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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

PAUL JAMES MORRIN

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Higgins LJ, Coghlin LJ and Hart J

____

HART J (delivering the judgment of the court)

Introduction

[1] The defendant and appellant was convicted of the murder of Gerald Martin O'Hagan in the early hours of 3 February 2006 following a trial before Treacy J and a jury between 17 January and 4 March 2008 at Londonderry Crown Court sitting at Coleraine. On 23 April 2008 he was sentenced to life imprisonment with a minimum term of 20 years imprisonment before he could be considered for release by the Parole Commissioners. He was refused leave to appeal against conviction by the single judge (Weir J) on all grounds except one, namely that the trial judge misdirected the jury on an aspect of the onus of proof, and he was also refused leave to appeal against sentence. The defendant has renewed his appeal for leave to appeal on those grounds in respect of which he was refused leave, although in the event not all of them were advanced on the appeal, and in addition applied for leave to admit fresh evidence.

[2] The prosecution case was that the defendant murdered Gerald O'Hagan in the defendant's flat at 41 Galliagh Park, Londonderry after having spent much of the previous day and night drinking with the deceased and with Sean Devlin who was the best friend of the deceased and the son of the defendant's former partner. The defendant treated Sean Devlin as his *de facto* stepson. The prosecution case depended upon circumstantial evidence consisting of (a) a considerable quantity of forensic evidence, and (b) inferences to be drawn from comments made by, and actions of, the defendant when he made a '999' call at 1218 on 3 February, and a photograph

of the deceased's body which he took on his mobile phone after the 999 call and before the ambulance personnel arrived.

[3] The defendant's case was that he did not murder Gerald O'Hagan, and that O'Hagan was, or could have been, murdered by someone else. It was suggested that Sean Devlin could have been that person. In the alternative it was argued that if the jury were satisfied beyond reasonable doubt that the defendant did inflict the fatal blows, then he was sleepwalking at the time. By its verdict the jury has clearly accepted that the defendant did inflict the fatal blows, and rejected the sleepwalking defence. The sleep walking defence was not the subject of any of the grounds of appeal and it is unnecessary to refer to it any further.

[4] The actions of Sean Devlin that night played a significant part in the defendant's case both at the trial, during which he gave evidence, and in the course of the appeal. Although Mr McCartney QC (who appears on behalf of the defendant with Mr Martin Rodgers) said in the course of the appeal that he could not go so far as to suggest that Sean Devlin was the killer, only that the defence asked the jury to believe that Sean Devlin was an unreliable witness who knew more about this than he admitted, in his closing speech to the jury Mr McCartney expressly suggested that Sean Devlin was either the killer or had talked to the killer.

> "The principle Crown witness in this case was Sean Devlin. He secured an order from the court to give his evidence by way of CCTV. You remember him being interviewed on three occasions sitting on a settee drinking tea. The Crown now says he has become a red herring. Why has he become a red herring? Because we, on behalf of the defence, say he supplied you with a litany of lies, of inconsistencies, of contradictions and omissions, but even worse he has been demonstrated to possess a knowledge of this crime which only the killer could have known."

Mr McCartney dwelt at considerable length with a number of aspects of Sean Devlin's conduct to which reference will be made later in the course of this judgment and then said –

> "The police say it's a red herring. We say it is not. We say at that stage an amateur sleuth would have realised they had another suspect in the frame, someone who was lying and someone who clearly possessed information which only someone who either killed that young man would know about or who talked to the killer."

It is therefore not surprising that in his charge to the jury the trial judge put the defence case in the following fashion.

> "Now the Defence case is that the accused did not kill the deceased, Gerald O'Hagan, and that the prosecution have not established beyond reasonable doubt that Paul Morrin was the killer and not to put too fine a tooth on it, the Defence have raised the possibility that the accused's stepson, Mr Devlin and the best friend apparently of the deceased, of Gerald O'Hagan, may have been the killer or at least knew who the real killer was."

The evidence at the trial.

[5] Whilst we shall refer to those aspects of the evidence relating to Sean Devlin which the defence say are significant, before doing so it is necessary to place them in the context of the prosecution evidence, and especially the forensic evidence of Dr Ingram, the Assistant State Pathologist, Mr Jason Bennett of FSNI, and Derek Tremain, a consultant graduate image scientist with the Policing Accidents Crime Operation Support Section in England.

[6] Dr Ingram concluded that Gerald O'Hagan died as the result of several wounds.

(1) A stab wound to the left side of the neck, entering at the back and transacting the left internal jugular vein, before emerging on the left side of the front of the neck.

