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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

CRIMINAL APPEAL (NORTHERN IRELAND) ACT 1980

REGINA

v.

MARK KINCAID

Before: Higgins LJ, Girvan LJ and Coghlin LJ

The Judgment of the Court

Introduction

[1] At Downpatrick Crown Court on 17 September 2007 Mark Kincaid, William Anderson and Gareth Anderson were each convicted of the murder of David Hamilton following a trial before Hart J and a jury. Mark Kincaid (the appellant) appeals against that conviction with leave of the single Judge. William Anderson has not appealed and Gareth Anderson has renewed his application for leave to appeal. Judgment in his case is given separately. The appellant was convicted by a majority verdict of 11 – 1 and his co-accused unanimously. Each was sentenced to imprisonment for life and on 30 November 2007 Hart J ordered that each of them should serve a minimum term of sixteen years before the release provisions of the Life Sentences (Northern Ireland) Order 2001 should apply to them. The evidence against each of the accused was circumstantial and was largely forensic in nature. There was substantial evidence connecting the accused William Anderson's flat to the death of David Hamilton.

Grounds of Appeal

[2] The grounds of appeal were as follows:-

(1) The trial judge failed to accede to the defence submission at the close of the prosecution case that

there was no evidence capable of being left to the jury to reach a verdict upon.

(2) The trial judge failed to properly take into account the following matters when he refused the defence submission of no case to answer at the conclusion of the prosecution case –

(a) there was no evidence that the appellant had been acting as part of a joint enterprise with his co-accused in the commission of the assault on the deceased;

(b) the forensic evidence was not capable of placing the appellant at the murder scene at the relevant time;

(c) the forensic evidence consisting of thumb print of the appellant found on a piece of glass located at the murder scene was not capable of being dated;

(d) the evidence of Barry Dann, a Crown witness, was consistent with the appellant having been in the deceased's flat a few months before the murder took place for a totally innocent purpose;

(e) the breaking of the glass bowl from which the piece of broken glass originated was consistent with the general destruction and disarray caused to the property in the flat of the deceased. There was no basis on the evidence to reach any possible finding that the glass bowl had been used as a weapon to assault the deceased as was asserted by the prosecution.

(3) The verdict should be set aside on the grounds that under the circumstances it was unsafe.

(4) The defence evidence established that on the evening of the murder the appellant had been at home in his father's house in bed. The appellant's girlfriend Julie Christie gave evidence that she arrived at the house at 7.45 pm and remained with the appellant until after

midnight. She confirmed that the appellant had not been in contact with his co-accused by mobile telephone that evening.

(5) The learned trial judge when summing up to the jury told them that her evidence had not been significantly challenged. The learned trial judge went on to say that before the jury could convict it would have to be able to draw the inference that the appellant got up and left his house and was present at the murder scene, the assault having occurred around 1.00 am.

(6) There was no factual basis upon which the jury having heard the entire evidence in the case could have properly drawn the inference that the appellant had left his home after the departure of his girlfriend and was present at the murder scene participating in a joint enterprise with the co accused.

The evidential background

[3] On Monday 29 November 2004 the police attended at the home of the deceased at No. 26H Gleneagles Gardens, Ballybeen Estate, Dundonald. The police had been alerted by work colleagues and neighbours about concerns for the safety of the deceased who was a diabetic, as he had failed to attend work and was not answering his door or telephone.

