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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

CLIFFORD GEORGE MCKEOWN

Before Kerr LCJ, Sheil LJ and Deeny J

KERR LCJ

Introduction

[1] On 20 March 2003 the appellant, Clifford McKeown, was convicted of the murder of Michael John McGoldrick following a trial before Weatherup J sitting at Belfast Crown Court without a jury. He was sentenced to life imprisonment. The judge fixed a minimum term of 24 years for the purposes of article 5(1) of the Life Sentences (Northern Ireland) Order 2001. The appellant appeals against conviction and sentence. The principal ground of appeal is that the learned trial judge should have excluded the evidence of Nick Martin Clark, a journalist who interviewed the appellant while he was in prison. Mr Martin Clark gave evidence of a confession to the murder by the appellant. This evidence, it is contended, should have been excluded under article 74 (2) (b) or article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

Background

[2] The body of Michael John McGoldrick was found in the driver's seat of a taxi at Montaighs Road, Derryhirk, Lurgan, in the early morning of Monday 8 July 1996. He had been a part-time driver with Minicab Taxis whose premises are at 24 North Street, Lurgan and was on duty on the evening of Sunday, 7 July 1996. Damien Duffy, a part-time controller for Minicab Taxis, was also on duty that evening. From 6pm he answered the telephone and co-

ordinated the fares for six drivers. Some time before midnight Mr Duffy received a telephone call asking for a taxi to collect a fare 10 minutes later at Centrepoint, Lurgan. The caller informed Mr Duffy that he intended to travel to Aghagallon, which is some miles away from Lurgan. He gave his name as Lavery. The fare was assigned to Mr McGoldrick as he was in the vicinity of Centrepoint at the time.

[3] A number of witnesses gave evidence that they saw Mr McGoldrick driving along the route from Centrepoint to Aghalee/Aghagallon through Lurgan between 11.35pm and midnight on the late evening/morning of 7/8 July 1996. All but one of these witnesses said that he was carrying one passenger. The judge did not accept the evidence of the single witness who said that he had seen two passengers in the taxi.

[4] In the early hours of Monday 8 July 1996, Conor Douglas was travelling south on Montaighs Road towards Derryhirk when he observed a taxi parked in an opening to the right, facing away from the road with the front passenger door open. He noticed the occupant in the driver's seat in an unnatural position and when he got no response to sounding his horn he went home to Aghagallon and phoned the police. Constable Dennison went to Montaighs Road at 7.00 am on 8 July1996 with Reserve Constable Johnston. He found the front passenger door open, the engine running and the body in the vehicle. Constable Johnston opened the door and switched off the engine. He found a round of ammunition on the ground at the rear of the vehicle. Dr Cupples arrived at Montaighs Road at 8.06am on 8 July 1996. At 8.10am he confirmed that the young adult male in the driver's seat was dead. Stephen Totten identified Mr McGoldrick to police at 8.38 am on 8 July 1996.

[5] Dr Carson, Deputy State Pathologist for Northern Ireland, carried out the post mortem on the body of Mr McGoldrick on the afternoon of 8 July 1996. He found a degree of rigor mortis which was consistent with death having occurred at midnight. The cause of death was stated to be laceration of the brain due to five bullet wounds of the head; he identified five entrance wounds to the back of the head and one exit wound to the front of the head.

[6] The appellant was interviewed by the police in connection with the McGoldrick murder on several occasions between 1996 and the time of the interviews with Mr Martin Clark. During the police interviews he denied involvement in the murder. When he was interviewed on 13 October 2000 in relation to the confession he was alleged to have made to Mr Martin Clark he again denied any involvement in the McGoldrick murder and denied making any confessions to Mr Martin Clark.

The alleged confession of the defendant

[7] The main evidence against the appellant was that of Nick Martin Clark that, in the course of an interview, he had admitted that he had murdered Mr McGoldrick. At the time that these admissions took place the appellant was in prison for another offence. Mr Martin-Clark told the appellant that he was a researcher/journalist. He conducted five interviews with him. During the third interview the appellant is alleged to have confessed to the murder of Michael McGoldrick. Since this is central to the case against the appellant we will need to refer in some detail to the learned trial judge's summary of it.

[8] Mr Martin Clark gave evidence that in 1999 he was a freelance journalist whose main interest in Northern Ireland affairs was collusion involving the security forces and loyalist paramilitaries. On 17 June 1999 he and a colleague, Lyn Solomon, visited the appellant in HMP Maghaberry; Ms Solomon had a contact in the office of Jeremy Corbyn MP, and a letter from Mr Corbyn to the appellant introduced Ms Solomon and "a colleague" (being Mr Martin Clark). The visit had been arranged in a telephone call from Ms Solomon to the prison authorities. Mr Corbyn's letter described the purpose of the visit as being concerned with the issue of the appellant's application for release on licence. Mr Martin Clark's and Ms Solomon's objective, however, was to obtain from the appellant information about loyalist paramilitary activity, as they believed the appellant to be gravely ill and he was known as "a talker". Ms Solomon represented to the prison authorities that they were researchers for Mr Corbyn. Mr Martin Clark gave evidence that at that first interview they were introduced to the appellant by Ms Solomon not only as researchers for Mr Corbyn but also as journalists.

[9] At the first interview on 17 June 1999 Ms Solomon asked most of the questions and Mr Martin Clark kept contemporaneous notes. After the meeting Mr Martin Clark completed a longer form version of the exchanges at the meeting. In the course of the conversation the appellant told them that he was under sentence of death from Belfast UVF for the murder of Mr McGoldrick. The appellant was asked by Mr Martin Clark if he had shot Mr McGoldrick. At that stage he denied that he had. There were two further references to the investigation into the McGoldrick murder at this meeting. The first of these occurred when the appellant said that he had been arrested along with his girlfriend in October 1996 and later released. The second reference was the appellant's statement that during interview by the police, they commented that it was a shame that Damien Duffy had not been the victim rather than Mr McGoldrick. The appellant was said to have explained to Mr Martin Clark and Ms Solomon that Damien Duffy was the brother of a known IRA man and that he was a radio operator in the taxi firm.