(2) 14 stab wounds to the back of the trunk, 6 of which inflicted serious injuries, the other 8 of which were all relatively superficial and had not damaged any internal structure.

The defendant was also found to have a cut on the little finger of his right hand, and Dr Ingram's evidence was that the wound was an incised wound caused by something sharp with a sharp edge which could have been a glass or it could have been a knife.

[7] Gerald O'Hagan was found in a kneeling posture beside a bed with his knees on the floor, and his head and trunk lying face down on a duvet on the bed. The duvet was saturated with blood, and Jason Bennett of FSNI found spots of projected blood on the duvet close to the pillows, and on a sleeping bag on top of the bed near the bedstead at the foot of the bed. Spots of projected blood matching the defendant's blood were found on the wall of the room, very close to an area of damage to the plasterboard. A knife was

found in the bedroom which fitted the piece of damage almost exactly. The blood spotting which matched the defendant's blood had been directly projected on to the wall at a height of approximately 4 ½ feet from the floor, and about 1 foot to 1 ½ feet from the wall. On the wall he found a transferred blood stain consistent with someone's bloodstained forearm bumping against the wall. The larger stain is the side of the forearm, and the smaller stain would be consistent, in Mr Bennett's view, with the elbow making contact with the wall. Both the smeared blood and the linear projected blood spots matched the deceased's blood, but Mr Bennett accepted that he did not know whose arm made the larger stains (which were referred to on the appeal as the smudge).

[8] A bloodstained tea towel found in the kitchen had a mixed DNA profile, the major profile matched the deceased, and the minor profile, which was incomplete, could have come from the defendant. A smear of blood found on top of a speaker in the computer room in the flat matched the defendant's blood.

[9] A heavily bloodstained T-shirt found in the flat was saturated with blood which had soaked through to the inside. There were numerous smears of blood on the chest of the T-shirt where it came in direct contact with a source of wet blood. There were also spots of airborne blood on the lower front of the T-shirt close to the hem. The deceased's blood matched the heaviest stain, but the spots of airborne blood near the hem matched the defendant's blood.

[10] The knife found in the bedroom was a kitchen knife with a 7" blade and a damaged handle. Both blade and handle were found to be quite heavily bloodstained. The deceased's blood matched bloodstains both at the tip and on the cutting edge of the knife close to the hilt. A mixed DNA profile from two individuals was found on a swab taken from the rough edge of the handle of the knife. The deceased may have contributed to this mixed profile, and the profile of the second contributor matched the defendant's blood. A mixed profile was detected on a swab from a smear of blood on the bed knob, and this revealed a major profile matching the deceased, and the incomplete minor profile could have come from the defendant.

[11] Swabs taken from the defendant's right hand were bloodstained, and the major profile matched the defendant, the incomplete minor profile matched the deceased. The swab from the left hand gave a major profile matching the deceased, and the minor profile matched the defendant.

[12] Blood was found on the front and rear of the defendant's trousers, and samples taken from both knees of the trousers matched the deceased's blood, whilst a sample from close to the zip pull matched the blood of the defendant.

[13] Blood was also found on a grey under T-shirt which had soaked through the white T-shirt onto the grey T-shirt worn underneath. This matched the deceased's blood, and this T-shirt was taken from the defendant by scenes of crime officer Greer.

[14] A blood spot found on the inner surface of the bracelet of the defendant's wrist watch had a mixed profile. The major profile matched that of the deceased, the incomplete minor profile matched that of the defendant, and the DNA could have come from the defendant.

[15] A tea towel draped over the deceased's back was heavily bloodstained and the DNA profile matched the deceased.

[16] Two profiles from airborne drops of blood found on the deceased's jeans matched the defendant's blood, and a third had a mixed profile, the major profile matching the defendant, and the minor, incomplete, profile could have come from the deceased. Samples from the rear of the right thigh and knee of the deceased's jeans revealed two full profiles matching the defendant's blood, and he was the major contributor to the third, mixed, swab.

[17] No blood was found on the keyboard, or on the mouse, or on the lead from the keyboard to the mouse in what was referred to as the computer room. The defendant's case was that he had awoken from a drunken sleep sitting at the computer, and then shortly afterwards discovered the body of the deceased. No blood from the deceased was found on the swivel chair of the computer room, and no blood was found in, or round, the taps, sink or in the vicinity of the sink in either the bathroom or the kitchen.

