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*(subject to editorial corrections)**

IN THE CROWN COURT OF NORTHERN IRELAND

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THE QUEEN

-v-

KEVIN CRILLY

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RULING ON THE ADMISSIBILITY OF EVIDENCE

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McLAUGHLIN J

[1] Kevin Crilly is charged with the murder of Captain Robert Laurence Nairac in May 1977. Captain Nairac was a commissioned officer in the Grenadier Guards and at that time was a staff officer attached to Staff Headquarters serving in the South Armagh area of Northern Ireland based at Bessbrook Mill Army Camp.

[2] He was last seen alive on Saturday, 14 May 1977 when he reported to the Operations Room at the base and informed the duty officer, Captain David Collett, that he was going to the Three Steps Inn, a bar located at Drumintee, South Armagh, and very close to the border with the Republic of Ireland. At that time he was in civilian dress and carrying a personal issued Browning semi-automatic pistol which he carried in a brown leather shoulder holster. Some modifications had been made to the weapon and it was readily identifiable as his person weapon. Among these changes were an extra long safety catch and alterations to the pistol grip.

[3] Captain Nairac informed his operations officer that he would be using an unmarked MOD car, a Triumph Dolomite Saloon, VRN CIB 4253. He was to communicate using a radio telephone concealed in the car. He left the base at about 9.55 indicating that he would return by 11.30. When he left, neither the task he intended to perform at the Three Steps Inn, nor his reason for going there, were known to colleagues. He communicated with his base on a number of occasions between leaving it and his final communication at 9.58 when he announced that he had arrived at his destination. When he failed to return to his base by 12.05 am on Sunday, 15 May, Captain Collett became

anxious. He was aware however that Captain Nairac had been late in the past and delayed taking any action, but when he had not returned by 1.05 he informed the CO and a search party was sent out. The police were also alerted.

[4] For present purposes it is not necessary to record more than that Captain Nairac was never seen again and it is the prosecution case that he was abducted, beaten and then shot dead by members of an IRA unit operating in the South Armagh/North Louth area. It is the prosecution case that Liam Townson was the gunman and that the defendant Crilly was one of the gang responsible for the kidnapping and death of Captain Nairac. It is alleged that Crilly left the scene at one point to go to Dundalk to bring Townson back to the scene, that he knew Townson was the OC, was armed and was fully aware that the intention was that Townson should be the person to execute Captain Nairac. He is thus said to be guilty as a secondary party being part of the common purpose to kill Captain Nairac. It is alleged that the execution took place at Ravensdale which is an area adjacent to the main road between Newry and Dundalk close to the border.

[5] Townson was arrested in the Republic of Ireland on Saturday 28 May 1977 at 1250 hours and was taken to Dundalk Garda Station where he arrived at 2053. During his time there he was subjected to extensive interviews. In short it is alleged that during the ninth interview on Monday 30 May he made a verbal statement of confession to Detective Inspector Courtney, the lead detective of the investigation. This was said to be witnessed by Detective Sergeant Canavan. The confession statement was the primary evidence against Townson at his subsequent trial at the Special Criminal Court in Dublin when he was convicted of the murder and ultimately sentenced to life imprisonment.

[6] Kevin Crilly was not arrested at the time. On 15 May 1977 James Swanston, then a sergeant in the SIB, Royal Military Police, attached to Newry RUC Station, was asked to find Crilly and speak to him. The prosecution alleges that Sergeant Swanston travelled to the home of the defendant where he lived with his parents and travelled there with Detective Constable Charlie Hamilton. On arrival at the house they noticed a red coloured Ford Cortina parked outside. He spoke initially to one or other of Crilly's parents and then Crilly appeared at the door. He acknowledged himself and confirmed that the Cortina was his car. He also said he had been at the Three Steps Bar the night before. Swanston and Hamilton contemplated arresting Crilly at that stage but decided they did not have sufficient evidence to justify same and returned to Newry Police Station. When they reported events to Detective Sergeant Gerry McCann they were instructed to return immediately to Crilly's house and arrest him. They returned to the house about one hour later but Crilly was no longer there and he was not found again for over 30 years.

[7] There are a number of pieces of evidence relied upon by the prosecution in support of its case against Crilly. One most important, and highly unusual portion of the evidence, emanates from the verbal confession statement of Townson, which was made allegedly at the time of interrogation of the latter in Dundalk in May 1977 and later relied upon at his trial at the Special Criminal Court in Dublin. In that confession, sought to be proved by Garda Detective Inspector Courtney, now retired, Townson described, inter alia, the role allegedly played by Crilly. It is not necessary to set out the details of it at this point, suffice to say that if the content of the statement were proved, and found to be reliable, it would constitute a most important part of the evidence for the prosecution in this case and a highly prejudicial piece of evidence from the defendant's perspective. It is not difficult to see why the defendant has sought to exclude this evidence.