[10] The second meeting took place on 7 July 1999. Mr Martin Clark interviewed the appellant alone. Again he made contemporaneous notes of

the conversation and after the meeting he began to prepare a hand-written and somewhat more extensive version of the conversation. This was not finished. During the second meeting there was no direct mention of Mr McGoldrick's murder but reference was made to a .22 weapon.

[11] The third meeting took place on 8 July 1999. Again only the appellant and Mr Martin Clark were present. As before, Mr Martin Clark made contemporaneous notes during the meeting. He added to those notes after the meeting. Four pages of notes dealing with Mr McGoldrick were torn from the notebook by Mr Martin Clark and he prepared a longer hand-written version of those four pages. His account of the conversation about Mr McGoldrick at the meeting was that the appellant asked Mr Martin Clark what had happened on 7 July 1996 and Mr Martin Clark was able to confirm that it was the date of Mr McGoldrick's murder. The appellant then said that that date was also Billy Wright's birthday and that the murder of Mr McGoldrick had been a birthday present for Billy Wright. Mr Martin Clark asked the appellant who had killed Mr McGoldrick; had it been Swinger Fulton, he inquired. The appellant said that it was not Fulton. He asked if Mr Martin Clark wanted to know who had killed Mr McGoldrick. Mr Martin Clark promised the appellant that he would not tell anybody, whereupon the appellant said, "you're looking at him". Mr Martin Clark's response was to say "what", as he did not think he had heard him quite right and to that the appellant replied "you're looking at him". After the appellant made that admission to Mr Martin Clark he gave further details of the murder. He said that four people were involved, two of whom were young men and he did not give their names, and the other two were himself and a named accomplice who was described as an "experienced man".

[12] Mr Martin Clark's evidence was that the appellant then explained how the police had come to suspect him of involvement in the murder. A named person had gone to a party and had been telling stories about what had happened, and a drug dealer who was present was a police informer. This person told the police what had been said at the party. This had been that the appellant and Billy Wright had taken pot shots at Mr McGoldrick. This version was described by the appellant as 'a bit of a far-fetched story'. The appellant told Mr Martin Clark that, as a result of this, he had been arrested and that after his release, the drug dealer telephoned him and explained what he had told the police.

[13] According to Mr Martin Clark, the appellant explained that Billy Wright and Mark Fulton were not in the frame for Mr McGoldrick's murder because they had been at a protest at Drumcree and the police would have video evidence that they were there at the time of the murder. Billy Wright originally had had a different plan that had been outlined at a meeting in the appellant's house on Friday 6 July 1996. The original plan had been to kidnap three priests from the Parochial House in Gilford and to leave one priest

behind to tell others what had happened. The appellant had organised a team of people to carry out this plan. However, Billy Wright had changed the plan and at another meeting on the Saturday it had been decided to kill a taxi driver.

[14] Mr Martin Clark said that the appellant explained that he had been in a car in position waiting for Mr McGoldrick's taxi to drive past. A telephone call had been made ordering the taxi and using the name of a Catholic from Aghagallon in order to avoid arousing suspicion. The appellant had had a mobile telephone in his car and he told Mr Martin Clark that it was better to use mobile telephones rather than telephone boxes.

[15] The fourth meeting took place on 5 August 1999 with Mr Martin Clark. Again Mr Martin Clark took contemporaneous notes. There was no discussion of Mr McGoldrick's murder during the meeting.

[16] A fifth meeting occurred between the appellant and Mr Martin Clark on 10 August 1999. Again contemporaneous notes of the meeting were taken by Mr Martin Clark and he completed a further record of the meeting some months later. In advance of the meeting Mr Martin Clark had written in his notebook an account of Mr McGoldrick's murder that had appeared in the appendix of a book by Sean McPhilemy with the title 'The Committee'. Mr Martin Clark read to the appellant the description of the murder contained in 'The Committee' and, according to the witness, the appellant picked holes in that account.

[17] Mr Martin Clark testified that the appellant then gave his own account of the murder. According to this account, Mr McGoldrick had been killed at Aghagallon beside Downey's pub (this being another name for the Derryhirk Inn). The taxi fare had been from Lurgan to Aghagallon. The appellant told Mr Martin Clark that when they telephoned the taxi firm and asked to go to Downey's Bar they had used the name of a person from Aghagallon who was Catholic. The telephone call to the taxi firm had been made by the accomplice whom the appellant named. This call had been made from a telephone box in Lurgan. The accomplice had then made a call to a telephone box in Aghalee where the appellant was waiting. The appellant criticised the accomplice for having made the two calls in quick succession and said that he should have used a mobile phone. The appellant was told by the accomplice that "the parcel is on its way". He and one of the young men had then driven to Downey's Bar. This young man got out of the car and stood at the side of the road. When Mr McGoldrick's taxi came along, the other young man (who was in the taxi) pointed out the man at the side of the road and said to Mr McGoldrick that that was his friend and they were going to a party in Aghagallon. He asked Mr McGoldrick to stop and pick him up. The young man by the side of the road had a carryout of beer and wine to make it look as if he was going to a party.