[18] Mr Bennett accepted that he assumed that the blood found on the knife matching the defendant's blood had come from the defendant's hand, but he was unable to say when it got there, other than it had got there within one month of the death of the deceased.

[19] Mr Tremain gave evidence that he superimposed a photograph of an injury found on the palm of the defendant's right hand with a photograph of the knife handle, as a result of which he concluded that the area of skin damage to the defendant's right hand could have been caused by a rivet in the handle of the knife.

[20] The prosecution also relied upon certain other aspects of the evidence as indicating when the deceased's death occurred and what happened afterwards. There was evidence that indicated that the deceased rang Devlin using the defendant's home telephone at 2.41 am, and then at 2.53 am he rang Laura Brady using the same telephone. There was automatic downloading of music from the defendant's computer which stopped at 3.27 am. Noel

Connolly lived in the flat below the defendant's, and he was woken at 4.00 am by rave music coming from the defendant's flat, and he gave evidence that over the next 1 ½ hours he heard the defendant's voice becoming more and more aggressive. Mr Connolly said that he heard the voice of Sean Devlin in the flat, but he did not say when he heard that. He also said in his evidence that he heard the defendant "and one other", and the prosecution suggested that as the defendant and the deceased were plainly there then it followed Sean Devlin was not.

[21] At 4.52 and 4.59 am there was evidence that online snooker and online poker had been accessed on the defendant's computer. Just before 5.30 Mr Connolly left his flat to go to work, and the prosecution alleged that his evidence showed that just before he left for work the "rumpus", as Mr Chesney for the prosecution described it in his closing, got worse, and then all went quiet and the prosecution alleged that "in all likelihood this is the time Gerard O'Hagan was killed".

[22] The next relevant event is that at 12.18 pm that day when the defendant made a '999' call, in the course of which he made the following comments.

> "There was a mad row and he hasn't moved".

and

> "I'm not arguing, it might have been me".

By 12.35 pm the defendant had taken a photograph of the deceased's body on his mobile telephone, a photograph which the prosecution alleged from the way it was composed was clearly not accidental. In addition cigarette ash was found on the deceased's back. Finally, the defendant said to ambulance personnel who came to the scene:

> "I don't know if I did that or not".

[23] The prosecution case was therefore as follows.

(1) The defendant had a cut on the little finger of his left hand which was an incised cut caused by a sharp edge such as a knife.

(2) Blood matching the defendant's blood was found on the handle of the knife, and blood matching the deceased's blood was found on the tip of the knife.

(3) Airborne drops of blood matching the defendant's blood were found on the back of the deceased's jeans.

(4) Airborne spots of blood matching the deceased's blood were found on the hem of the outer T-shirt worn by the defendant.

(5) Projected spots of blood matching the defendant's blood were found on the wall very close to the damaged area of plasterboard, damage which fitted the tip of the knife almost exactly, and was also found on the defendant's jeans near the zip. Blood matching the deceased's blood was found at the edge of the damaged area of plasterboard.

(6) The deceased's blood matched the bloodstain on the front of the heavily bloodstained outer T-shirt worn by the defendant, and the inner T-shirt worn by the defendant.

(7) The saturated blood on the T-shirts was due to direct contact with a source of the deceased's blood.

(8) Blood matching the deceased's blood was found on both the front and rear of the defendant's jeans.

(9) Blood matching the deceased's blood was found on the defendant's hands, and on the inside of the bracelet of his wristwatch.

(10) The rivet on the handle of the knife could have caused the injury to the palm of the defendant's right hand.

[24] There was therefore considerable evidence from which the jury could infer that the defendant bled onto his own clothes, onto the wall near the deceased's body, onto the knife and on to the deceased's clothes. The jury would also be entitled to infer that the defendant had direct contact with the deceased's profusely bleeding body. These matters constitute a strong body of evidence from which the jury could properly infer that the defendant was the person who attacked the deceased from behind using the knife found in the bedroom. To this has to be added the evidence suggesting that there were only two people in the flat at the time, that the defendant's voice was raised, the defendant's acceptance to the ambulance men that he might have been the killer, his statement to them that there had been a mad row, the absence of any blood on the computer keyboard, and the defendant taking the photograph of the deceased's body, and that someone had been smoking over the body. When all of the evidence is taken together there is undoubtedly an extremely strong circumstantial case against the defendant that it was he who had attacked and murdered Gerald O'Hagan.

[25] The defendant suggested that a number of pieces of evidence supported the inference that, contrary to his denials, Sean Devlin was present in the defendant's flat at the time of the murder.