[8] The history of the matter bears a little further consideration. The prosecution sought leave to adduce the content of Townson's statement pursuant to the provisions of Part III of the Criminal Justice (Northern Ireland) Order 2004. The Order provides for the Regulation of the admission of hearsay evidence in the course of a trial. Obviously the alleged statement of Townson, which was made in 1977 to a police officer, when Crilly was not present, falls within the normal common law hearsay rule. The following statement from the 38th Edition of Archbold (1973) sets out succinctly the common law position:

> "1395(i) GENERAL PRINCIPLE
>
> It is a fundamental rule of evidence that statements made by one defendant either to the police or to others (other than statements whether in the presence or absence of a co-defendant, made in the course and pursuance of a joint criminal enterprise to which the co-defendant was a party ….) are not evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the statements and thereby makes them his own. …. Nor is a plea of guilty by one defendant in any sense to be regarded as evidence against a co-defendant …. If, however, a defendant goes into the witness box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant. …. In some cases, the judge in his discretion may think it proper to warn the jury that a co-defendant may have some purpose of his own to serve in giving evidence and that accordingly it

would be dangerous to act on his uncorroborated evidence ….

It is the duty of the judge to impress on the jury that the statement of one defendant not made on oath in the course of the trial (and not falling within any other recognised exception) is not evidence against a co-defendant and must be entirely disregarded. …..

1395(a) Where a party to the offence for which the defendant is being tried, is called as a witness whether by the prosecution or the defence the position is exactly the same; at no stage can the witnesses previous statements become admissible against the defendant, notwithstanding that for one reason or another it may be necessary to put them to the witness ……

1396(ii) **Prejudicial Nature of Defendant's Statement as Against Co-Defendant**

Notwithstanding the general rule referred to ante … and the judge's duty to direct the jury upon it, in some cases further steps were taken to minimise the highly prejudicial effect which a defendant's statement may have upon the case of a co-defendant. The position was referred to generally in R v Gunewardene (1951) 35 Cr. App. R. 80 at pp. 91-92:

> '… It would be impossible to lay down that, where two prisoners are being tried together, counsel for the prosecution is bound, in putting in the statement of one prisoner, to select certain passages and leave out others …. It not infrequently happens that a prisoner in making a statement, though admitting his guilt up to a certain extent, puts greater blame upon the co-prisoner, or is asserting that certain of his actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner

would have the right to have the whole statement read and could complain if the prosecution picked out certain passages and left out others …. although in many cases counsel do refrain from reading passages which implicate another prisoner and have no real bearing on the case against [the maker of the statement]', per Lord Goddard CJ."

[9] Part II of the 2004 Order provides as follows:

"**Admissibility of hearsay evidence**

18. - (1) 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 –

(a) any provision of this Part or any other statutory provision makes it admissible,

(b) any rule of law preserved by Article 22 makes it admissible,

(c) all parties to the proceedings agree to it being admissible, or

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

(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant) –

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the cases;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);

(c) how important the matter or evidence mentioned in subparagraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it.
(3) Nothing in this Part affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings."

[10] Pursuant to those provisions the prosecution brought what has now become a reasonably common application for the reception of hearsay evidence. What was different about this application was the nature of the evidence sought to be adduced, particularly having regard to the common law position which I have set out above. As the case was to be tried by a judge sitting alone, without a jury, an application to admit the evidence of Townson's statement was made in advance of the trial to Hart J who was assigned to deal with disclosure and pre-trial matters. This is a procedure which was considered and approved recently by the European Court of Human Rights in the case of McKeown v UK (Application No. 6684/05), which originated in Northern Ireland. In support of its application the prosecution relied upon dicta contained in R v McLean and Others [2008] 1 Cr. App. R. 11 and R v Y [2008] 1 WLR 1683 [2008] EWCA Crim. 10. The lead judgment in both cases was delivered by Hughes LJ and he took the opportunity in R v Y, the later of the two, to explain further his reasoning in R v McLean.

[11] In McLean three defendants were convicted of murder at the Central Criminal Court in August 2005. The prosecution case (quoting from the headnote) was put on the basis of joint enterprise. The appellants advanced inconsistent defences at their trial where one defendant sought to admit in

evidence the statement of another defendant made to a prison officer whilst on remand implicating the third defendant. Applying the common law rule, that what is said by one defendant out of court is admissible in his case only, the judge refused to admit the statement. On appeal it was contended he was wrong so to rule and that the provisions of the Criminal Justice Act 2003 rendered the statement admissible evidence for or against all the defendants.

[12] It was held, allowing the appeal and ordering a retrial, that Section 114(1)(d) of the Criminal Justice Act 2003 made admissible the statement of one defendant made out of court if it was in the interests of justice that it should be admitted. Once admitted the statement became evidence in the case generally and not simply in the case of the defendant who made the statement. Accordingly, the reasoning process of the trial judge in his ruling on admissibility was fundamentally fallacious, involving consideration of a rule of law which no longer existed in its unmodified form. That judgment is dated 30 January 2007. The provisions of Section 114(1)(a) of the 2003 Act are in identical terms to those of Article 18(1)(d) of the 2004 Order.