[18] According to Mr Martin Clark, the appellant told him that he had followed the taxi after the second young man had been picked up. He had driven behind it with his lights off, even though it was around midnight. He was right behind the taxi and used his hand brake to slow down as he did not want his rear brake lights to show. Travelling north from Downey's Bar, the Montaighs Road becomes the Featherbed Road. The two vehicles travelled a short distance along this road. In his record of the account given by the appellant, Martin Clark referred to the location as the Featherbed Road. The appellant told him that one of the young men in the car asked Mr McGoldrick to stop because he wanted to go to the toilet. This had been pre-arranged. The young man in the front passenger seat alighted from the taxi and the appellant then got out of his vehicle and went to the driver's side rear door of the taxi. He opened the door and straight away shot Mr McGoldrick five times in the head. The appellant said that he delivered four shots together at the back of the head and then a fifth shot into the back of the neck.

[19] The appellant was asked why he had fired the last shot and he said it was to finish the job. The appellant said that a .22 gun was not messy and that it was ideal, if there was time, because .22 bullets were of small calibre and they did not exit the skull but would ricochet round inside the brain and thus ensure death. He said that Aghagallon had been chosen because it was a quiet spot where there was no trouble. After the shooting the three men got into the appellant's vehicle and drove to the accomplice's vehicle, which had been parked further along the road on a turning off to the right. The two young men drove to Portadown in one of the cars and the appellant and the accomplice drove to Portadown in the other. The appellant was dropped off at Union Street where he washed his clothes and then the accomplice returned the car to the owner. The appellant buried the gun in a field in Aghalee near his father's house and after a couple of days he picked it up and took it to a safe house in Portadown. The appellant said that the same gun was used in the killing of one Bernadette Martin.

[20] Two diagrams were completed by Mr Martin Clark during the interview on the appellant's direction. The first was said to represent the layout of the various places described by the appellant and the other showed the position of the cars at the time of the shooting. The appellant had made a mark on one or other of the diagrams.

[21] In December 1999 Mr Martin Clark published an account of his conversations with the appellant in the Sunday Times. He was paid £7,500 for the article. After its publication he was contacted by police and made a police statement. He was subsequently served with a Production Order on foot of which he forwarded to the police his records of conversations with the appellant.

Movements of the appellant on the evening of Sunday 7 July 1996

[22] The only other evidence against the appellant was that of a young woman whom we shall refer to as Ms C, who worked in Centrepoint. Ms C gave evidence that she saw the appellant in Centrepoint at some time between 7.00 to 8.00pm and 10.00pm on Sunday 7 July 1996. The defence case was that the appellant had not been in Centrepoint that evening. Weatherup J accepted Ms C's evidence that the appellant was in Centrepoint between the times stated, but concluded that his presence there at that time was of no evidential value in relation to the charge.

The appeal

[23] The Notice of Appeal contained no fewer than twenty three grounds but these can be summarised as follows: -

1. The appellant's alleged confession should have been excluded under article 76 or article 74 of PACE.
2. The judge should have acceded to the application for a direction of no case to answer.
3. The judge should have entertained a reasonable doubt as to whether a confession had actually been made to Mr Martin Clark. This court should likewise conclude that there was such a doubt and that the conviction was thereby unsafe.
4. Alternatively, even if satisfied that the admissions were made, both the judge and this court could not be satisfied as to their reliability and, on that account alone, the conviction could not be deemed safe.

The first issue: should the confession have been excluded under Article 76 and/or Article 74

[24] At the trial the defence objected to the admission in evidence of the confession alleged to have been made by the appellant to Mr Martin Clark. A *voir dire* hearing was held to determine the issue. On the trial the appellant's challenge was confined to the claim that to admit this evidence would adversely affect the fairness of the trial contrary to article 76 of PACE. Article 76 provides: -

> "(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 …"

[25] Weatherup J described his approach to the issue in this way: -

> "The approach of the court … was to ask two questions. First, whether there was *prima facie* evidence that the disputed confession had been made by the defendant? Secondly, if there was a case to answer that the defendant had made the confession, should the evidence of the confession be excluded under article 76." (paragraph 75 of the judgment)

[26] As to the first of these questions, the judge recognised that the issue whether the confession had been made or not was ultimately one for the jury rather than a matter to be finally decided on the *voir dire* hearing. He suggested, however, that the issue of admissibility was intertwined with the question whether the confession had in fact been made. He considered, therefore, that it was necessary to decide whether the confession had been made before reaching a conclusion on its admissibility. Indeed, this was the approach that had been proposed by counsel who appeared for Mr McKeown on the trial, Mr Allister QC. He had made the following submission to the judge: -

> "The defendant has denied of course that any such confessions were made. Now, ultimately I acknowledge that this is a jury issue but it is so intertwined with the application to exercise the discretion to exclude the evidence, that it cannot be isolated and ignored at this stage. … To ignore that issue at this stage would be quite unreal in terms of proceedings of this case."

[27] Weatherup J ruled that there was a *prima facie* case that the confession had been made by the appellant. He concluded, however, that the decision whether the prosecution could prove beyond reasonable doubt that the confession had been made was one that had to be addressed at the conclusion of the case rather than at the *voir dire* stage. He said: -

> "Now in this case where it is central to the defence that the confession was not made and reliance is

> placed on article 76 to indicate that under fairness a confession ought not to be admitted, it seems to me that the discretionary exclusion only arises if there is evidence in the first place that the confession was made. It is therefore, in the circumstances of this case, a necessary preliminary of the article 76 application that I be satisfied that there is evidence that the confession was made."

[28] We could not agree with a proposition that "the discretionary exclusion only arises if there is evidence in the first place that the confession was made" if that were to have general application (although we do not understand the judge to be propounding this as a rule of general application). On the contrary, we consider that in suitable cases the issue of discretionary exclusion can arise and be determined without the need to reach a conclusion as to whether the confession had in fact been made. The subject is dealt with in *Blackstone* at F17.28: -

> "Where the defence in a trial on indictment challenge the confession under s.78 [the equivalent in the English legislation of article 76], they may ultimately wish to assert at the trial that no confession was made…. The issue at the *voir dire* is simply whether the introduction of the confession would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. It is not the function of the judge to decide whether the confession was made (*Keenan*). See however *Alladice* (1998) 87 Cr App R 380, in which the trial judge reached such a decision before deciding to admit the statement."