(1) The reference in the defendant's '999' call to Sean Devlin having gone back to the defendant's apartment with Gerald O'Hagan.

(2) The evidence of Noel Connolly that he recognised Sean Devlin's voice coming from the defendant's flat.

(3) Evidence given by Constable McNeill that when he was stationed at the cordon and was approached by Connolly returning to his flat Connolly said that he had heard the defendant and two young fellows arguing at 4.00 am.

(4) Evidence from Laura Brady that she received a phone call from the deceased on a land line some time after 2.49 am, and that at the time there were at least two male persons talking to each other.

(5) That Sean Devlin's alibi defence was supported by Paul Burke, his mother's carer, who had attended with him as an appropriate adult when Sean Devlin was first interviewed as a significant witness by the police in relation to the murder.

(6) A conversation between Sean Devlin and Lisa Dalton when Devlin told her that the knife used to kill the deceased had been 9 or 10 inches long.

(7) The defence also relied upon a number of inconsistencies in accounts given by Sean Devlin to the police in the course of 3 ABE interviews made on 3 and 4 February 2006, and on 13 December 2006, about his movements and actions that night.

1. That he had been in the Ice Wharf bar with the defendant and Gerald O'Hagan drinking when he had not in fact been served alcohol there. He later said that he had been drinking double vodkas at that venue.

2. That he made phone calls on 3 February 2006 when outside the defendant's flat, calls made to the defendant between 2.13 and 2.22 am, at a time when he previously asserted he had been in bed at his mother's home, an account confirmed by Paul Burke.

3. A statement by his mother to the police that when Sean Devlin arrived home at 2.00 am she had given him a cigarette, whereas in his first interview he said that Paul Burke had given him a cigarette.

The grounds of appeal.

[26] We will take the amended grounds of appeal in turn, the first being that the learned trial judge erred both in fact and in law by his failure to provide the jury with proper or adequate assistance in respect of a question asked by the jury whether Mr Bennett had identified the smudge on the wall as from the assailant or an unidentified forearm. The trial judge had not made any reference to this part of the evidence in his initial charge to the jury, and following the conclusion of his charge and a requisition by Mr McCartney on this point, there followed a lengthy exchange between counsel and the trial judge. In the course of his requisitions Mr McCartney referred to the "assailant's" forearm as having left the smudge on the wall. The reference to the "assailant" in this context had been introduced by Mr McCartney in the course of his cross examination of Mr Bennett when he put the following question:

> "Now, two things arise here; my learned friend offered you a proposition yesterday which concerned the assailant's forearm striking the wall. Do you remember that photograph you looked at?"

Mr Chesney, junior counsel for the prosecution at the trial with Mr Fowler QC, interjected to say that he did not make the suggestion, but the evidence had come from the witness. There then followed a largely inaudible exchange between Mr McCartney and the trial judge, followed by Mr McCartney putting to Mr Bennett:

> ". . . but that's a proposition which you in fact formed?
>
> Mr Bennett – Yes.
>
> Mr McCartney – Did you form that when you went to the house that day?
>
> Mr Bennett – Yes"

[27] Mr McCartney's question conflated two quite distinct propositions.

1. That the deceased's blood was transferred to the bedroom wall by the medium of someone's forearm. That proposition never seems to have been disputed at the trial.

2. That the forearm was that of the assailant.

That these two propositions were quite distinct does not appear to have been enunciated clearly or at all at this stage, but Mr Bennett had earlier agreed that he had formed the proposition put to him by Mr McCartney, as may be seen from the passage quoted above. However, he later said –

> "It's a transfer of bloodstain on the wall. I don't know whose arm made that mark.
>
> Mr McCartney – Well can I point out the significance of it? You see, there was no smudge or smear or blood residue found on the forearm of the accused. That's its importance do you understand?
>
> Mr Bennett – Yes".

[28] After a lengthy exchange between counsel and the trial judge, the judge gave a further direction to the jury.

