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Judgment: approved by the Court for handing down | *Delivered:* **15/12/09**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

THE QUEEN

-v-

THOMAS GRAHAM

_____

Before: Higgins LJ, Girvan LJ and Coghlin J

COGHLIN LJ

Background Facts

[1] On 17th May 2007 the applicant, Thomas Graham, was convicted of the murder of Geraldine Kane following a trial before Stephens J and a jury and sentenced to life imprisonment. The conviction was by a majority of 10 to 2. On the 6th August 2007 the learned trial judge subsequently fixed the minimum term to be served in accordance with Article 5 of the Life Sentences (Northern Ireland) Order 2001 at 11 years. The applicant now seeks leave to appeal that conviction and sentence.

[2] The applicant was originally arraigned on the charge of murder on 8th September 2006 when he pleaded not guilty. On 25th April 2007, at the commencement of his trial, he asked to be re-arraigned and pleaded guilty to manslaughter upon the ground of diminished responsibility. That plea was not accepted by the prosecution and the trial proceeded.

[3] Prior to the trial of the applicant, the prosecution served a notice of intention to adduce evidence of the applicant's bad character, dated 24th April 2006, in accordance with Article 6 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") and Rules 44N(4) and (6). The particulars of bad character evidence endorsed upon that notice referred to the witness statements of Pauline McGuigan and Anne Marie McBride and stated that the evidence was to be admitted in accordance with Article 6(*c*) and (*d*) of the 2004 Order. The particulars provided read as follows:

> "The accused has referred in his handwritten notes to a previous incident involving Miss McGuigan to which he pleaded guilty to assault and threats to kill and received 4 months imprisonment. The evidence of Miss McGuigan assists in putting this into context and will assist the jury in understanding the evidence. In addition this incident occurred during a relationship with Miss McGuigan just as the attack resulting in the death Miss Kane occurred during a relationship with the accused. The previous conviction shows propensity to the present offence".

[4] When the applicant was re-arraigned and entered the plea of guilty to manslaughter by reason of diminished responsibility the prosecution indicated that it no longer wished to proceed with the application to admit bad character evidence. As a consequence of discussion between Counsel an agreement was then reached between the prosecution and the defence that some of the Crown witnesses would be called to give oral evidence, some of the statements made by the prosecution witnesses might be read to the jury and the written statements of some of the prosecution witnesses might simply be tendered in evidence. During the course of these discussions Counsel then acting on behalf of the applicant specifically requested and the prosecution agreed that the witness Pauline McGuigan should give oral evidence before the jury. Counsel on behalf of the applicant indicated that he wished to cross-examine Miss McGuigan. In due course Miss McGuigan gave oral evidence and was cross-examined. In all, it appears that her evidence occupied some 45 minutes of the trial.

[5] During the course of her direct evidence Miss McGuigan described a previous relationship with the applicant as a consequence of which a son had been born. She said that relationship terminated in August 2000. Miss McGuigan gave evidence that on 17th January 2002 she had taken her son to visit the applicant at the psychiatric ward in the Mater Hospital. She described how an argument had developed between her and the applicant while they were in a lift in the hospital with her son in the course of which he shouted at her, threatened to kill her and started to strangle her by pressure from his forearm across her throat. Miss McGuigan was able to escape from the lift. The applicant ran away but was arrested by the police. Miss McGuigan subsequently obtained a non-molestation order in accordance with the advice of the police. She also told the jury of an occasion when the applicant had forced her to stop her motor vehicle when driving along Springfield Avenue. On that occasion, the applicant appeared to be anxious to tell her that he was sorry. She also said that the applicant called at her house at approximately 11 pm on the 29th April 2002 but when she saw who it was she closed and locked the door.

[6] It seems clear that the cross-examination of Miss McGuigan was directed towards establishing the extent to which she had been aware of the applicant's psychiatric history and the various treatments that he had received. She accepted that she had known that the applicant was depressed and that she been aware that he had received Electric Convulsive Therapy ("ECT") during the course of his stay in Knockbracken in 1997. At that time she had been in a relationship with the applicant and she had visited him a few times in Knockbracken. The cross-examination concluded in the following terms:

> "Q. You know, don't you Miss McGuigan – you have been the victim of a bad attack, there is no doubt about that and you have been very badly treated?
>
> A. Yes, very badly.
>
> Q. I know that, but you know, don't you, Thomas Graham is a very sick man?
>
> A. Yes, Thomas Graham has also made me very sick because I couldn't look after my kids for long enough.
>
> Q. I can understand that. You know he is a very sick man that is only question I asked you?
>
> A. I don't believe he is that sick.
>
> Q. You said a minute ago yes?
>
> A. Yes, he is depressed. I don't believe he is that sick. I am depressed, I wouldn't do that to anyone.
>
> Q. Have you ever had electro-therapy shock treatment?
>
> A. No.
>
> Q. Have you ever been an in-patient in a mental institution?
>
> A. No."