[29] There are some cases, however, where the question whether a confession was in fact made is so bound up with the issue of the fairness of admitting it in evidence that it becomes necessary to address the question whether it was in fact made – see, for instance, *Ajodha v The State* [1982] AC 204. Whether a particular case should be subject to this approach will depend heavily on the judge's assessment of the requirements of fairness in the specific circumstances. An appellate court should be slow to interfere with what is essentially a discretionary judgment. We are not surprised that the judge felt it necessary to address the question whether the confession was in fact made before deciding if it would be fair to admit it in evidence and we would certainly not be prepared to say that he was wrong to do so.

[30] On the question whether the evidence should be excluded under article 76, Weatherup J said (at paragraph 77 of his judgment): -

> "… I was invited to exercise the power under article 74 (3) of PACE to exclude the evidence on the basis that it had not been proved that the confessions made to Mr Martin Clark had not been obtained –
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> (a) by oppression of the person who made it; or
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> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,"

[31] The judge concluded that the confession had not been obtained by oppression. He went on to say: -

> "[78] … However I was of the view that if I could not be satisfied beyond doubt as to the reliability of a confession obtained in the circumstances of the present case for the purposes of article 74(2) (b), I should exercise my discretion to exclude the evidence of confession under Article 76. In addition I would exercise my discretion to exclude the evidence under Article 76 in relation to any other unfairness.
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> [79] The approach to issues of unreliability in this context is an objective approach. *Blackstone* at F17.10 states that -
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> > '…. the court must consider whether what happened was likely in the circumstances to induce *an* unreliable confession to the offence in question, and to ignore any evidence suggesting that the *actual* confession was reliable.'
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> [80] The approach to the exclusion of evidence for unfairness under Article 76 requires the Court to take three steps –
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> (a) to have regard to all the circumstances.
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> (b) to determine whether the admission of the evidence would have an adverse effect on the fairness of the proceedings.

(c) to exclude the evidence where the adverse effect would be such that the Court ought not to admit the evidence."

[32] The judge expressed himself as satisfied beyond reasonable doubt that the confession had not been obtained as a result of anything said or done which was likely to render it unreliable. Indeed he concluded that the circumstances were such that a confession made in the conditions that it had allegedly been given probably enhanced its reliability. He emphasised, however, that its reliability fell to be judged at the conclusion of the case. He stated that the admission of the evidence would not have such an adverse effect on the fairness of the proceedings as to prompt its exclusion. Accordingly the evidence of Mr Martin Clark was admitted. The main trial proceeded. The witnesses who had given evidence on the voir dire adopted and affirmed their evidence in the main trial.

[33] On the appeal Mr John Orr QC for the appellant asserted that the judge had misdirected himself in invoking the provisions of article 74. He maintained that the defence application had been under article 76 alone. Mr Orr claimed that in adopting this incorrect approach the judge had restricted his consideration of the issue of the reliability of the confession and whether it had been made when finally considering the matter as the tribunal of fact. In consequence, he said, the appellant had been denied a fair trial.

[34] We are not convinced that the judge was in fact invited to exclude the evidence under article 74 (3). From our consideration of the relevant part of the transcript it appears that the defence were merely observing that the court did have such a power. The prosecution is not required to prove that a confession was not obtained by oppression or that it was not unreliable (under article 74 (2), (a) and (b)) unless either the defence "represent" that it is inadmissible under these provisions or the court of its own motion requires proof of admissibility under article 74(3). The judge appears to have concluded that article 74 (2) had been triggered by a defence application which, as we have said, we do not consider had in fact been made. Be that as it may, his consideration of the issue, did not create any disadvantage for the appellant. On the contrary, we consider that this introduced a further safeguard as to the admissibility of the confession. We do not believe that the fact that the judge was prepared to determine whether the confession was reliable detracted in any way from his consideration of whether to admit it in evidence.

[35] If the learned trial judge held the view that the determination of whether confession evidence should be excluded under article 76 involves a consideration of article 74 (2) – and this is far from clear – we would not share his opinion. The two provisions are separate and call for separate consideration. If the judge could not be satisfied beyond doubt as to the

reliability of a confession obtained in the circumstances of the present case, then he would have been bound to exclude it under article 74, not article 76. In fact he concluded that the confession was not obtained in consequence of anything said or done which was likely to render any confession unreliable and the issue is therefore academic. The judge concluded that a confession made in the circumstances in which it was given in the present case probably enhanced reliability and with that view we respectfully agree.

[36] It is well settled that this court should be slow to interfere with the exercise of a trial judge's discretion under article 76 to allow a confession to be admitted. In *Blackstone* at D 24.20 the authors state that the "Court of Appeal will not interfere save in extreme cases" At paragraph F17.16 it is stated: -

> "The Court of Appeal will not interfere with the exercise of a trial judge's discretion to admit evidence under s. 78 [the equivalent of article 76] unless satisfied that the decision was perverse. It follows that cases in which the discretion is said to have been wrongly exercised are comparatively rare. A recent example is *Millar* [1998] Crim LR 209 in which the judge adverted to an out of date version of the PACE codes of Practice and thereby reached an incorrect conclusion through failure to note serious breaches of the applicable Code."

We are satisfied that this is not an instance in which the Court of Appeal should interfere. The appellant's case on the first issue fails

The second issue: should a direction have been given?

[37] Weatherup J set out the reasons for refusing the application for a direction (which was based on the second limb of the test in *R v Galbraith* 73 Cr App R 124) in paragraphs 92 to 94 of his judgment as follows: -

> "[92] The *Galbraith* approach provides that the case against a defendant should continue where -
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> '…the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty." per Lord Lane CJ at page 127.'