[13] In R v Y the defendant was due to stand trial alone on a charge of murder. X had already pleaded guilty to the murder, accepting that he was the second assailant and that he had stabbed the deceased. Prior to arrest, X was said by a girlfriend to have admitted to her that he had killed someone and that the other assailant was the defendant. The Crown applied to the trial judge to admit her witness statement as hearsay evidence of X's confession, pursuant to Section 114(1)(d) of the Criminal Justice Act 2003. The judge held that Section 114(1)(d) had no application to a hearsay statement contained in a confession of another person, and accordingly ruled that the Crown's application did not fall to be considered on its merits. The Crown sought to appeal against that ruling pursuant to Section 58 of the 2003 Act. The defendant contended that no interlocutory appeal under Section 58 lay against a ruling which was a "evidentiary ruling" within the meaning of Section 62(9) of the Act.

[14] On appeal the court determined it had jurisdiction to entertain the appeal and then considered the merits of the prosecution's submissions. Allowing the appeal, it stated that paragraphs (a) to (d) of Section 114(1) were alternatives, so that hearsay evidence was admissible if it fell within any of those paragraphs; that, since Section 114(1) could not be read so as to subordinate paragraph (d) to paragraph (b) and since the Common Law Rules preserved by Sections 114(1)(b) and 118 where rules of admissibility and not of inadmissibility, hearsay contained in a confession was as open to admission under Section 114(1)(d) as any other hearsay; that neither the fact that the hearsay in question was an accusation against the defendant rather than an admission against interests by the maker, nor the fact that it was the Crown which sought to adduce it, could rule out the application of Section 114(1)(d), although those and all other material factors were relevant to the

exercise of judicial judgment under Section 114(1)(d) and (2); and that, accordingly, Rule 5 in Section 118(1) did not exclude the application of Section 114(1)(d) to an out of court statement contained in, or associated with, a confession, and the judge had erred in his ruling.

[15] The Court of Appeal in England has therefore accepted the broad principle that a confession statement of one accused may be admitted as hearsay evidence in the trial of another also charged with that offence whether he is a co-defendant, or where the confessor, having pleaded guilty, leaves the other perpetrator to be tried separately, perhaps on a separate indictment.

[16] It is important to note however that in R v Y Hughes LJ took the opportunity to clarify the issue further and sounded a note of caution which is summarised in the headnote to R v Y in the following terms:

> "(i) hearsay is necessarily second best evidence and is for that reason much more difficult to test and to assess: the jury never sees the person whose word is being relied upon, and that person cannot be asked exploratory or challenging questions about what he said. Those very real disadvantages of hearsay evidence, which underlay the common law rule generally excluding it, remain critical to the assessment of whether the interests of justice call for its admission. Those interests will require attention to the difference between an admission against interest and an accusation against someone else. Before concluding that it is in the interests of justice to admit a hearsay statement the judge must very carefully consider the alternatives which may well include the bringing of an available, but reluctant, witness to court …
>
> (ii) The existence of Section 114(1)(d) of the 2003 Act does not make police interviews routinely admissible in the case of persons other than the interviewee. The reasons why they are ordinarily not admissible except in the case of the interviewee are likely to continue to mean that in the great majority of cases it will not be in the interests of justice to admit them in the case of any other person…."

[17] Having regard to those authorities, the arguments and the submissions advanced before him, Hart J concluded, in accordance with the 2004 Order, that the verbal confession statement of Townson, which implicated Crilly,

should be admitted as evidence in this trial. It is important to emphasise that his ruling is not under challenge, let alone appeal, before me. It is an autonomous decision which stands and unless a ruling to the contrary is made by me on a specified basis the prosecution is entitled to present that evidence in the trial. Finally, I should point out that the discretion to exclude evidence, otherwise admissible by virtue of the 2004 Order, pursuant to Article 76 PACE and common law is specifically preserved by Article 30(2) of the 2004 Order.

[18] After the case commenced before me I was told that since at least October 2010, i.e. some three months before the trial commenced, the defendant had been attempting to obtain a copy of a transcript of proceedings in the trial of Townson which took place at the Special Criminal Court in Dublin in 1977. Approaches were made to the P.P.S. and the Irish judicial authorities for assistance but the transcript had not been obtained when the trial commenced. A copy of the transcript, at least material parts of the voir dire conducted in the trial of Townson, during which his alleged verbal and written confession statements were challenged as to their admissibility, voluntariness and reliability, did become available during the weekend at the end of the first week of the trial. Enormous industry was applied, for which great commendation is due to leading and junior counsel for the defence and their instructing solicitor, to assimilate this documentation which ran to approximately 1300 pages over that weekend. When the trial resumed in the second week defence counsel were able to give me a brief summary of some of the things they had been able to find from their study of the transcript. It was very much incomplete at that stage, but was sufficient to justify adjourning the trial for a number of days to facilitate a more comprehensive reading of it. Paginated copies were provided for the prosecution and for me.

The arrest and trial of Townson in 1977

[19] Making due allowances for the late availability of the transcript, what has emerged to date can be summarised as follows.