The basis of the application

[7] The original grounds of appeal drafted by Counsel who conducted the trial on behalf of the applicant were abandoned on 10th October 2008. Fresh grounds of appeal were submitted by Mr Barlow, who appeared on behalf of the applicant before this court, on 15th October 2008 and these focused upon the assertion that the prosecution had relied upon the evidence of Pauline McGuigan as evidence of bad character. It was further asserted that there had been agreement between the prosecution and the defence that the evidence

should be admitted in accordance with Article 6(1)(*a*) and (*d*) of the 2004 Order as being evidence that the parties agreed was admissible and was relevant to an important matter in issue between the defendant and the prosecution. The grounds of appeal as then set out by Mr Barlow criticised the decision to admit the evidence as having no relevance or probative value in relation to any issue in the trial and alleged failure on the part of the trial judge to give a proper and effective direction on bad character evidence.

[8] In a skeleton argument prepared for the hearing of this appeal Mr Barlow further refined his argument as amounting to the following propositions:

(i) The evidence adduced from Paul McGuigan was inadmissible. It had no relevance to the single issue before the jury.

(ii) Alternatively, if admissible, its admission had such an adverse effect upon the fairness of the proceedings that it should have been excluded.

(iii) If admissible, the learned trial judge was under a duty to direct the jury as to its relevance to the facts of the case and to warn them not to place undue reliance upon that evidence or to conclude therefrom that the applicant was guilty.

[9] In his skeleton argument under the heading "Ground 1 – Admission of Evidence of Bad Character", Mr Barlow again proceeded to assert that the prosecution had relied upon the evidence of Pauline McGuigan as evidence of bad character under Article 6 of the 2004 Order and referred to Article 8(1) of that order which provides that for the purposes of Article 6(1) (*d*) the matters in issue between the defendant and the prosecution include the issue of propensity to inflict unlawful violence. At paragraph 8 of the skeleton Mr Barlow stated that the only issue at the trial was whether the abnormality of mind substantially impaired the defendant's mental responsibility for his acts and omissions at the time of the killing. Paragraph 10 stated that:

> "(10) The single question that has to be answered is whether the evidence of Pauline McGuigan was evidence of such propensity on the part of the applicant".

[10] In the skeleton Mr Barlow concluded that the evidence was not admissible under the 2004 Order and that even if it had been admissible to demonstrate propensity, its inclusion was so unfair as to have an adverse effect upon the fairness of the trial. He then went on to criticise the trial judge's lack of direction on bad character evidence.

[11] In the course of his oral address to this court Mr Barlow conceded that he now accepted the evidence had not been admitted in accordance with

Article 6(1) (*a*). He then focused his case upon submissions that the Crown had sought to exploit the evidence of Pauline McGuigan as establishing a loss of temper on the part of the applicant and a complaint that the judge had not dealt with her evidence in the context of the issue as to whether the abnormality of mind suffered by the Applicant had substantially impaired his responsibility for his acts or omissions at the time of the killing.

The Defence Experts

[12] The burden of proof in establishing the defence of diminished responsibility contained in section 5(1) of the Criminal Justice Act (Northern Ireland) 1966 ("the Act of 1966") rests upon the accused. The standard of proof is that of the balance of probabilities. The experts called on behalf of the prosecution and the defence agreed that, at the time of the killing, the accused was suffering from an abnormality of mind caused by disease or inherent cause. Accordingly, the trial judge directed the jury that those two elements of the defence had been established. In such circumstances, the fundamental factual issue for determination by the jury was whether the abnormality of mind that they considered to have been proved had substantially impaired the accused's mental responsibility for his acts and omissions at the time of the killing. The accused elected not to give evidence. Expert psychiatric evidence was called on behalf of both the prosecution and the defence.