> [93] In asserting that this did not apply in the present case the defendant submitted that the Court should be satisfied that the evidence as to the circumstances of the murder and the evidence as to the alleged confession should "fit like a glove". I rejected that suggestion and adopted the approach that there would be sufficient evidence for the case to continue even if there were inconsistencies in the evidence if those matters appeared reasonably capable of resolution or if any outstanding inconsistency was such that a court could still be satisfied beyond reasonable doubt of the guilt of the defendant.
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> [94] Following that approach and taking account of the totality of the prosecution case I was satisfied that there was evidence on which the Court could properly come to the conclusion that the defendant was guilty. Accordingly the defendant's application for a direction was rejected. The defendant did not give evidence on his own behalf nor did he call any evidence in his defence."

[38] The judge's approach to the question whether a direction should have been given was faultless. He was correct to refuse the application. The appellant's argument on this issue also fails.

The third issue: was the judge correct to conclude that a confession had been made?

[39] Two principal arguments were advanced on behalf of the appellant in support of the claim that it could not be reliably concluded that a confession had in fact been made. It was suggested that Mr Martin Clark had two reasons to wish to invent the confession. The first of these was in order to blackmail the appellant to provide information to support the existence of collusion between security forces and loyalist paramilitaries. Secondly, it was suggested that he would obtain financial gain from the conviction of the defendant. The second argument was based on what was said to be the obvious falsity and unreliability of Mr Martin Clark's evidence in a number of material areas.

[40] The judge dealt with these arguments in paragraphs [110] *et seq* of his judgment as follows: -

> "[110] In relation to the defendant's claims of dishonest and unscrupulous methods I am satisfied

that Mr Martin Clark has been guilty of misrepresentation to the prison authorities, to the defendant, to the defendant's solicitor and that the Sunday Times article misrepresented Mr Martin Clark's reason for disclosure of the alleged confession. Further I am satisfied that Mr Martin Clark was untruthful in his evidence to the Court in relation to his membership of the NUJ and that his evidence was at least disingenuous in relation to the support he might receive from Miss Solomon in relation to his connection with Mr Corbyn. Further I am satisfied that Mr Martin Clark was evasive in his evidence as to the basis on which he and Miss Solomon came to visit the defendant. In addition I am satisfied that Mr Martin Clark was not as forthcoming to the Court as he might have been in relation to his association with Sean McPhilemy.

[111] There were matters relied on by the defendant as examples of dishonest and unscrupulous methods that I do not accept. The defendant challenged the credibility of Mr Martin Clark on the basis that he was prepared to breach the journalist's duty of confidentiality and breach an express promise of confidentiality he claimed to have given to the defendant. Mr Martin Clark treated his promise of confidentiality as dependant on the defendant's continuing cooperation in the supply of information. He accepted that had the defendant continued to provide information he would not have made any disclosures implicating the defendant in the murder of Mr McGoldrick. Mr Martin Clark did refer to a provision in the Code of Ethics that permitted disclosure by journalists in exceptional circumstances, which he said applied to information concerning the commission of a murder and according to his evidence he obtained the approval of the NUJ Ethics Committee. In any event the legal obligation requires the disclosure of such information. I find no grounds for criticism of Mr Martin Clark based on any alleged requirement that he should have kept such information confidential.

[112] The defendant's contention was that Mr Martin Clark's motives in making false allegations against the defendant were to blackmail the defendant for

information about loyalist violence and for financial gain. It was put to Mr Martin Clark that the contact with the defendant was initiated at a time when Mr McPhilemy was in most need of supporting information about the committee by reason of the ongoing libel actions in England and America. Mr Martin Clark had limited knowledge of the details of the proceedings and there was no evidence on the subject other than Mr Martin Clark's agreement to some of the facts put to him by Mr Allister. However the picture emerged of a coincidence in the timing of contacts with the defendant and the changing fortunes of Mr McPhelimy. In May 1999 Mr Martin Clark interviewed Mr Sands, who was Mr McPhelimy's source for his allegations about the existence of a committee, and published a newspaper article supporting the allegations. Then Mr Sands claimed that his account had been a hoax and another journalist published a newspaper article to that effect. This was said to threaten Mr McPhelimy's position in the libel actions, particularly in England where he could have faced financial ruin. It was agreed by Mr Martin Clark that on 8 June 1999 he and Ms Solomon met with the contact who was to suggest that they should arrange to meet the defendant. It was contended on behalf of the defendant that the arrangements to meet the defendant were then made to investigate the prospects of obtaining alternative confirmation for the existence of the committee from the defendant. At a more general level Mr Martin Clark did accept that his concern in contacting the defendant was to obtain information about collusion between the security forces and loyalist paramilitaries.

[113] Of course the claim that the confession had been invented also involved the claim that the notes of the confession had also been invented. The defendant pointed to the structure of the entries in the notebooks as well as the nature and content of some of the notes as evidence of invention. I find no evidence of invention in connection with the structure or nature or content of any of the notes.

[114] The defendant contended that all the details attributed to the defendant could have been obtained

by Mr Martin Clark from other sources such as newspapers and the other personal sources. I accept that research and interview could have revealed to Mr Martin Clark all the information about the McGoldrick murder that could have enabled him to present an account that was consistent with the version of events now presented by the prosecution.

[115] In relation to the issue of financial gain, it was accepted by Mr Martin Clark that in the event of the conviction of the defendant he might be able to publish further articles for financial reward on the subject of the defendant and the McGoldrick murder.

