

THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

JAMES P McCONVILLE

RULING ON HEARSAY APPLICATION

MR JUSTICE HART

[1] The application before the court is one to admit, by virtue of Article 20(2)(a) of the Criminal Justice Evidence (Northern Ireland) Order 2004 (the 2004 Order), the evidence of Reserve Constable Kenneth Hull. It is not disputed that he died on 30th July 2005 in Basra in Iraq.

[2] The accused is charged with the manslaughter of George Foster, with the aggravated burglary of his house, and with the false imprisonment of George Foster and of his wife Thomasina Foster at 16 Manor Drive, Lisburn.

[3] On 17th January 2001 two men entered the Foster home and demanded money. One of the intruders produced a small handgun and threatened that if they did not tell the intruders where the money was they would shoot Mr Foster. Mr Foster was an elderly man who had health problems and indeed had been getting ready to go to a hospital appointment when the intruders broke in. Somehow during this aggravated burglary Mr Foster nevertheless managed to escape from the house and made his way to a neighbour's house where he collapsed. Although an ambulance was called Mr Foster died in his neighbour's home.

[4] The accused was arrested and questioned by the police at some length in relation to his alleged involvement in this matter. For the purposes of the present application it is only necessary to state that the attitude of the accused during the formal interviews

was in general one of stating 'No comment' in answer to the questions put to him. However, it is alleged that he requested the opportunity to speak to the detectives who had been questioning him without his solicitor being present, and it is to the circumstances surrounding that request and the granting of that request by the police that Reserve Constable Hull's evidence relates. The papers contain a statement by him at page 126 relating to his talking to the defendant on 9th August 2001 in his capacity as a gaoler at Grosvenor Road PSNI station during the period of the defendant's detention. His evidence is, in effect, that it was to him that the defendant first conveyed his request to speak to the CID without his solicitor being present and that Reserve Constable Hull passed on that request to the relevant officers. He says in that statement that he told the accused that a record would be kept of this request. A similar exchange took place when a similar request was made by the defendant, it is alleged, on a second occasion. Three other officers were concerned with these events - Detective Sergeant Munn, Sergeant Majury and Sergeant Merrick. Their notebook entries, which are to the same effect, are exhibited and they are witnesses on the committal papers and it may therefore be assumed that they will be called by the prosecution.

[5] The objection to the application that has been advanced by Mr O'Kane on behalf of the defendant is that the evidence which the prosecution seek to admit is of peripheral relevance and only goes to the collateral issue of credibility, and that the Court should therefore exclude this evidence by applying the factors listed in Article 18(2) of the 2004 Order. For the prosecution Mr Fowler QC relies on the provisions of Article 20(2)(a), and concedes that there is a discretion to exclude the evidence by virtue of Article 30 of the 2004 Order, and by virtue of the general discretion conferred by Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

[6] The first observation I wish to make is that the provisions of Article 20 do not appear to confer upon the Court any discretion to exclude the evidence provided the conditions stated in Article 20 are met. First of all, the wording of Article 20 makes it quite clear that in an application under Article 20(2)(a), namely that the relevant person is dead, there is no discretion vested in the court nor is there any provision of the type which is to be found in Article 20(4). Article 20(4) relates only to evidence which is sought to be admitted where the relevant person will not give evidence through fear. I am therefore satisfied that so far as Article 20(2)(a) is concerned that provided the prosecution can show that Reserve Constable Hull is dead this evidence is automatically admissible subject to the question of any other discretion there may be elsewhere. I am fortified in that conclusion by the views of Professor Spencer in his valuable work 'Hearsay Evidence in Criminal Proceedings' at para 6.23 at page 108. As he points out, the court still has a discretionary power to exclude the evidence by virtue of Article 30 upon which Mr O'Kane relies.

[7] However, Article 30 confers a very limited discretion in the circumstances of the present case because Article 30(1)(b) appears to be limited to excluding evidence because of the danger that to admit it would result in an undue waste of time taking

into account the value of the evidence, and that is not an issue which really arises in my view in the present case.

[8] Article 30(2)(a) expressly preserves the right of the Court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 and therefore one has to look at the relevant factors to see what would justify the Court in excluding evidence on the basis that it would have an unfair effect upon the trial. In the present case, as I have already pointed out, there are three police officers who give evidence to the same effect, and therefore when they come to give evidence the defence will have the opportunity to cross-examine them about the circumstances relating to the alleged request by the defendant to speak to the CID without his solicitor being present, and the accused will always have the opportunity to controvert their evidence if he wishes to do so.

[9] Although the evidence may be thought to be somewhat peripheral it is not, in my view, irrelevant because clearly it has a bearing upon whether such a request was made and the response of the police to it. I cannot see how to refuse to admit evidence which is a part of evidence which is already on the committal papers can be said to have an adverse effect upon the fairness of the trial. I therefore grant the application.