[13] Dr Helen Harbinson, Consultant Psychiatrist, was called on behalf of the defence and, during the course of her evidence, as well as referring to her personal examinations, she made use of copious medical notes and records relating to the accused's psychiatric history from approximately 1995. Those documents included notes and records relating to the accused's admission to the Mater Hospital on 21st December 2001 and the incident involving Pauline McGuigan in January 2002. In the course of direct examination Counsel on behalf of the applicant referred to the applicant having received ECT before, after and subsequent to the assault. It appears that the contemporary medical notes and records indicated that the applicant may have received an excessive dose of ECT and his senior Counsel indicated to the trial judge that he would contend that the accused's mental state and the fact that he had received an excessive dose of ECT on 15th January had a bearing on the assault on Pauline McGuigan. Dr Harbinson conceded that there was nothing to indicate that the accused had been psychotic at the time but she emphasised that the first few ECT treatments are a particularly risky time for a patient. She said that during such time there would be a lifting or increase in physical energy before there was a sustained lifting in mood. She said that, in the short-term, the patient might be expected to be confused, disorientated and have memory problems. The transcript confirms that the learned trial judge made considerable efforts to clarify with Dr Harbinson and Counsel for the applicant the precise relevance of this evidence. Ultimately, it seems that the

defence did not wish to take the point further and the learned trial judge directed the jury that the ECT treatment did not have any relevance to the issues that they were to determine.

[14] The defence also relied upon the evidence of Dr O'Connell who had been responsible for the treatment of the accused during an admission to the Central Mental Hospital in Dublin for a period of some 20 months between 2004 and 2006. Dr O'Connell expressed the opinion that the applicant was suffering from severe mental illness most of the characteristics of which were in keeping with schizophrenia. Other characteristics such as depression might have amounted to a stand-alone disorder such as psychotic depression. He noted that, while the symptoms were most clearly described in the aftermath of the offence, he could see where the symptoms were described as early as 1996/97. He believed the disorder was long standing and chronic with both suicidal and homicidal thoughts. During his examination in chief Counsel for the applicant referred Dr O'Connell to the ECT treatments between the 17th and the 29th January 2002. Dr O'Connell noted that, subsequent to the ECT on 15th January the medical notes contained very positive comments about the change in the accused's demeanour, namely, he was brighter and more socially active. When asked in cross-examination to consider the possibility that the threat to kill and the attempt to strangle Pauline McGuigan had simply been a reaction to her refusal to revive the relationship his reply was:

> "Well equally it may be inferred from that that he has homicidal thoughts directed towards people he has some attachment to."

[15] The prosecution called Dr Fred Brown, Consultant Forensic Psychiatrist, and Dr Loughrey, Consultant Psychiatrist. The applicant told Dr Loughrey of his relationship with Pauline McGuigan. He said that, after one of his spells in hospital, they had stayed in a bed and breakfast facility in Bundoran. At that time he had persistent thoughts of trying to strangle her but he had managed to put them so deep inside himself that they had not stimulated any action. He told Dr Loughrey about the incident in the lift with Pauline McGuigan. The applicant described how she had been very aggressive towards him during the relationship, upon occasions repeatedly striking him blows. He claimed that she refused to take him out of the hospital during the course of the visit and that she became critical of him when travelling in the lift. He then continued:

> "I lost it, I grabbed her by the throat … the lift opened automatically … I can't say 100% what (would have happened otherwise) … I was in a terrible rage. She had pretended before to understand my illness. Now she was putting it down that was acting, that I was lazy, self centred".

[16] In cross-examination Dr Loughrey was asked about the "Untoward Incident" inquiry held by the hospital subsequent to the assault on Pauline McGuigan. He was asked whether that meeting, apparently chaired by Dr McDonald, Consultant Psychiatrist, should not have considered some earlier material dating from 1995/97 relating to self harm and the hearing of "voices". Dr Loughrey stated that he would not have expected Dr McDonald to put before the meeting all the diagnoses that had been raised and possibly rejected over time.

[17] Both Dr Browne and Dr Loughrey were cross-examined about the effect of ECT and the conditions for which it was generally accepted to be an appropriate treatment. The suggestion that the applicant had been given an excessive dose of ECT in the Mater Hospital was raised with Dr Brown who was asked if he had ever discussed that possibility with Dr McDonald. Dr Brown answered in the negative. He did agree that ECT was an appropriate treatment for depression but not for personality disorder.