[20] Townson was arrested at Dundalk on Saturday 28 May 1977 and was at the Garda Station by 8.53pm. He was then subjected to a series of interviews the first of which commenced at 9.15 (or 9.30 depending on which police officer's record is accurate). The formal interviews ended at 4.30 pm on Monday 30 May 1977 when Townson was taken from the police station by Gardai. He was returned to the station at 7.15 when he was first permitted contact with a solicitor. An interview schedule has been prepared and I set out the details below from it:

"LIAM TOWNSON INTERVIEW SCHEDULE

1. Interview 1:

   - 9.15 pm on Saturday 28th May 1977 until 3.45 am on Sunday 29th May 1977 [6 hours 30 minutes]
   - Garda Sgt Corrigan & Garda Hynes

2. Interview 2:

   - 3.45 am until 5 am on Sunday 29th May 1977 [1 hour 15 minutes]
   - Garda Sgt. King & Garda Staunton

3. Interview 3:

   - 11.40 am until 4.30 pm on Sunday 29th May 1977 [4 hours 50 minutes]
   - Detective Garda Dunne & Detective Garda Godkin

4. Interview 4:

   - 4.30 pm until 7.10 pm on Sunday 29th May 1977 [2 hours 40 minutes]
   - Detective Inspector Courtney & Detective Sgt. Canavan

5. Interview 5:

   - 7.50 pm until 9 pm on Sunday 29th May 1977 [1 hour 10 minutes]
   - Detective Garda. Dunne & Detective Garda Godkin

6. Interview 6:

   - 9 pm until 11.45 pm on Sunday 29th May 1977 [2 hours 45 minutes]
   - Garda Sgt Gethins & Garda Clune

7. Interview 7:

   - 8.15 am until 10.30 am on Monday 30th May 1977 [2 hours 15 minutes]

- Garda Corrigan & Garda Hynes

8. Interview 8:

   - 10.30 am until 3.15 pm on Monday 30th May 1977 [4 hours 45 minutes]
   - Detective Garda Dunne & Detective Garda Godkin

9. Interview 9

   - 3.15 pm [or 3.20 pm] until 4.30 pm on Monday 30th May 1977 [1 hour & 15 minutes]

   - Detective Inspector Courtney & Detective Sgt. Canavan"

[21] Details contained in the transcript led to the present application to exclude the evidence of Townson's confession from the trial. The application was based on both common law and Article 76 of Police and Criminal Evidence (NI) Order 1987 which is in the following terms:

> "*Exclusion of unfair evidence*
>
> 76.—(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this Article shall—
>
> (a) prejudice any rule of law requiring a court to exclude evidence; or
>
> (b) affect, in proceedings such as are mentioned in subsection (1) of section 8 of the Northern Ireland (Emergency Provisions) Act 1978, the admissibility under that section of a statement made by the accused."

[22] It will be observed that when giving consideration to the question of admissibility of this evidence under the 2004 Order Hart J was required to take into account a number of matters including the requirement that the evidence should not be admitted unless it was in the interests of justice to do so (Article 18(1)(a) of the Order). It will be observed, therefore, that the statutory test under the 2004 Order and the statutory discretion defined in Article 76 PACE, are different, require considerations of different material (at least potentially), perhaps a consideration of material from a different perspective and that different outcomes may be possible. For the reasons already given this court would be reluctant to be seen in any way, or be thought to be giving any encouragement to, anything that might be suggestive of an appeal against the order of Hart J.

[23] As the application was developed on behalf of the defendant by Mr Richard Pratt QC, who appeared for the defendant with Mr John Kearney, a number of highly relevant matters emerged which could not have been known to or appreciated by Hart J without the aid of the transcript of which the following are important examples.

(i) The detectives conducting the interrogation of Townson appear to have acted without any obvious overall co-ordination or strategy. Officers appeared to come and go from the interviews at their pleasure, usually without reference to any superior officer, co-ordinator or lead investigator. There was no structure to the length of the interviews, the topic to be raised or any method of recording what took place on a detailed basis. Officers appear to have conducted the interviews for as long, or as short, a period as suited them. There were no structured breaks and the entire process appears to have lacked any formal routine. Thus the first interview commenced at 9.15 pm, continued until 3.45 am when a second interview commenced; it concluded at 5.00 am.

(ii) Cautioning of the accused appears to have taken place at the election of the officers and was not done at all on a number of occasions by their own admission.

(iii) The lack of co-ordination of the interview process led to the accused being interrogated for a period of 19 hours out of his first 26 hours in custody. Following that period he was returned to his cell and observations made by other officers suggest that he slept for a maximum of two hours before the next interview session commenced.

(iv) He did not receive the benefit of legal advice at any time during his period in custody until 7.15 pm on Monday evening, by which time he had allegedly made verbal and written confessions.

(v) The officers conducting the interviews were aware that a request had been made for access to Townson by a Mr Carroll, solicitor, on the Sunday evening and that it was understood by them that he would come from Dublin and should arrive about 9.30 am yet interviewing re-commenced on Monday at 8.00 am. In the event Mr Carroll did not come to the police station as planned and was first logged as arriving there at 4.00 pm on Monday afternoon. At that stage Townson had already made the alleged verbal confession. As a side issue at the trial the court determined that claims by Mr Carroll that he had made frequent telephone enquiries during the course of the day, and explained his absence, were denied by the police officers and his claims were rejected by the court. It is not in dispute however that he arrived at 4.00 pm.

