says:

> "There is sometimes a tendency in criminal cases to permit limited relaxations of the rule in relation to evidence tendered by the defence, but the practice is contrary to authority and has been deprecated. In Turner (1975) 61 Cr App R 67 the trial judge was held to have been correct in refusing to admit evidence to the effect that a person not called as a witness had admitted having committed the offence charged. The person concerned had withdrawn the admission after making it, but this should not have affected the admissibility of what he had said. Only by calling him as a witness (when their difficulties would have included his privilege against self-incrimination), could the defence have properly put the evidence before the court."

But, the learned author continues, "The law on this subject is in an unsatisfactory condition."

[10] I do not consider it necessary to go over what the learned author says at pp 213 and 214 about the development of the law in this area, but it is significant to note that he makes it clear at p. 214 that whilst the Law Commission paper which led to the 2004 Order provisionally recommended that evidence of the kind rejected in Sparks and Blastland should be admissible, no such specific recommendation was contained in the final report, and none is contained in the 2004 Order. He continues:

> "It is certainly arguable that an exculpatory statement would be admissible under one of two provisions of [the 2004 Order]. …In some cases it might be admissible under [Article 20] if the maker of the statement is unavailable to give evidence, perhaps because he can no longer be found or is afraid to give evidence. It might also be admissible by virtue of the judge's general power to admit hearsay evidence in the interests of justice under [Article 18 (1)(d)] although this would obviously depend greatly on the view taken by the judge of the reliability and probative value of the statement."

At p. 275 he returns to this topic and concludes:

> "It may be that [Article 18(1)(d)] provides a practical solution to such problems; it would be hard to deny that the interests of justice would be served by allowing the jury to have access to the evidence which had to be excluded at common law."

[11] In his *Hearsay Evidence in Criminal Proceedings*, Professor Spencer, at 10.46, expresses a somewhat more emphatic view by saying that [Article 18 (1)(d)] is the safety valve and he continues:

> "The fact that a third party has extrajudicially confessed to the offence is now potentially admissible as evidence for the defence under this provision."

[12] He then refers to Article 20, but it is noteworthy that at footnote 75 he refers to the case of Hare [2006] EWCA Crim 2512 where he notes the Court of Appeal strongly discouraged the use of the "inclusionary discretion" to admit at the instance of the defence hearsay evidence of confessions allegedly made by third parties whom the defence could have called to give live evidence had they chosen to do so. Of course that is a somewhat different situation to that in the present case. *Blackstone* [2009] at F15.7 refers to Turner, Blastland and Sparks and concludes that evidence of the type rejected in those cases

> "…may in future be admitted where it is in the interests of justice to do so and the importance of the evidence the defence would be a factor that the court will consider in deciding where the interests of justice lie (see Prosecution Appeal (No 2 of 2008); R v Y ([2008] 2 All ER 484). But it remains the case that there is no special hearsay exemption for defence evidence."

[13] That brings me to R v Y in which this was exhaustively considered, and at [61] and [62] the judgment concludes that Article 18(1)(d) is available for all types of hearsay, and Article 22(5) does not exclude the application of Article 18(1)(d). It also establishes that the greatest care must be taken to ensure that the Article 18(2) factors are fully considered in order to enable the court to conclude that it is genuinely in the interests of justice that the jury should be asked to rely on the statement without seeing the maker and without any question being addressed to the maker of the statement. It is emphasised that Article 18(1)(d) does not have the effect of routinely admitting out of court statements whether by a co-accused or anyone else. At [59] the judgment emphasises that the identity of the applicant is plainly relevant to the interests of justice test and that the

interests of justice might point to a different conclusion where the application is made by the defendant. But at [58] it was stated that it would be unusual for a statement to be sufficiently reliable for it to be in the interests of justice to admit the statement even though the maker cannot be questioned.

[14] I am satisfied that Article 18(1)(d) renders it possible that an extrajudicial confession by a third party may be admissible at the request of the defence, but it will not be routinely admitted, indeed it would be unusual to admit it. Whether the confession is sufficiently reliable to be admitted has to be assessed by the court having regard to the provisions of Article 18(2).

[15] I now turn to those in the context of the present case. Article 18(2)(a) relates to how much probative value the statement has, assuming it to be true. The contents of this call clearly have some probative value but, as I have already explained, I consider that it falls short of being a confession at all and therefore one should not assume that it is true. Article 18(2)(c) requires the court to consider how important the contents of that call are in the context of the case as a whole. In the present case, which is one where the prosecution case is based upon circumstantial evidence, anything which may point to someone other than the defendant having committed the murder is clearly important.

[16] Article 18(2)(d) requires the court to consider the circumstances in which the statement was made. It was made to the police by a 999 call, but not in circumstances where the content of what was said could be probed or evaluated in any way whatever. Articles 18(2)(f) and (2)(e) require the court to consider how reliable the maker of the statement appears to be and how reliable the evidence of the making of the statement appears to be. So far as the making of the statement is concerned there is no issue as to the accuracy or completeness of the recording. Therefore, unlike virtually all forms of hearsay evidence, the actual words can be considered without having been filtered or distorted by being passed through a number of mouths before they reach the jury. How reliable does the maker statement appear to be? There is nothing in the content of the statement to suggest that the maker has any information as to the nature or circumstances of the murder that would tend to confirm that he was in fact the murderer. In other words, other than these remarks being made there is nothing whatever to indicate that they are or even may be true.

[17] Article 18(2)(g) requires the court to consider whether oral evidence of the matter stated can be given and if not why it cannot. This in one sense highlights the unsatisfactory nature of this statement because the maker of the remarks is anonymous. There is nothing whatever to point to who he is, and therefore were this material placed before the jury there would be no rational basis upon which the jury could consider whether the person concerned is genuine or not. It is true that oral evidence can be given in the sense that one hears what the person is saying, but I consider that Article 18(2)(g) is directed towards consideration of

whether the person who makes the statement can be brought to court to be produced and be examined and cross-examined before the jury. Plainly in this case that cannot be achieved.

[18] Article 18(2)(h) requires the court to consider the amount of difficulty involved in challenging the statement. I consider that these remarks are so sparse and so lacking in detail, quite apart from the fact that they are conditional in nature, that it would be exceptionally difficult for the prosecution to challenge the statement. Finally, Article 18(2)(i) requires the court to consider the extent to which that difficulty would be likely to prejudice the party facing it. I am satisfied that the prosecution would be greatly prejudiced by the admission of this evidence.

[19] One is required to look at all of these matters and then come to a conclusion as to whether or not it is in the interests of justice for these remarks to be placed before the jury. Whilst the strictness of the previous common law has been relaxed to some extent by the provisions of Article 18(1)(d), as cases such as Hare and Y make clear the courts place very strict conditions on whether or not extrajudicial confessions by third parties should be admitted in evidence. I consider that these remarks fall very far short of amounting to any form of credible evidence that could be put before the jury and for those reasons I refuse the application.