> "Another matter which the Defence emphasised was that the smeared blood on the bedroom wall which I was addressing you about yesterday, that the evidence or theory of Mr Bennett was that that blood on the wall which we know was Gerald O'Hagan's blood, the smeared blood was Gerald O'Hagan's blood, that's what the evidence was. And Mr Bennett he had indicated that his theory about that was that the forearm of the assailant had made contact with the wall and that's what caused the smearing. And the Defence criticised whether legitimately or not, is a matter for you, but they criticised the police for not at least having examined the clothing of Sean Devlin for example, to see whether or not there was any blood on the forearm of the clothing that he would have been wearing. But again you have already heard that the police looked at the clothing and there was no visible signs of blood, but then of course Mr McCartney says, as he is entitled to legitimately do, he said well look why did you not subject it to forensic examination, I think I covered that ground

> with you yesterday. But specifically in relation to the smear, you might want to bear that in mind.
>
> But also he says that there is no evidence of any blood on the forearm area or the elbow area of Mr Morrin and he invites you to conclude from that, that the absence of any blood on those areas having regard to the theory provided by Mr Bennett, he invites you to conclude that the real killer wasn't Mr Morrin but the real killer had actually escaped or got away from the apartment. Again, that's a matter for you whether or not you accept that or not. But it is something that you will bear in mind when considering whether or not the Prosecution have satisfied you beyond reasonable doubt that Mr Morrin was in fact the killer."

[29] As can be seen from the judge's reference to "the assailant" in this passage he incorrectly attributed to Mr Bennett Mr McCartney's proposition that the smear was placed on the wall by the assailant. The jury later returned with two questions, one being –

> "Did the forensic scientist, Mr Bennett, identify the smudge on the wall (forearm) as from the assailant or from an unidentified forearm".

There then followed a discussion between the judge and counsel when doubt was expressed as to what exactly had been said by Mr Bennett, and the judge rose to allow counsel to try and agree what was said. It seems from the transcript that they listened to the recording, and when the court resumed the transcript shows that Mr McCartney dealt with the issue in the following terms when he correctly summarised Mr Bennett's evidence.

> "Mr McCartney QC : Well can I just say this My Lord by way of final submission. Evidence was given by the Crown that the smear was caused by someone who had a blood soaked right forearm, no dispute about that.
>
> The Honourable Mr Justice Treacy: Yes.
>
> Mr McCartney QC : There was no evidence given that either the Defendant or the victim had a blood soaked right forearm.
>
> The Honourable Mr Justice Treacy: Yes.

> Mr McCartney QC : So therefore it is correct, in fact, to say ... the witness was in fact correct to say that as far as identity is concerned, he doesn't know who made that."

[30] When the jury returned the trial judge dealt with their first question and continued –

> "As to the second question. Did the forensic scientist Mr Bennett identify the smudge on the wall (forearm) as from the assailant or an unidentified forearm? And the answer to that question is no. He told you in evidence that he didn't know whose arm made that mark. So that's the answer to your question."

[31] Mr McCartney submitted that the judge's reply failed to alert the jury to the significance of this evidence, and that this failure constituted an irregularity because the judge failed to provide the jury with the assistance on this point which Mr McCartney argued it was entitled to, and thereby neutralised an important point relied upon by the defence. This was that the police had failed to treat Sean Devlin as a suspect, and in this particular regard failed to have a forensic examination of Sean Devlin's forearm, or his clothing, to see if there had been blood on his forearm, having relied simply on a visual inspection which did not reveal any bloodstains to the forearm. This had to be placed in the context of there being no trace of the deceased's blood found on the defendant's forearm.

[32] The manner in which a trial judge should respond to a question from the jury depends entirely upon the terms of the question. If, for example, the question seeks further guidance on a matter of law then the judge should either repeat what he or she has already said about the law, or expand upon that direction if necessary. If, on the other hand, the question relates to a matter of fact, then the answer should deal with that question precisely and accurately. We consider that this is what the trial judge did in this instance. There was no need for him to expand on his answer as he had already given the jury an appropriate direction in which he very clearly explained the significance of this issue from the defendant's perspective, as can be seen from the passage at [28] above. Having adopted the conflation of propositions initially advanced by Mr McCartney, when this error was identified by counsel the judge correctly answered the jury's question. We do not accept that any further direction or assistance to the jury was required, or that the judge failed to provide the jury with the assistance it was entitled to, and therefore we refuse leave to appeal on this ground.

[33] The second ground of appeal, which was number 4 in the amended notice of appeal, was that the learned trial judge failed to have any or any proper or adequate regard to the possibility, or evidence, suggesting the presence of, and potential guilt of, someone other than the appellant. In support of this ground Mr McCartney relied upon the evidence set out at [25] above which, he contended, showed that Sean Devlin was present in the flat during the time of the crucial events. He further contended that various contradictions in Sean Devlin's accounts of his movements that night were not dealt with in a coherent and cohesive manner in the judge's charge. We can deal with this ground briefly because we consider this criticism of the trial judge's charge to be without substance. Far from ignoring or inadequately reminding the jury of each of these matters, the trial judge dealt with them accurately and in considerable detail between pages 13 and 23 of his charge, and did so in a manner which was comprehensive, balanced and fair. We refuse leave to appeal on this ground also.