[4] The police were compelled to force entry to the deceased's flat around 2.00 pm. They discovered his body lying on the living room floor lying face down naked from the waist up. There was a lot of blood and the body was badly marked. The head had been covered by a heavily bloodstained fleece and a bloodstained brick was lying near the head. A television set was also partly lying on top of the body. There was evidence to the effect that the deceased normally kept his home in an immaculate condition but when he was discovered the living room in which he was lying was in a state of total disarray. The TV and stereo were lying on the floor with their wires ripped out; a wooden shelf on a brick ledge had been pulled off; the coffee table glass top had shattered; cassette tapes, empty beer cans, an upturned ashtray and clothes were lying on the floor. A forensic medical officer confirmed life extinct at 5.10 pm. He noted the presence of at least one deep gash in the back of the deceased's head, several wounds to his back and left arm and numerous bruises. The autopsy report confirmed that the deceased who was 40 years of age and of slim build weighing 10 stones 3 lbs and 5' 9" tall had died from a subdural haemorrhage. The deceased had sustained a number of injuries to his head, chest and upper limbs. There were four lacerations on the left side of the scalp associated with extensive bruising on the scalp and the left side of the

face. The skull had been fractured and had caused bleeding over the surface of the brain which led to his death. The lacerations on the scalp and the fracture of the skull were consistent with the deceased having been struck at least twice with a heavy blunt object or objects, probably inflicted whilst he was lying on the floor. The head injury had not been immediately fatal. There were bruises on the right side of the forehead, a laceration to the left side of the forehead, bruises to the nose and lacerations to the lips. He had also had a fracture to the right check bone. Some of these latter injuries were caused by blows to the face or due to a fall but none would have contributed to death. On the back of the chest there were numerous irregular abrasions and bruises and two distinct circular bands of bruising consistent with his having been kicked or stamped. Three ribs on the left side had been fractured leading to small tears on the surface of the left lung. There were five fractures of the right ribs consistent with being kicked or stamped on. There were numerous bruises, abrasions and lacerations on the upper limbs and distinct abrasions on the upper left arm and left side of the chest consistent with having been struck with a television decoder box. There was also bruising to the left testis possibly due to a kick or stamp. The evidence showed that the deceased had been moderately intoxicated when he died which would have caused unsteadiness and incoordination hindering his ability to escape or adequately defend himself. The pathologist estimated that the time of death was likely to have been between 6.00 am and 8.00 am on 29 November but it was likely that the deceased had survived for 4 to 6 hours after the attack. It was estimated that the attack occurred between 1.00 am and 3.00 am. However the pathologist emphasised that these timings were variable and it was not possible to say what the exact time of death was.

[5] The evidence established that the deceased had last been seen alive around midnight on Sunday 28 November when he left a party being held in the flat of Stephen Hunsdale and Pauline Stewart in Dundonald. Barry Dann was also at this party.

[6] One of the co accused William Anderson lived at No. 26E Gleneagles Gardens which shared a landing with the deceased's flat. The other co accused Gareth Anderson lived at No. 28C Gleneagles Gardens. All three defendants and several others had spent part of the afternoon of 28 November in William Anderson's flat at No. 26E watching a football match on Sky television and drinking. The appellant claimed that he left his flat around 4.00 pm and returned to his home at No. 53C Ardmore Avenue where he lived with his father. The two accused remained at No. 26E Gleneagles Gardens with others and then went to the Moat Inn where they remained until 11.30 pm.

[7] The evidence against the appellant consisted of evidence that his left thumb imprint was found on a piece of broken glass which was situated below the storage heater on the carpet in the living room of the deceased's flat. The piece of glass was under other debris and close to the body of the deceased.

The piece of glass had come from a small glass bowl/candle holder. The evidence established that the glass bowl/candle holder usually sat on the mantelpiece of the electric fire in the deceased's flat. Thus it was found some distance from where it normally rested.

[8] It was the appellant's case that, having left William Anderson's flat at 4.00 pm on Sunday 28 November, he had returned to his home, a 10 minute walk away, had a meal and went to bed. His girlfriend Julie Christie joined him at his father's house around 7.30 pm on Sunday evening and remained there with him until around midnight to 12.30 am. Her evidence was that she saw him taking a sleeping tablet. Whether it was a sleeping tablet depended on the correctness of the appellant's statement to her to the effect that it was. His case was that he remained in his father's house alone for the rest of the night through to the morning. His father was not present as he was elsewhere.