[18] Dr Brown had personally examined the applicant who had told him about the incident in the lift with Pauline McGuigan. He claimed that the incident was not related to hearing any voices but that he had been suffering from a very, very heavy depression – "a complete blackness". He also informed Dr Brown of another occasion when he had been visited by Pauline McGuigan in Knockbracken Healthcare Park at a time when he had "strong voices to kill her by strangulation". He said that he had thoughts of strangling Pauline McGuigan with a bit of cord. Dr Brown confirmed in cross-examination that, at the completion of his report, he had discussed the case with Dr McDonald during a social outing and he also agreed that Dr McDonald played on the same football team as Dr Loughrey. It would appear from cross-examination that the applicant blamed Dr McDonald for failure to afford him proper treatment. In cross-examination it was suggested to Dr Brown that Dr McDonald had failed to diagnose a personality disorder and had been responsible for supervising the wrong dosage of ECT at the time of the Pauline McGuigan incident.

The Charge

[19] In the course of his directions to the jury the learned trial judge dealt in some detail with the expert evidence and the differences between the medical experts as to the appropriate diagnosis of the applicant's mental condition. He pointed out that the case made by the defence was that the applicant had been suffering from paranoid schizophrenia or schizo-affective psychosis at the crucial time and that, as a result of this illness, he had been suffering from a substantial impairment of his mental responsibility. He also drew the attention of the jury to the fact that Dr Brown, one of the medical experts called on behalf of the prosecution, had agreed that if schizophrenia was the correct diagnosis at the crucial time then it was much more likely that the applicant's responsibility for his acts and omissions would have been subject

to substantial mental impairment. By way of balance the judge reminded the jury that the prosecution case was that, at all material times, the applicant had been suffering from either personality or depressive disorder or, possibly a combination of both, and that he would have been able to retain a degree of control over his impulses and feelings which he would have been able to actively resist.

[20] In dealing with the incident involving Pauline McGuigan the trial judge said:

> "On 17th January 2002 the defendant receives a visit from Miss Pauline McGuigan to the Mater Hospital. And this is a separate incident which you may or may not wish to take into account when considering your verdict. It's entirely a matter for you what you make of the evidence of Pauline McGuigan and the incident that occurred on 17th January 2002 in the lift in the Mater Hospital. It may be that you can gain some insight into the Defendant's mental condition and motivation from that incident; either one way or the other. But remember that it occurred on 17th January 2002, some 2½ years before 19th July 2004".

[21] After outlining the facts of the incident in the lift the trial judge continued as follows:

> "Now, it is entirely a matter for you, but one possible view that you could form is that the defendant became dangerously violent in response to the idea that she was seeing someone else, that he was going to prevent her from doing so by strangling her. If you look at the specific details of that incident, you may think that there is no suggestion of a voice telling him what to do or his thoughts telling him what to do, or of him believing that there was physically a third person outside his body giving him instructions. I repeat, it is entirely a matter for you as to what, if anything, you take out of that incident. It may be that you think it was an earlier manifestation of his deteriorating condition, that his illness was in fact deteriorating, and this was an earlier warning of what was to come later. That his condition only fully flowered at a later stage in the period leading up to the events in 1A Cavendish Square, Belfast on 19th July 2004".

[22] The trial judge went on to suggest to the jury that they should "stand back" when considering the significance of the evidence of Pauline McGuigan. He noted that she had agreed that the applicant was a very sick man but she did not believe that he was "that sick". The judge then reminded the jury of the cross-examination by Counsel on behalf of the applicant who had put to her that she was not medically qualified and had neither the knowledge nor the experience to be able to properly express such a view and he suggested to the jury that they might consider that was a valid point to make. He also noted that her evidence might have been influenced by her justifiable anger at the treatment that she had received from the applicant. Alternatively, he raised the possibility that the jury might consider that Miss McGuigan had been in a relationship with the accused and that, in such circumstances, she might have been able to form a view as to his characteristics and the ability to control himself.

[23] During the course of the application Mr Barlow, on behalf of the applicant, conceded that, in giving the foregoing directions to the jury the learned trial judge had dealt fairly with the evidence.