[34] A further amended ground of appeal (which reformulated the ground upon which leave to appeal was given by the single judge) was that the learned trial judge misdirected the jury as to the proper onus of proof in respect of the clothing worn by Sean Devlin. This ground is based upon two passages in the charge where the judge said that the defence could have had their own experts examine Devlin's clothing to see if in fact there was blood on it, even though the police evidence was that they had carried out a visual examination of the clothing which failed to reveal the presence of blood.

[35] The relevant portion of the judge's charge in which the impugned passages appear are to be found first at pages 13 and 14, and then at pages 23 and 24, of the judge's charge.

> "But the Defence says it gets even worse than that because they say that the clothing of Sean Devlin that whilst it was seized by the police, that they didn't examine it. Even though as everyone knows and as the evidence is established, traces of blood which might not or wouldn't have been visible to the naked eye, could on examination using modern forensic techniques which can find even microscopic particles of DNA or blood (Inaudible). That the police didn't bother subjecting Sean Devlin's clothing to these sophisticated forensic techniques to see if there was any blood on his clothing. And they asked and said well why not carry out that relatively simple investigatory step, especially they say, because you were dealing with someone who was and should have been treated as a suspect.

Now the police, of course, have given evidence that they have examined the clothing and the clothing is here if you need to look at it. And that there was no visible signs of blood on the clothing, but the Defence said well that's not the end of the matter. That you could look at a garment and not see any blood stains on it, but on sophisticated forensic examination blood which otherwise wouldn't have been visible to the naked eye, would turn up on that examination. So why did they not carry out that step. But, as I said, bearing in mind that that clothing is still available for inspection and you have been told on a previous occasion that the Defence had their own experts, and that the fact their own experts had asked to examine a series of items in this case. But they never sought to examine the clothing of Sean Devlin. And you might want to consider, members of the jury, well why was that? Was it because the Defence, that this really the idea that Sean Devlin was involved in some way or another in the killing of Gerald O'Hagan or knows more about it than he's letting on. Is that for the Crown (Inaudible) a red herring and if it hadn't been a red herring, if it was a really serious point that the Defence wanted to pursue. Would you not have expected then at the very least, to have had their experts to examine Sean Devlin's clothing to see whether or not there was in fact blood upon it. And that didn't happen and of course the Defence say well look it's not up to us, it's up to the Prosecution to prove the case and it is not up to us to carry out these enquiries. That's a matter for the police and the Prosecution. "

And later

"So, you might want to ask yourselves did the police in this case, did they deliberately, recklessly or negligently fail to treat Sean Devlin as a suspect? Did they fail to keep an open mind? And did they fail to follow up relevant lines of enquiry?

But of course Sean Devlin's account is entirely consistent with the forensic evidence in this case. The only blood found in the house, in the apartment and on the relevant items, was that of Gerald O'Hagan and Paul Morrin. There has been no evidence of the

> blood of any third party having being found on any relevant item. And this was clearly a bloody attack and there was no forensic evidence to connect Sean (Inaudible) and although the police didn't forensically examine the clothing, you have their evidence that they didn't see any blood on the clothing. But we also know that Mr Devlin's mobile phone was forensically examined and there was nothing found on the mobile phone. And I have already, of course, reminded you that the clothing which is available was not examined by any Defence expert, even though they could have done that.
>
> <u>Now, you might think that if the Defence had thought for one moment that an examination of Mr Devlin's clothing would have revealed blood, that at the very least that they would have examined it</u>. But as I said to you before lunchtime the Defence says, as they are entitled to, that they don't have to prove anything, it's up to the Prosecution to prove their case. And this is a key point for you to consider, is that they were making the point, at least implicitly if not explicitly, that if Sean Devlin hadn't been properly eliminated as the killer, they would say, how can you be satisfied beyond reasonable doubt that Paul Morrin is the killer, if they haven't properly eliminated Sean Devlin. But as I say that is a matter for you to take into account and attach such weight, as you consider appropriate bearing in mind all of the evidence."

[36] We have to say that we regard the trial judge's comments on the defendant's failure to have Sean Devlin's clothing examined for the presence of blood (which we have underlined) as unwise, because, looked at in isolation, they may be thought to be capable of bearing the implication for which Mr McCartney contends. However, it is well established that an appeal court must look at any impugned passage or remark in a judge's charge in the context of the charge as a whole. In <u>R v Yap Chuan Ching</u> (1976) 73 Cr. App. R. 5 at p. 9 Lawton LJ put the matter thus.