[116] In the light of all the reservations expressed above about Mr Martin Clark there is a special need for caution in relation to his evidence, and particularly so as it concerns an alleged confession. Having considered all the evidence I am satisfied that Mr Martin Clark did not invent the confession attributed to the defendant, whether for the purpose of blackmailing the defendant into giving information about loyalist violence in general or the committee in particular, or for financial gain. There was a coincidence in timing between the contact with the defendant and the urgent need for support for Mr McPhelimy in the libel actions and such need may well have been a factor in the approach to the defendant. Mr Martin Clark agreed that the contact with the defendant was not concerned with his health or his release but with obtaining information about loyalist collusion, included in which might be information about the existence of he committee. When relations broke down between the defendant and Mr Martin Clark, for reasons that were never apparent to Mr Martin Clark, I am satisfied that he did not invent the defendant's confessions in an attempted blackmail of the defendant for information. Further I am satisfied that, while it may be to Mr Martin Clark's financial advantage if the defendant is convicted of this offence, he has not invented the confession or given his evidence in order to secure any such financial advantage. Having considered all the evidence and all the submissions I am satisfied that the defendant made the confession of his involvement in the murder of Mr McGoldrick at the

> third and fifth interviews. I have considered whether the caution that must be exercised in relation to the evidence of Mr Martin Clark, by reason of the reservations expressed above, raises a reasonable doubt in relation to his evidence about the making of the confession but I am satisfied that the defendant made the confession. Further I am satisfied that the notes presented by Mr Martin Clark are not an invention and that they represent the record of the interviews and were made during as well as after the interviews. I do not believe that invented notes would have appeared in the manner that these notes were presented. The confusing sequence of notes did not indicate later invention. The muddled nature of the relevant notes of the third interview indicated that they represented a hasty and confused and partly misunderstood description of events recorded in the circumstances outlined by Mr Martin Clark, rather than being the product of invention. The supplementary statement of 10 July 1999 made after the third interview bore the hallmarks of alarm in the light of the character of the information then available. Rather than indicating lack of authenticity the haphazard nature of the notes left me in no doubt that in the circumstances in which the notes emerged they were a genuine attempt at a record of discussions with the defendant. "

[41] It is clear from these passages that the arguments advanced to the judge on this issue (which were in every material respect identical to those presented to this court) were thoroughly and conscientiously considered by him. We can find no reason to doubt, much less to criticise, his conclusions on them. The appellant's contentions on the third issue must also be dismissed.

The fourth issue: should the confession be considered reliable?

[42] Mr Orr made two main submissions on this issue. He suggested that virtually all the information contained in the confessions that the appellant is alleged to have made to Mr Martin Clark was widely known. It could not safely be assumed, therefore, that the appellant had any personal knowledge of the circumstances of Mr McGoldrick's murder. Secondly, he asserted that that there were several inconsistencies between the alleged confession and the forensic and other evidence.

[43] On the first of these arguments we do not consider that the fact (if indeed it be the fact) that most, if not all, of the material contained in the confessions was widely known necessarily casts doubt on their authenticity. This was a notorious murder. It is unsurprising that details of the killing were widely disseminated. The reliability of the confession does not depend on the inclusion of a detail that could only be known to someone involved in it. Of course, the presence of such a detail may be a compelling reason to accept that it was reliable; the absence of such material does not lead inexorably to the opposite conclusion.

[44] We turn then to consider the vaunted differences between the confession and the objective facts established by forensic and other evidence. While we will consider each of the avowed areas of inconsistency, it is perhaps appropriate to say, by way of preliminary, that the existence of discrepancies between the appellant's account and the scientific and other evidence does not inevitably lead to the conclusion that the confession is to be doubted. As the trial judge observed, precise recall of every detail in the sequence in which it occurred is not to be expected where a murder is carried out.

Position of the car and the front seat passenger in the taxi

[45] Mr Orr claimed that Mr Martin Clark had implicitly accepted in his evidence that Mr McKeown had told him that the car he was in pulled up behind the taxi which had stopped at the side of the road. This was contrary to the evidence that the taxi had driven right off the road, where it was found the next morning by Mr Douglas.

[46] On the second point, Mr McKeown was alleged to have told Mr Martin Clark that no-one was sitting in the front passenger seat of the taxi when Mr McGoldrick was killed; in the notes of the fifth interview it was recorded that "guy in passenger seat got out". In his evidence Mr Martin Clark stated that he was not sure if the appellant had said that it was the youth in the front seat or the youth in the back seat who had got out of the vehicle but it had been his interpretation that it was the front seat passenger. This was contrary to the forensic evidence which indicated that it was more likely than not that there was someone sitting in the front passenger seat as there was no blood spattering on the seat as would have been expected if it had been vacant.

[47] Weatherup J accepted that there were inconsistencies but he did not consider these to be significant. He dealt with both points in the following passage of his judgment: -

> "[134] The other matters related to the position of the taxi at the time of the shooting and the presence of a front seat passenger in the taxi at the time of the

> shooting. The defendant would have been expected to have first hand knowledge of these matters. The events being described would have occurred in such fraught circumstances that accurate recollection of every detail could not reasonably be anticipated. ... A participant may well not remember the exact details or the exact sequence. The description of the position of the taxi was not critical to an account of the incident. It is the type of detail that someone might well confuse on a retelling of the story some time later. It is certainly not such a prominent aspect of the event that a discrepancy as to the location of the taxi would create a doubt about the essential core of the account."

[48] We agree with this analysis. It is entirely to be expected that the position of the car would not be a matter of outstanding importance such as would register indelibly in a participant's memory. The discrepancy in relation to the presence of someone in the front passenger seat is equally explicable as a lapse of recollection on the part of the appellant. One would expect that, once the taxi stopped, events would have occurred with great rapidity. If there was a passenger in the front at the time that the shots were fired it is overwhelmingly likely that he would have left the car immediately afterwards. That the appellant forgot that the passenger had not alighted before the shots were fired is as untoward as it is unsurprising.