(vi) When he arrived at the police station the Special Criminal Court found that he, by a "conscious and deliberate" process, was lied to by the police officers. He was told that the investigating officers were not available for consultation with him because "They were in the country". In fact on the police account Townson was in the course of his ninth, and final, interview and had just made a verbal confession to Detective Inspector Courtney.

(vii) Knowing that Mr Carroll was by then in the police station he was denied access to Townson, and indeed at 4.30 pm Townson was removed from the police station without notice to his solicitor, taken "into the country" when he allegedly took the investigator officers to two locations where incriminating items, including Captain Nairac's personal firearm and holster, together with the alleged murder weapon, were found.

(viii) When Townson was removed from the police station at 4.30 pm, having earlier made an oral confession, it had still not been written down. In fact it was not written down for 1½ hours after he allegedly completed it. When it was written down it was not read to the defendant and he was not asked to sign it. It was apparently written up in a police notebook, not whilst he was in the Garda Station, but whilst the officer was out "in the country" at around 17.20 hours.

(ix) Despite being interviewed from shortly after his arrest until 3.00 pm on Monday the defendant maintained a denial of any knowledge of or involvement in the murder or disappearance of Captain Nairac and showed no signs of any change in that position. That was a total of some 43½ hours. Then within 15 minutes of an interview commencing under Detective Inspector Courtney it was alleged he made the verbal confession which he completed five minutes before his solicitor arrived at the station from Dublin.

(x) It is alleged that in the course of interview Townson drew a map which indicated the location of various items later found in searches. There was also a copy of the map and the original map contained a letter 'B'. In the

course of cross-examination at one stage when it was suggested to the Garda officer to whom he provided the sketch that he had "alleged" Townson had made this sketch (it being denied that he had) the officer replied emphatically to the court "I am not alleging, I am saying he did". It was said that the 'B' had been put on the document by Townson but for some reason the letter did not appear on the copy. This led to the defence team having the document scrutinised by a handwriting expert, Mr Julius Grant, who carried out a comparative examination of the 'B' with nine samples of Townson's handwriting together with a sample of handwriting provided by Detective Garda Canavan. In the course of trial the latter had been asked to write the word "UNBENDING". Mr Grant concluded that the writing of the letter 'B' was more consistent on balance with having been written by Canavan and was consistent with Townson's not having written it. The court also noted that he had not been asked to sign this map but that it had been signed by Detectives Canavan and Courtney.

(xi) When the detectives "went out into the country" it was alleged that Townson then dictated a further confession which was recorded in writing by an officer. In cross-examination the officer said he had a piece of paper with him, possibly folded in four and stored in his pocket, that he used this to write out the confession at Townson's dictation, did so over a period of 1½ hours whilst sitting in a vehicle with Townson and wrote it when leaning upon his own knee. Townson did not sign this "written" confession.

(xii) In the course of the trial at the Special Criminal Court the lying response given to Mr Carroll when he arrived at the police station, was held to be a "conscious and deliberate denial of his constitutional right to obtain legal advice in the circumstances" and so resulted in the necessary exclusion of the alleged written confession. The court held however that as the verbal confession had been concluded, although not recorded in writing by then, it was admissible. At the trial therefore Townson had to answer to the alleged verbal confession, rather than the written confession as well. Hart J was aware of the constitutional issue as he did have access to the judgment of the Supreme Court of Ireland on the appeal.

(xiii) The official timing of the interview during which Townson's confession was made, was allegedly from 3.15 pm (or 3.20) until 4.30 pm and the confession was concluded before Mr Carroll arrived at 4.00 pm. The interview notes however were originally written to show it commenced at 3.50 pm but were later changed to read 3.20 pm; this was said to be due to "a mistake". Its significance in relation to the time of Mr Carroll's arrival makes this an important issue but in any event it means the start time of the interview was not recorded at its commencement. An apology was allegedly made during the interview by Townson for lying to Gardai King and Crowe, but Crowe never interviewed him during his detention or, worse, he did and it is not recorded.

Defence submissions

[24] This long litany of matters identified by the defence is said to raise such concern that this evidence ought now to be excluded and the prosecution be prohibited from relying upon it due to the adverse impact of it on the fairness of the trial. It is said that Crilly is in an invidious position as he has no knowledge of the truth of the accounts given by Townson or the Gardai officers and is in a position to challenge neither. Given that Townson claimed he never made a confession, verbal or written, coupled with the wholly unsatisfactory aspects of his interrogation, judged particularly by present standards, as revealed by the transcript, he cannot be expected to cross examine the Gardai officers on the basis their evidence is untrue. Neither could he be expected to explain how or why Townson should implicate him, if indeed he did. It was argued that the effect of permitting the prosecution to prove the confession would be to transfer to him a burden of proof which was unfair and contrary to principle; further it would involve him in mounting a collateral attack on the safety of Townson's conviction which was not his concern. Finally, I was told that certain interviewing police officers were not available, *e.g.* due to death or illness, but because "they had gone to ground" – a description given to the defence by the prosecution.