> "Mr Latham accepted that when this Court comes to consider the effect of the final direction which the judge gave to the jury, it must be looked at against the whole background of the case, and in particular against the whole of the summing-up. That has been said time and again in this Court. If any authority is required for the proposition it is to be found in

> Hepworth and Fearnley (1955) 39 Cr. App. R. 152, [1955] 2 Q.B. 600. There Lord Goddard C.J. said: "But I desire to repeat what I said in the case of Kritz (1949) 33 Cr. App. R. 169; [1950] 1 K.B. 82: 'It is not the particular formula of words that matters; it is the effect of the summing up. If the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and the onus is all the time on the prosecution and not on the defence,' that is enough. I should be very sorry if it were thought that cases should depend on the use of a particular formula or particular form of words."

[37] Lawton LJ's comments reflect the settled practice of this Court, and so the comments of the trial judge have to be viewed in the light of the particular passages in which they occur and which have been set out above, and in the light of the trial judge's repeated reminders to the jury that the prosecution had to prove beyond reasonable doubt that the defendant was the person who struck the fatal blows. He balanced the comments complained of by immediately reminding the jury that the onus of proof lay upon the prosecution, as he did with particular emphasis at the end of the second passage quoted above. This was in addition to the standard direction on the burden of proof which he gave to the jury towards the beginning of his charge, and his reminder to the jury at the very conclusion of his charge that it was for the prosecution to prove the defendant's guilt beyond reasonable doubt. In addition, there is to be found the following passage, which occurs in the middle of the extended consideration by the trial judge of the defendant's case in relation to the position of Sean Devlin and between the passages quoted at [35] above.

> "In the first place, the Prosecution have to prove that Paul Morrin killed Gerald O'Hagan and they have to do that as beyond reasonable doubt. Now, if as a result of any of the evidence that you have heard, you think there is even a reasonable, as opposed to a fanciful possibility, that someone other than the accused might have killed the deceased, then in those circumstances the accused Paul Morrin would be entitled to be acquitted because in these circumstances you couldn't be satisfied beyond reasonable doubt that he was the killer.

> And linked to that theme, the Defence, I suspect, were also making this point. That is, if you think there were investigative errors of a kind which are capable of undermining the investigation, because relevant lines of enquiry were not pursued, or not properly pursued, with the effect that you are not or cannot be satisfied beyond reasonable doubt that Paul Morrin is the killer, again he will have to be acquitted."

[38] Looking at the charge as a whole we are satisfied that the jury was not misled as to the burden of proof, and that the trial judge correctly directed the jury on the burden of proof. We are satisfied that this ground of appeal has not been made out.

[39] The final ground of appeal relied upon took the form of an application for leave to call fresh evidence. The initial application was for leave to call witnesses in respect of four episodes where it was alleged that Sean Devlin had behaved in a violent manner, allegations which were subsequently withdrawn. We shall refer to these as the unproved allegations. On the first day of the appeal hearing Mr McCartney indicated that he only sought to rely on one of these episodes. However, it later emerged that there may have been a further episode, and it was confirmed at the start of the second day of the hearing that there had been a fifth episode which resulted in Sean Devlin pleading guilty to a charge of assault and two charges of threats to kill in respect of which he was sentenced to a total of three months imprisonment. Each of the five episodes related to events occurring after both the murder of Gerald O'Hagan and the trial. Mr McCartney was permitted to make submissions in respect of all five episodes.

[40] Before considering the circumstances of these five episodes it is necessary to consider this court's power to admit fresh evidence under Section 25(2) of the Criminal Appeal (Northern Ireland) Act 1980 (the 1980 Act) which provides:

> "(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to –
>
> (a) whether the evidence appears to the Court to be capable of belief;
>
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

> (c) whether the evidence would have been admissible at the trial on an issue which his the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

[41] As each of the episodes allegedly occurred, or in the case of the fifth incident did occur, after the trial no issue arises under s. 25(2)(d). As can be seen from s. 25(2)(c) this Court has to consider whether the evidence would have been admissible at the trial on an issue which is the subject of appeal. We are satisfied that an issue on this appeal is whether Sean Devlin may have been responsible for the murder of Gerard O'Hagan, and so that element of s. 25(2)(c) can be satisfied. That leads us to a further issue, namely whether any of the material sought to be admitted as fresh evidence would have been admissible at the trial, and that question requires this Court to have regard to the provisions of art. 5 of the Criminal Justice Evidence (Northern Ireland) Order 2004 (the 2004 Order), and in particular to art. 5(1)(b)(ii). This provides that the evidence

> "is admissible if and only if (b) it has substantial probative value in relation to a matter which (ii) is of substantial importance in the context of the case as a whole".