[24] Mr Barlow framed his main criticism of the reference in the trial judge's charge to the assault upon Pauline McGuigan in the context of the evidence of Eamon Falloon, a barman/doorman at the Glenowen bar. Mr Falloon's statement was read in evidence by agreement and related to an apparent argument between the accused and the deceased on the evening prior to the killing. In the passage about which Mr Barlow complained the learned trial judge made the following remarks:

> "However, if you accept that there was an argument, or a heated argument, you may think, and it's entirely for you, that the question arises as to whether the fatal attack on Geraldine Kane was prompted by another argument later on in 1A Cavendish Square. That is, that after they had been heard by Thomas Murphy and John Wallace in the house, conversing perfectly normally, without any hint of aggression that they had an argument, you may wish to consider, and it is for you, whether an argument prompted the attack. I emphasise that even if you consider that an argument prompted the attack, that the defendant can still have been suffering from a mental abnormality which substantially impaired his response to that argument. In short, that he can still make out the defence of diminished responsibility. However, you may, and it's a matter for you, consider as to whether this was the response of the defendant to an argument and that his response was to kill. You may consider, and it is again a matter for you, that on a previous

> occasion the defendant's response to an argument to Pauline McGuigan was an attempt to cause her harm in the lift in the Mater Hospital".

[25] Essentially this passage in the learned trial judge's charge was concerned with assisting the jury as to the evidence about whether or not an argument had taken place at some earlier stage of the evening and if so whether that was relevant. Mr Barlow specifically did not complain of the passage that occurred shortly after the words quoted above when the learned trial judge drew the attention of the jury to part of the analysis of the attack on Pauline McGuigan carried out by Dr McDonald, who at that time was responsible for treating the accused. In that note Dr McDonald was recorded as observing that the accused had a tendency to become involved in intense emotional relationships and had suffered distress when problems had arisen. After drawing their attention to the note the learned trial judge went on to say to the jury:

> "It's a matter entirely for you, but there is evidence that the relationship between Thomas Graham and Geraldine Kane was coming to an end. Could there have been an argument as a response to the defendant's intense emotional relationship with Geraldine Kane? It's entirely a matter for you?

Discussion

[26] It seems clear to us that the basis upon which this application was originally based was misconceived insofar as it was founded upon the proposition that the evidence of Pauline McGuigan was admitted as bad character evidence in accordance with the provisions of the 2004 Order. The trial judge was not requisitioned on the basis that evidence had been wrongly admitted or that there had been no adequate direction in relation to bad character and/or credibility or propensity nor had the prosecution advanced any arguments in relation to those matters. No submission was advanced on behalf of the applicant that the evidence should be excluded because of the adverse effect on the fairness of the proceedings in accordance with Article 6(3) of the 2004 Order. The evidence was admitted as a consequence of an agreement between the prosecution and defence and Pauline McGuigan was called by the prosecution to give oral evidence at the specific request of the defence. The incident involving the assault upon Pauline McGuigan in the lift was bound to be referred to during the course of the trial. It had been recorded in the applicant's medical notes and records and featured in the reports and evidence of all four psychiatrists. It was also referred to in the handwritten notes made by the applicant in the aftermath of the killing and found within the manual of the Proton car that he drove when he escaped to the Republic of Ireland. In that document the applicant had written:

> "Began to realise how bad it was, first partner Geraldine began to have thoughts of killing her, a good person who I loved but when dark moods came I began following her and gathering knives, then had breakdown, couldn't deal with thought in my head, left Geraldine and children. I knew I was a danger to her, can't explain why. Same thing happened Pauline McGuigan".

[27] The transcripts of the cross-examination of Pauline McGuigan, the cross-examination of the psychiatrists called on behalf of the prosecution and the examination of the psychiatrists called by the defence all suggest an attempt on the part of the defence to extract from the witnesses confirmation of the applicant's case that, at the time of the killing and very possibly much earlier, the abnormality of mind from which he had been suffering substantially impaired his mental responsibility for his acts and omissions.

[28] Considered as a whole, the directions given to the jury by the learned trial judge were detailed, balanced and comprehensive and, in our view, cannot be seriously faulted. Mr Barlow has focused on the passage in which the trial judge referred to the suggestion that a heated argument had taken place some hours prior to the killing and suggested that the jury might consider whether there was an analogy with the accused's response to an argument with Pauline McGuigan in the lift. We do not accept that extract from the charge can be viewed in isolation. At an earlier stage, of which no complaint is or could be made, the learned trial judge had placed the evidence of Pauline McGuigan in a balanced context and left the matter entirely to the jury.

[29] After giving the matter careful consideration we are not persuaded that the verdict is in any way unsafe and, consequently, the application will be dismissed.