[25] In addition to the alleged unsatisfactory aspects of the conduct of the interrogation of Townson, as detailed above, the defence have also argued that the legal landscape has altered in an important way, particularly following upon the decision of the Supreme Court of the United Kingdom in Cadder v HM Advocate (HM Advocate General for Scotland and Another Intervening) [2010] 1 WLR 2601, [2010] UKSC 43, so as to render Townson's alleged confession inadmissible *per se*. In that case the Supreme Court reviewed all of the leading authorities, European and otherwise, relating to the status of statements made by an accused, by way of confession, which were made without benefit of legal advice. It is agreed that the decision of the Supreme Court was not put before Hart J for his consideration by either side.

The prosecution's response

[26] The prosecution has relied upon the fact that as Townson is still alive he could be called by Crilly as a witness. A letter was produced to me which was sent by the solicitor for Crilly, who was then purporting to act on behalf of Townson, which stated that Townson did not propose to co-operate with the investigation conducted by the Police Service of Northern Ireland. The implication was that he would refuse to be a witness. There does not appear to have been any follow up to this. The prosecution has not included Townson as a witness. It has not been suggested that any summons has been or should be served upon him, if he resides within the jurisdiction, or help

sought from the Irish judicial authorities if he resides out of the jurisdiction. It is said however that Crilly is free to call him and by that means would be able to advance before this court all of the arguments which Townson advanced on his own behalf (albeit via highly experienced senior and junior counsel) at his trial.

[27] Secondly, that certain remarks made by Crilly in the course of an interview conducted by journalists from the BBC Northern Ireland *Spotlight* programme are consistent with the allegations made about him in Townson's verbal statement.

[28] Thirdly, that the absence of Townson from the trial was not in any event to be regarded as unusual since that was the essence of hearsay evidence, namely that the original maker of the statement is not available and thus unavailable for cross-examination.

[29] The prosecution case is essentially that I should hear all of this evidence and weigh up its probative value in the course of the normal trial process.

[30] Finally, it was also argued that the statement of Townson should not be regarded as having been put beyond redemption by the decision of the Supreme Court in Cadder. Attempts were made to rely upon the reservation expressed by Carswell LCJ in the case of R v Gordon [2001] NIJB 50 in respect of the approach adopted by the Court of Appeal in England, specifically that set out in the judgment of Lord Bingham LCJ in R v Derek William Bentley (Deceased) [2001] 1 Crim. App. R. 307 as to whether present day standards, or those current at the time of trial, should be applied.

[31] The cases of Bentley and Gordon were referred back to the respective Courts of Appeal by the Criminal Cases Review Commission. The purpose of the court in those cases was to determine whether or not the convictions should be regarded as safe. In Bentley the court concluded that it should judge the safety of the conviction according to the standards which would now apply in any other appeal. It is true that Carswell LCJ expressed some reservation on this matter, although he observed that the High Court of Justiciary in Scotland had adopted the Bentley reasoning in Boncza-Tomaszewski v HM Advocate 2000 SCCR 657. He did however refer to the commentary of Sir John Smith QC in [1999] Crim. LR 330 in which the position the court had arrived at was described as capable of having "alarming implications", because of the number of convictions which could be upset if Appellate Courts applied current standards to decisions made in the past. Carswell LCJ also referred to what he regarded as a possible caveat entered by Lord Bingham LCJ himself in R v King [2000] Crim. LR 835 when he said:

> "We should not (other things being equal) consider a conviction unsafe simply because of a failure to comply with a statute governing police detention, interrogation and investigation, which was not in force at the time."

Carswell LCJ ended his review of the law in R v Gordon by stating:

> "We shall content ourselves with saying that there appear to be matters which await clarification in future decisions."

[32] For reasons which I shall come to, it appears to me that the position has now been settled by the Supreme Court of the United Kingdom in Cadder wherein it endorsed the approach of the Chief Justice of Ireland, Murray CJ in A v Governor of Arbour Hill Prison [2006] 4 IR 88. The important thing for me to restate however is that whilst the concern of the Courts of Appeal of England and Wales and Northern Ireland in the aforementioned cases was to review the safety of a conviction, *i.e.* after a trial had already been conducted, and it was therefore vital to define the yardstick by which to judge that, my concern is to assess the impact on the overall fairness of the trial of the admission of all or any of this evidence as I try the case. There can be but one answer, *i.e.* Crilly can only have a fair trial in 2011 if it is judged by today's standards, not those of a bygone era.