[9] During his interviews with the police the appellant said that he only knew the deceased to see him in the street but had never spoken to him. He continuously denied that he had ever been in the deceased's flat. In his first interview on 3 December 2004 he said that he had never been in the flat. He repeated this throughout interview on 4 December stating that he was 110% positive that he had never been in the flat and it was impossible that he had ever been there. At an interview which commenced at 2145 on the same date the following exchange took place –

> Q. Is there anything you want to tell me about this murder.
> A. You said you had evidence to link me to the murder of David Hamilton.
> Q. Yes and also.
> A. Can you prove it.
> Q. Sorry.
> A. Can you prove it.
> Q. Yeah. I can but I'm not going to just at the minute.
> A. Well I have nothing to say then.

At the tenth interview on 6 December the police showed to him the piece of glass with his finger print on it found in the deceased's flat and he said that it was impossible that his left thumb print was on this piece of glass. He said "It is definitely nothing to do with me". He repeated on a number of occasions that he had never touched the glass before and had never been in the flat before. On his eleventh interview he was again asked if he had any idea how his thumb print had got on to the broken glass. His reply was, "I don't understand how they could have got there." He repeated that he had never touched the glass or been in the flat.

[10] A prosecution witness, Barry Dann who was a friend of the deceased gave evidence about the deceased attending the party on Saturday 28 November 2004 and the time he left. He said that the appellant had been in the deceased's flat on one occasion on 7 September 2004 at a birthday party. Mr Dann, said that the appellant had been in the flat for around half an hour.

[11] In his evidence given at the trial the appellant accepted that he had been in the flat of the deceased on that occasion. He admitted that he knew that all along and stated that he lied to the police about it. He said that the reason for lying to the police about his presence in the deceased's flat was that he had panicked because he had never been in a situation like that before where someone had been murdered. He was trying to distance himself from the flat. However, he had been charged with murder and was being held in custody. He said he contacted his solicitor seeking another interview with the police so that he could tell the police he had been at the party in the deceased's flat. His account of his presence at the party was that he had been there for about half an hour or less, perhaps 10 to 15 minutes. He said he was drinking and could not recall if he was sitting or standing. He had no recollection of touching the glass bowl when he was in the flat but he must have done so. His solicitor wrote to the police requesting that he be reinterviewed. In that letter the solicitor wrote that the appellant "now recalls" that he was in the flat of the deceased.

[12] Julie Christie gave evidence at the trial and stated that on 20 November she had joined the appellant at his home at around 8.00 pm. She gave his father and the father's girlfriend a lift to the latter's house and she returned. She stayed with the appellant until around 12.30 am. According to her evidence he had taken a sleeping tablet while she was still there at around 10.00 pm. The trial judge noted in his summing-up to the jury that the evidence of Julie Christie was not significantly challenged. In his evidence the appellant stated that he had taken a sleeping tablet after Julie Christie had left.

[13] During police interview the appellant initially said that he had phoned William Anderson during Sunday evening. He later stated that this was wrong. He had made the telephone calls to his brother James' mobile phone using his girlfriend's mobile phone in connection with passing on a message that he would not be able to work on the Monday. The evidence showed that the police had seized the appellant's mobile phone and that of his girlfriend and there was no evidence of phone call records having been produced by the prosecution to prove that he had phoned William Anderson.

The appellant's argument

[14] The appellant submitted that the sole evidence to connect him with the scene was his left thumb print on a fragment of glass from a small glass candle holder found under the storage heater in the living room. There was no

forensic evidence to connect this glass with the attack on the deceased. The evidence indicated that the glass candle holder had been broken at some time and possibly during the attack on the deceased. The forensic evidence was that it was not possible to date when the finger print was left on it. The glass candle holder normally sat on the mantelpiece in the deceased's flat. Forensic evidence was that the fragment also contained the left finger print of the deceased. Despite the appellant denying that he had ever been in the deceased's flat during several police interviews his solicitor contacted DS Gibson on 21 January 2005 by phone informing him that the appellant now recalled that he had previously been in the flat for an innocent reason and offering himself for further interview. No further interview took place. The appellant contended that the prosecution accepted that he had been in the deceased's flat on 7 September 2004 attending a party.