The number and sequence of shots

[49] Dr Carson gave evidence that there were five gunshot wounds in the back of Mr McGoldrick's head. The first of these was very close to the scalp, in Dr Carson's estimation, probably fired by someone sitting in the seat behind Mr McGoldrick. The other four shots were fired some inches away from the scalp. In his account to Mr Martin Clark, the appellant said that he had shot four bullets to the back of the victim's head and the last one in the neck. When asked whether his findings were consistent with Mr McKeown's account Dr Carson replied that he couldn't exclude Mr McKeown's account as a possibility but that the account he, Dr Carson, had given was more likely to accord with the findings on post mortem examination.

[50] Weatherup J found that the evidence of Dr Carson established that the shooting sequence could have been either one shot followed by four shots or it could have been four shots followed by one shot (paragraph 33 of the judgment). On that basis the judge concluded that there was no inconsistency between the account given by the appellant and the actual findings on post mortem. We agree with that conclusion and dismiss the appellant's argument on this point.

The jamming of the gun

[51] Two damaged and unfired bullets were found in the taxi. These indicated that the murder weapon had jammed twice. No mention was made in Mr McKeown's alleged confession of the gun jamming. Mr Orr suggested that one would have expected someone relating the story of a murder to mention that the gun had jammed; this was the type of factor that would not have been generally known.

[52] Weatherup J concluded that this was a detail that might reasonably have been omitted from a description of events. We agree. It does not appear to us that the omission of reference to the gun having jammed casts any doubt on the reliability of the account that the appellant gave to Mr Martin Clark.

The position of the gunman when the shots were fired

[53] The forensic scientist, Dr Griffin, was asked what the most likely position of the gun was when it was fired. She replied that it was most likely to have been on the driver's side of the head rest with the gunman in the back seat of the car at the time of the shooting. Mr Rossi, a ballistics expert, expressed the view that the presence of a spent case at the off side rear seat suggested that the gun was fired inside the car and that there was weight on the back seat (implying that this was supplied by the body of the gunman). Dr Carson had attended the scene at Montaighs Road before Mr McGoldrick's body had been removed and he stated that given the position of the deceased and the location and type of wounds, it was likely that the first shot was discharged at contact range by someone sitting in the seat behind Mr McGoldrick. His head would then have slumped forwards and to the left and four further shots were then discharged at a somewhat greater distance. The upper entrance wound of the group of four showed peppering, which indicated that the muzzle of the gun was some inches from the head. The close grouping of the last three shots suggested the muzzle of the gun was within a foot of the head.

[54] This was at odds with the account given by Mr McKeown to Mr Martin Clark, Mr Orr asserted. No record of this point appeared in the notes of the third and fifth interviews. Mr Martin Clark's evidence was that he understood from Mr McKeown that he got into the back of the taxi but the question whether the appellant was inside or outside the taxi was not addressed directly.

[55] The judge decided that the evidence established that a single shot had probably been fired by a person in the back of the taxi and the other four shots were fired by a person who may have been inside or outside the taxi with the weapon beside the driver's headrest. He concluded that on this

point there is no inconsistency between the objective evidence and the account that the appellant had given to Mr Martin Clark as the confession did not deal with the position of the person firing the weapon. Again we agree with the judge's conclusions on this point.

Telephone calls

[56] Mr Orr claimed that there were conflicting versions relating to telephone calls made to and from parties and locations on the night in question. The notes of the third interview did not record the location from which calls were made but the long version of the interview that Mr Martin Clark said he had prepared later records that the call to Mr McKeown was made after the accomplice had watched the taxi leave. This would have placed the accomplice at Centrepoint in Lurgan. The notes of the fifth interview recorded the accomplice as having made the call from a telephone box in Lurgan. Evidence from British Telecom engineers was that the calls were made from a public telephone box in Waringstown and that there were five calls, the first two of these were to a number in Aghalee, the third to Belfast (probably a BT service call), the fourth to a Craigavon number and the fifth to the Aghalee number again. This illustrated an inconsistency between the evidence of Mr Martin Clark and the evidence of the BT engineers, Mr Orr said.

[57] Weatherup J did not consider it significant that Mr Martin Clark had recorded that the telephone calls were made from Lurgan when they were in fact made from Waringstown. He pointed out that Mr McKeown would not necessarily have had personal knowledge of the matter and he could not have been expected to describe an incidental detail to Mr Martin Clark who, as he would have known, was not familiar with the area.

[58] Mr Orr also drew our attention to the fact that in his notes of the third interview Mr Martin Clark had recorded that the accomplice was waiting in a second car at Centrepoint for the taxi to leave and that when he saw it leave he made a mobile telephone call to Mr McKeown who was in position in the first car on the road to Aghagallon. This was, Mr Orr argued, at odds with telephone account in the notes of the fifth interview. He suggested that it was significant that it had been recorded in the notes of the third interview that when the last phone call was made and the accomplice said that "the parcel is on its way" Mr McGoldrick could not have left Centrepoint. Weatherup J accepted Mr Martin Clark's explanation for these discrepancies. This was to the effect that the recording of the details at the third interview was hurried because prison officers wanted to bring the interview to an end. He had failed to understand and properly record the information that he had been given.

[59] We consider that the judge's consideration of these issues and the conclusions that he reached on them were impeccable. We agree with his analysis and see no reason to dissent from it.

The priests at Gilford

[60] Mr Martin Clark gave evidence that Mr McKeown had told him of an aborted plot to kidnap three Catholic priests from a house in Gilford, leaving a fourth priest behind to raise the alarm. The priests were to be kept captive until the Orange parade at Drumcree march was allowed to proceed. Mr Orr suggested that the fact that the police had no intelligence of any plot to kidnap any priest in July 1996 and, indeed, that there was only one priest in the parochial house in Gilford at the material time, indicated that the alleged confession was unreliable.

[61] The trial judge concluded that this did not cast doubt on the confession. The fact that four priests were not available for the completion of this plan sounded on the viability of the plan, not on the accuracy of the confession. We agree.