[33] The suggestion that the defendant can call Townson to deal with all of the matters which he wishes to rely upon in respect of Townson's challenge to the reliability or admissibility of his alleged confession, or even as to whether he made it at all, is in my opinion a non-starter. There is a fundamental conflict between the defendant and the person allegedly making it. It is a tension which is so basic and fundamental that it would, in my opinion, result in a level of unfairness in this case that would be quite unacceptable. The concerns raised by the defence about the manner in which the alleged verbal confession was obtained from Townson are such that, even without the decision in Cadder or European jurisprudence upon which it is based, the statement could not be used consistently with fairness to Crilly in this trial. It would inevitably involve demanding of the court, that it weigh evidence which cannot be taken at face value which cannot adequately be challenged or evaluated. It leaves the defendant with a burden which ought not to be cast upon him in a criminal trial which is tantamount to a requirement to establish that Townson's confession and conviction are unreliable.

[34] Finally I come to the effect of Cadder itself. The background to the case is outlined in the following summary in the headnote.

> "The accused was detained by police, pursuant to Section 14(1) of the Criminal Procedure (Scotland) Act 1995, on suspicion of serious assault. He was cautioned that he did not have to answer any questions, beyond giving his name, address, date and place of birth and nationality and was taken to the police station. He was informed in accordance with Section 15, that he was entitled to have a solicitor informed of his detention but he did not exercise that right. Thereafter, he was interviewed under caution by two police officers, without a lawyer present, and he made a number of admissions. At the subsequent trial at the Sheriff Court on charges of assault and breach of the peace, the Crown led evidence of the content of his police interview and relied on the admissions which he had made. He was convicted. He sought leave to appeal on the ground, inter alia, that reliance on the contents of his interview, conducted in the absence of a lawyer, breached his right to a fair trial under Article 6(3)(c), read in conjunction with Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and he relied, in particular, on the decision of the Grand Chamber of the European Court of Human Rights."

The decision of the Grand Chamber referred to is Salduz v Turkey 49 EHRR [2008] 421. In the judgment of Lord Hope of Craighead DPSC, he stated that the Grand Chamber had expressed its conclusion as follows:

> "Against this background, the court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' …. Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 …. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. …. The emphasis throughout is on the

> presence of a lawyer as necessary to ensure respect for the right of detainee not to incriminate himself."

Then at paragraph 44 he said:

> "It plainly had in mind that there was a consensus across Europe that the presence of a lawyer was a safeguard against ill-treatment, as can be seen from its reference in paragraph 54 to the recommendations of the European Committee for the Prevention of Torture. But it is just as plain that the risk of irretrievable prejudice to the accused because of a lack of respect of his right to remain silent was at the forefront of its mind too."

[35] He then considered whether the Supreme Court should follow Salduz and stated, at paragraph 47:

> "As for the question whether Salduz v Turkey has given rise to a clear and constant jurisprudence, the case law shows that it has been followed repeatedly in subsequent cases."

He then referred to a long list of authorities that had been filed by JUSTICE in its written submissions to the court and concluded:

> "In my opinion the Strasburg Court has shown by its consistent line of case law since Salduz v Turkey 49 EHRR 421 that the Grand Chamber's finding in paragraph 55 is now firmly established in its jurisprudence."

[36] Lord Rodger of Earlsferry JSC, agreeing with Lord Hope as to the effect of Salduz, said that the European Court had found:

> "69. …. That, for the right to a fair trial to remain sufficiently 'practical and effective', Article 6(1) requires that, as a rule …. access to a lawyer 'should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even then any restriction must not unduly prejudice the rights of the accused under Article 6. The law remains the same in this respect."

[37] Lord Rodger then reviewed the position as to the status of this protection in Scots law and continued:

> "97. To return to the main point. Assume that, up to now the system for questioning suspects under the 1995 Act has assisted the police in obtaining incriminating information from suspects. It must follow that the recognition of a right for the suspect to consult a solicitor before being questioned will tilt the balance, to some degree, against the police and prosecution. Although inescapable, that consequence is one that many of those who are familiar with the way the presence system operates may well find unpalatable. The change will, however, have the same effect of putting the police and prosecution in Scotland in the same position in this respect as the police and prosecution in the rest of the United Kingdom and, indeed, in other countries which are members of the Council of Europe."

[38] In a short summary of the effect of their decision Lord Brown of Eaton-under-Heywood JSC said:

> "108. The critical point can, I think, be comparatively shortly made. The Strasburg jurisprudence makes plain that it is not sufficient for a legal system to ensure that a suspect knows of his right to silence and is safeguarded (perhaps most obviously by the video recording of any interviews) against any possibility that by threats or promises of one sort or another he may nonetheless be induced against his will to speak and thereby incriminate himself. It is imperative too that before being questioned he has the opportunity to consult a solicitor so that he may be advised not merely of his right to silence (the police will already have informed him of that) but also whether in fact it is in his own best interests to exercise it: by saying nothing at all or by making some limited statement. He must in short have the opportunity to be advised by a solicitor not to make incriminating statements despite whatever inclination he might otherwise have to do so. It is clearly Strasburg's judgment that whatever in the result may be lost in the way of convicting the guilty as a result (wholly or partly) of their voluntary admissions is more than compensated for by the reinforcement thereby given to the

> principle against self-incrimination and the guarantees this principle provides against any inadequacies of police investigation or any exploitation of vulnerable suspects."