[15] It was the appellant's case that he had left the company of the co-accused on 28 November 2004 at 4.00 pm and had been with his girlfriend that evening. The account of the girlfriend had not been challenged. The prosecution were seeking to infer that after his girlfriend had left he had got up and gone to Gleneagles Gardens to meet with the co accused and was present when the deceased was attacked. It was submitted that this was a speculative hypothesis unsupported by the evidence and based solely on his finger print on a fragment of glass which was not connected with the attack but consistent with the small ornament breaking during the general destruction which occurred. The finger print evidence was insufficient to sustain the inferences necessary to establish guilt and the judge was wrong not to withdraw the case from the jury at the end of the prosecution case. It was contended that there was no evidence that the appellant was part of a joint enterprise with the co-accused in the murder and no evidence that the appellant had left his home after midnight and gone to the deceased's flat or had been in the deceased's flat at any material time. The sole evidence against the appellant was the thumb print on the fragment of glass which could not be dated. It was improbable that the glass candle holder was used to attack the deceased and more likely that it was shattered and broke during a struggle in the room. The appellant had an innocent explanation for his thumb print being on the glass as he had been present during a party on 7 September 2004. There was no logical inference that the thumb print must have been left by the appellant during an attack on the deceased or that he was present during the attack. The photographs of the scene showed scattered beer cans indicating that a drinking party had taken place at the time of the murder and other forensic evidence established links to other residents in Gleneagles Gardens. The contact with police by the appellant's solicitor in January 2005 was incompatible with the suggestion that he had tailored his case once he knew of Mr Dan's evidence as no disclosure of Mr Dan's evidence had occurred at that stage. The police failure to re-interview the appellant created an unfair impression. There was no evidence that the appellant had contacted any of the co accused on the evening of 28 November. The evidence was purely circumstantial and was

reasonably explicable on a basis consistent with the appellant's innocence. The verdict was unsafe having regard to a proper analysis of the totality of the evidence. Counsel relied on R v. Pollock [2004] NICA 34.

The Crown argument

[16] The Crown case was that the existence of the appellant's thumb print on the piece of glass was sufficient to found his conviction when considered in the light of other circumstances of the case, the most prominent of which were his failure to give an explanation in interviews for the presence of the print and his lie that he had never been in the deceased's flat. On his own case he lied persistently to the police in denying that he was ever present in the flat. It was unlikely that he had touched the glass on the previous occasion he had been in the flat, that is on 7 September 2004, there being no reason for him to do so. In addition there was an inconsistency between his accounts at interview and during the evidence. He was entirely ambivalent about such a dramatic event occurring close to him and his credibility as a witness was undermined. His two friends with whom he had been drinking could be linked forensically to the incident. His evidence that he attempted to be re-interviewed by police to give an explanation for being at the flat previously was before the jury. His account that he did so before knowing that others had told the police about his being there on 7 September did not explain his failure to tell the police initially. It was open to the jury to reject his evidence that he did not know that others had told the police about him being there. The jury was entitled to conclude on the evidence that he had rejoined his friends after they returned from the Moat Inn. He had told the police initially that he had phoned William Anderson who invited him for a drink and he said that he did not like the Moat which was the real reason he did not go there. There was a later change in his story. The jury could conclude that he changed the story in order to support his false contention that he did not meet up with his friends. Julie Christie's evidence was not an alibi. It was perfectly feasible that after she left the appellant had gone out. Julie Christie said that he took the sleeping tablet at 10.00 pm and she only had his word that it was a sleeping tablet. He had claimed that he took it later than 10pm.