The accomplice's journey

[62] Mr Orr submitted that the timings of the accomplice's journey in the alleged confession were contradictory. Indeed, he claimed that they were not physically possible. The confession had suggested that the accomplice dropped the less experienced man at Centrepoint and telephoned to say that the "parcel" was on its way. As the telephone records show that the accomplice had made the call from a public telephone in Waringstown, the accomplice, after observing the departure of the taxi (which had been ordered for 11.45pm), would have had to drive from Centrepoint to Clare Road in Waringstown to make the telephone call. He would then have to travel from Clare Road to Derryhirk by 11.55pm (this was the time at which a witness, Rosalind Kelly, said she heard a gun shot). All of this, Mr Orr argued, pointed to an unanswerable inconsistency in the alleged confession, as it would not have been possible to make these trips within the time available.

[63] The evidence was that the telephone call from Clare to Aghalee was made at 11.37pm. Mr McGoldrick collected the youth at Centrepoint at around 11.50pm and the two cars were at Derryhirk at around midnight. Weatherup J concluded that the accomplice could not have watched Mr McGoldrick leave Centrepoint and then travel to Clare to make the phone call to Aghalee and that this did not happen. He dealt with the topic in the following passage of his judgment: -

> "The confession involved the accomplice making the telephone call and then driving to Derryhirk and if

> the youth was at Centrepoint I do not find any inconsistency in the accomplice completing that task whether from Clare or from Centrepoint in Lurgan and whether by geography or timing or otherwise."

[64] Once again we find nothing to criticise in this analysis or conclusion. We do not consider that this point casts any doubt on the reliability of the confession.

The position of Mr McKeown's car prior to the arrival of the taxi at Downey's Pub

[65] Mr Martin Clark recorded in his notes of confession that "McKeown and other drove to Aghagallon. Pulled in behind Downey's". Mr Orr claimed that this was inconsistent with the sketch made in the course of the interviews. This appeared to show that Mr McKeown's car was parked beside Downey's Pub. During cross-examination Mr Martin Clark stated that Mr McKeown told him that he had come from the side of the bar and had gone past the front. Mr Orr argued that this contradiction undermines the reliability of the alleged confession. The trial judge concluded that there was no inconsistency between these items of evidence because a vehicle in the car park behind Downey's Pub that was proposing to travel along Montaighs Road would have to travel in front of the bar. That movement would be consistent with that shown on the sketch. Again, we agree with this conclusion.

Mr McKeown at Centrepoint or Aghalee

[66] Mr Orr drew our attention to the fact that that there was no record in the interview notes of Mr McKeown having being at Centrepoint at any stage. Despite this, during his cross-examination by Mr Allister, he said that it was clear that Mr McKeown had implied that he had been to Centrepoint. When asked about why he did not make a note of this he said that Mr McKeown did not tell him in so many words that he had been at Centrepoint. The judge attached no significance to whether Mr McKeown was at Centrepoint or not. Neither do we.

Other issues

[67] We have dealt with the principal submissions made on behalf of the appellant. There remain two subsidiary arguments. The first is on the matter of disclosure. Mr Orr suggested that the Crown were dependent on the honesty and integrity of Mr Martin Clark in supplying all relevant documents. Since his dishonesty had been demonstrated throughout the trial and had been accepted by the trial judge, it was impossible to be sure that all relevant material had been disclosed.

[68] As is customary a judge other than the trial judge had been assigned to deal with the question of disclosure. Mr Orr argued that the disclosure judge could not have had sufficient knowledge to identify what may or may not be relevant to all the complex issues involved in this case and referred in this context to comments made by him to the effect that the defence were "somewhat hampered". Mr Orr argued that the procedures in respect of disclosure were inadequate to guarantee the appellant a fair trial pursuant to article 6 of the European Convention on Human Rights and said that this was a case where a special advocate should have been appointed.

[69] We see no reason to speculate that material relevant to the issues in this case has been withheld. Demonstrated dishonesty on the part of Mr Martin Clark does not establish that he has concealed or failed to supply such material. In every case there is a hypothetical possibility that full disclosure has not been made but there is nothing about the present case that takes it beyond that theoretical risk. We acknowledge that there was late disclosure of an e-mail from Ms Solomon but late disclosure is, unfortunately, a commonplace in criminal trials and we would certainly not be prepared on that account alone to conclude that this indicated withholding of other relevant material.

[70] As to the suggestion that a special advocate should have been appointed, as we observed in *R v Clifford McKeown* [2005] NICA, this is to be reserved for wholly exceptional cases. There is nothing about this case that brings it within that exceptional category. For the reasons that we gave in that judgment we do not consider that such a course was necessary here.

Differences between the judgment handed down and the final judgment

[71] Mr Orr pointed to a number of textual differences between the judgment that Weatherup J handed down and the judgment that was later published. We have considered these but we do not believe that any significance attaches to them. It is, of course, desirable that judges should deliver judgments in non-jury trials in their final form and that they should avoid, if at all possible, editing or other changes subsequently but we are satisfied that such changes as were made by the judge in the present case were essentially incidental to his reasoning and are therefore of no importance in our assessment of the safety of the appellant's conviction.

Conclusions

[72] We are satisfied that the conviction of the appellant is safe. During the third interview with Mr Martin Clark, Mr McKeown boasted that he had killed Mr McGoldrick. During the fifth interview he provided details of the events leading up to and surrounding the killing. While the confession contained information that was in the public domain we are satisfied that that

fact does not render the confession less likely to be true or unreliable. We consider that the suggestion that Mr Martin Clark invented the confession for financial gain is preposterous. This was of little consequence when pitted against the enormous disruption to his life that has occurred as a result of his giving evidence against the appellant. The appeal against conviction is therefore dismissed.