[39] I am satisfied the effect of the decision in Cadder is that a statement of a defendant particularly one in the nature of a confession, cannot be admitted in evidence unless he has had the advantage of prior legal advice. Obviously the protection is geared to the maker of such a statement whereas in this case Crilly is not the maker of the statement. It is equally important, in my opinion, that he should have similar protection.

[40] Townson was under some considerable pressure, I make no comment on the propriety of it, to make a confession. Crilly had already put himself beyond the reach of the police, and remained so for over 30 years. It was all too easy for Townson or any of the others being interrogated, to give Crilly a role in those circumstances which may not be correct. It would give rise to a serious anomaly if it would be considered unfair today to admit it in the trial of the maker but somehow fair to admit it in that of a co-defendant, alleged co-conspirator or similar in circumstances where it had been obtained in the manner set out earlier. It will be for each court to consider the surrounding circumstances in individual cases having regard to the interests of justice (the 2004 Order) or the impact on the fairness of the trial (Article 76 PACE).

[41] This does not give Crilly the benefit of contemporary standards unjustifiably. The relevance of these considerations is that I must conduct a fair trial in the case of Crilly in 2011 and it is self-evident that I can only do that by reference to standards which apply today, rather than those which were applicable many years before. I shall proceed therefore, either on foot of Cadder, or on foot of the principles set out in Cadder, coupled with all of the many unsatisfactory aspects of the circumstances in which the alleged verbal confession may have been made, that it would be wholly unfair to require Crilly to rebut that evidence. I therefore have no hesitation in excluding it.

[42] I am reinforced in the view that the proper remedy is to exclude the evidence at this stage, rather than hear it and then decide whether I should or should not rely upon it, by the remarks in R v Quinn [1990] Crim. LR 581. There the Court of Appeal of England and Wales considered a case involving a breach of Code of Practice D relating to confessions made pursuant to PACE. The court said that the test is not the seriousness or otherwise of the breach (though this is certainly relevant) but whether the admission of the evidence produced thereby would have an unacceptably unfair effect on the proceedings. The prosecution had obtained evidence in that case by identification of the accused as the perpetrator of an offence by means of a procedure carried out abroad which was the antitheses of the properly conducted identification parade which would have been required in England

under Code of Practice D. The identifying witness was given virtually no alternative to identifying the accused, and the whole procedure was conducted in a manner calculated to suggest that result. The other evidence against the accused was tenuous in the extreme. Lord Lane CJ said:

> "The function of the judge is therefore to protect the fairness of the proceedings, and normally proceedings are fair if a jury hear all the relevant evidence which either side wishes to place before it, but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet …."

[43] I am satisfied that is the position in this case as the effect of permitting the prosecution to present the verbal confession of Townson would put Crilly in a position which was unfair because he could not begin adequately to test the evidence to enable me to make a meaningful decision as to its worth. I shall therefore exclude the evidence of Townson's confession.

Footnote

This ruling was delivered in summary on 21 February 2011 in the course of the trial. I explained then that the full ruling was being typed, would be subject to editorial corrections and would not be released before the end of the trial. A copy of the summary is attached and the above is a copy of the full ruling therein referred to. This approach is in accordance with normal practice.

The effect of this is that I have acted upon the prosecution's summary of the evidence as it stood on 21 February but the result of the ruling has been to exclude some evidence it sought to rely upon. In my final conclusions I have not accepted the interpretations of other admissible evidence contended for by the prosecution. Therefore the only valid conclusions on the effect of the evidence can be found in my judgment delivered on 1 April 2011.

R McL
1/4/11

IN THE CROWN COURT OF NORTHERN IRELAND

_____

THE QUEEN

-v-

KEVIN CRILLY

_____

1. I have considered in detail the submissions on behalf of the defendant and prosecution relating to an application pursuant to Article 76 PACE (NI) Order 1989 that I should exclude certain evidence sought to be relied upon by the prosecution, principally contained in the evidence of Detective Inspector Garda Corrigan (retired).

2. The evidence focused upon in the application consisted of a verbal confession made allegedly by one Liam Townson in May 1977 in which he confessed his part in the murder of Captain Nairac and implicated the present defendant as a secondary party. This evidence was deemed admissible in this trial prior to its commencement in the hearing before Mr Justice Hart.

3. I have prepared a detailed ruling which has been dictated and is being typed at present. It will require substantial editorial correct before it can be published.

4. For present purposes I shall state simply that this is not an appeal from Mr Justice Hart nor is it a review or appeal from the decision of the Special Criminal Court in Dublin which acted upon the confession when convicting Townson.

In the light of the material put before me I have concluded that having regard to all the circumstances, including the circumstances in which it was obtained, the admission of the evidence would have such an impact on the fairness of this trial that I ought to exclude it.

5. I confirm that in reaching this decision I have applied the ruling of the UKSC in Cadder v Lord Advocate which in my opinion would render the use of this evidence in Northern Ireland today against Townson at least problematic, perhaps more. I concluded that its use against a person who did not make it, and was not present when it was made, would be unfair having regard to the factors which I have identified in my ruling.

R McLaughlin
21 February 2011