The judge's case on no case to answer

[17] The judge concluded that he should dismiss the application for a direction made on behalf of the defence at the end of the Crown case. The judge concluded that the case against the appellant depended on the print on the piece of glass. Where that piece of glass was found was crucial. It was under the debris near the head of the deceased. The appellant had lied to the police about ever being in the flat. The jury would be entitled to conclude that the appellant had lifted the glass candle holder and had broken it during the trashing of the flat in the course of events which led to the death. It could conclude that the appellant was present during and was a party to the violent

attack on the deceased. The lies of the appellant were such that it was open to the jury to conclude that he had lied to cover up his involvement. The jury would be entitled to conclude that even if the appellant was in the flat on 7 September that could not provide an innocent explanation of his finger print on the glass as there was no evidence that he had touched it on that occasion.

Conclusions

[18] We conclude that the trial judge was correct to dismiss the application for a direction. The piece of glass came from a small glass bowl or candle holder which according to the plan produced by the deceased's friend Maureen Thompson had sat on his mantelpiece. Because the glass was broken and lying among debris in the flat which was normally tidy the inference was that the glass came to be broken during the incident involving the attack on the deceased. The resting place of the glass was consistent with the general movement of objects from right to left across the living room during the attack. In interview the appellant had said that he was 110% sure that he had never been in the flat even when shown the photographs of it. He had said "Why should I be in the flat? I don't even know the fella" thereby seeking to distance himself both from the deceased's flat and from any knowledge of the deceased. He sought to account for his thumb print on the glass by speculating that it may have been an ashtray from William Anderson's flat. When confronted by the evidence against him the appellant withheld his only possible explanation and did so consistently for a lengthy period of time. He accepted that he would have had no reason to touch the glass bowl when he was in the deceased's flat. The appellant had been drinking at William Anderson's flat from Friday 26 November to 6.30 am on Saturday 27 November. The original reason he gave for not going to the Moat Inn was that he had had enough to drink. He later in interview said that he did not drink in the Moat because he did not like it. He was asked in interview whether he had spoken to anyone that night when he was at home. At first he denied speaking to anyone and then he said that he telephoned William Anderson just to see what they were up to. He confirmed that William was inviting him down for a drink and he said that he had made an excuse about his stomach. He denied ringing anybody else. Later in his interviews and in his evidence he said that in fact the only person he had called that night was James his brother to "make sure" that he told Brian he would not be along to help him clean windows on Monday because he had to sign on. He had already told James but this call was to remind him. He could not give any reason why he did not call Brian directly. Furthermore there had been no arrangement in place to work for Brian on Monday so he had no need to make such a call. He claimed to have been mistaken about the call to William despite at one point in the interview having corrected the police when they asked if William had phoned him he said, "No no. I phoned him." The inference could be drawn that the appellant changed his story in relation to this aspect of the matter as he had slipped up mentioning the phone call to William. The inference could be drawn that he was seeking to avoid the suggestion that he

had accepted William's invitation to join him for a drink after they returned from the Moat Inn where Kincaid did not like drinking. On the appellant's own account he showed a remarkable lack of interest in the murder when he heard of it. According to his version he was told about it by Raymond Thompson at around 3.30 pm on the Monday following the murder. He claimed not to have paid much attention and did not ask who the victim was despite having spent most of the weekend in the block of flats in which it had occurred. When prompted by the police asking "Did you not think it might have been Anderson, Moffett or the other Anderson?" he said that he had not asked. This lack of interest in such a notable event in the locality could give rise to the inference of a guilty mind. When told by the police that there was evidence linking him to the murder of the deceased the appellant's response was "can you prove it"? It was indeed a curious remark to ask the police whether they could prove that they had evidence to link him to the murder. He could not explain why he had made that remark.

[19] We conclude that taking account of all the circumstances there was ample evidence at the conclusion of the Crown case to justify the trial judge's refusal of the application to give a direction.

The safety of the conviction

[20] In R v. Pollock [2004] NICA 34 the Court of Appeal considered the proper approach to be taken when considering whether the verdict of a jury is unsafe. The following principles were established:

> "1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
>
> 2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against the background.
>
> 3. The court should eschew speculation as to what may have influenced the jury to its verdict.
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> 4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[21] We conclude that the existence of the appellant's thumb print on the piece of glass from the candle holder/glass bowl was in the circumstances sufficient evidence to found his conviction when considered in the light of the surrounding circumstances. These included the lying to the police in which he persisted for a lengthy period of time. He had refused to give an explanation for his thumb print being on the glass bowl, an explanation which could only have assisted him if it were true. There were inconsistencies between his account at interview and the evidence advanced at trial. His apparent marked and incongruous ambivalence to the occurrence of the killing is a further factor. The jury had the benefit of seeing and hearing the appellant giving evidence. They were fully entitled to conclude that he was not a credible witness. The jury were fully aware that he attempted to be re-interviewed in order to put his explanation after his persistent lying to the police. While he maintained that he did not know that anyone else had told the police that he had been in the deceased's flat before the night of the murder, that did not explain his failure to mention it initially nor were the jury bound to conclude that he was honest in saying that he did not know anyone had told the police about his visit. The appellant had initially stated that he had phoned William Anderson to see what he was up to. He later changed that evidence. He later denied the phone call and claimed that the reason he did not accompany his friends to the Moat Inn was because he had had enough to drink already. Earlier he had said that he did not like drinking in the Moat Inn. The jury were entitled to draw adverse inferences against the appellant from his change of account and to infer that he had changed his account to support his contention that he did not rejoin his friends to drink. The evidence of Julie Christie did not provide him with an effective alibi.

[22] The case against the appellant depended on circumstantial evidence. While that evidence is different from direct or expert evidence it can be no less compelling and often more so. The classic approach to circumstantial evidence is to be found in the well know passage from the judgment of Pollock CB in R v Exall 1866 4 F& F :

> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise ... Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded

> together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved."

In R v Meehan & others (unreported Belfast Crown Court) Carswell J referred to circumstantial evidence as "a multi-stranded skein of facts". In the appeal from that decision the Court of Appeal rejected the contention that the court must scrutinise each individual piece of evidence and reject those of insufficient weight. At p.31 Hutton LCJ said:

> "Mr Weir QC criticised the approach of the trial judge as set out in this passage and submitted that each strand of the Crown case must be tested individually, and that if it is not of sufficient strength it should not be incorporated into the rope. ….. We reject this submission. It is, of course, clear that each piece of evidence in the Crown case must be carefully considered by the trial judge but it is also clear law, as stated by Pollock CB, that a piece of evidence can constitute a strand in the Crown case, even if as an individual strand it may lack strength, and that, when woven together with other strands, it may constitute a case of great strength."

Counsel on behalf of the appellant submitted that there was no inference to be drawn simply from a finger imprint found on a piece of glass. Counsel on behalf of the respondent submitted that the correct approach was that approved of by Hutton LCJ in R v Meehan. While the central plank of the prosecution case was the finger print found on the piece of glass, there were other circumstances for the jury to consider as well. It was for the jury to consider all those circumstances together to determine whether they were satisfied beyond a reasonable doubt of the guilt of the appellant.

[23] In the light of the appellant's arguments we have scrutinised carefully the trial judge's summing up but we detect no error of law or unfairness in relation to his presentation of the evidence. We consider that the summing up to the jury was a fair and balanced one.

[24] We are satisfied accordingly that there was sufficient evidence for the case properly to be put before the jury and that it has not been shown that the

conviction is in any way unsafe. It was a verdict which a jury properly directed, as this one was, was entitled to reach. The conviction was not unsafe.