It is important to bear in mind that art. 5 only permits the admission of bad character evidence in respect of evidence which has "substantial probative value", and which is of "substantial value in the context of the case as a whole". The requirement that the value of the evidence be "substantial" in either instance clearly requires something more than mere relevance or probative value. In his *Evidence of Bad Character*, 2nd Edition at 3.9 Professor Spencer comments that "the effect of these is to impose a test of what might be called 'enhanced relevance'". As Hughes LJ observed in R v Braithwaite [2010] 2 Cr. App. R. 18 when referring to the similar expression "enhanced probative value":

> "We can see why, although we ourselves prefer not to rephrase the statute, remembering only that the distinction we have mentioned exists between this test and that of simple relevance."

[42] Braithwaite and the earlier decision of R v Bovell, R v Dowds [2005] 2 Cr. App. R. 27 are valuable because they address an issue which is particularly germane to the circumstances of the present application, namely the value to be attached to the unproved allegations, particularly when those allegations are subsequently withdrawn. In Braithwaite at paragraphs 18-20

Hughes LJ quoted the observations of Rose LJ in Bovell before addressing the weight to be attached to allegations that are not pursued to trial or conviction by the complainant.

> "At [21], Rose LJ giving the judgment of the court said:
>
> > '21 … It seems to us to be unlikely in the extreme that the judge, had he known of the events in 2001, would have admitted the allegation of a section 18 offence made against the complainant. We say that, first, because we entertain considerable doubt as to whether the mere making of an allegation is capable of being evidence within [art. 5(1)]. As the allegation was, in the circumstances which we have identified, withdrawn, our doubt on this aspect is increased.'
>
> 19. This court there sounded an important note of caution, but it did not have to examine all the different types of evidence which a party might attempt to adduce. It would appear that it had in mind the case where all that the applicant seeks to adduce is the fact that someone else has made a complaint, since that was the position in the appeal before it. We emphasise that whenever a bad character application is made, the court must look at the nature of the evidence. The evidence of a live witness to the effect that a complainant in an assault case has on several previous occasions mounted an unprovoked attack on him, in circumstances very similar to those before the jury, would be a mere allegation if no conviction had ensued, perhaps because there was yet to be a trial. But we leave open the possibility that it might in some circumstances (assuming truth) be assessed as having substantial probative value. That, however, is not this case.
>
> 20. A defendant who asks to adduce a CRIS report to the police containing a complaint made in the past to the police by someone else who was not prepared to support it, is advancing a very different level of probative value. First, it is, at best, hearsay. Its

> admission would fall to be judged by reference to the conditions for the admission of hearsay and we venture to suggest that given the difficulties of the jury in assessing such evidence it would be rare for it to be judged to be of substantial probative value. Secondly, if the complainant has failed to support the allegation that robs it of a great deal of probative value. If, in addition, there has been a decision by the police or CPS not to pursue the allegation or even, as in one instance, in the present case, the formal acceptance of a verdict of "Not Guilty", the probative value is even further reduced. In the present case, in the example of U given above, the CRIS reports did not even contain any accusation by anyone identifying him as responsible for the bad character conduct alleged. The 'evidence' in this case was in truth no evidence at all that the witnesses had committed the offences in question. It might be different if hard evidence of the allegation were to become available and if that is what the applicant were to seek to adduce. Accordingly we have no doubt that the judge was right to direct himself that a mere police report indicating that an allegation had been made, which remained unproven, was most unlikely to have substantial probative value."

[43] From <u>Bovell</u> and <u>Braithwaite</u> it can be seen that although the court does not close the door completely against allegations of criminal behaviour that were subsequently withdrawn being admitted because they could be assessed as having substantial probative value, such evidence should be regarded with considerable caution because the failure of the complainant to support the allegations robs them of a great deal of probative value. We propose to approach the material upon which the defendant seeks to rely in the present appeal in the same fashion.

[44] A further consideration that has to borne in mind when considering unproved allegations is that, in the absence of agreement between the prosecution and the defence as to the facts of such allegations, it will be necessary for the allegations to be proved by the complainant and other witnesses being called, or for their evidence to be admitted as hearsay evidence if for some reason the witnesses are unwilling, or unavailable, to give evidence. The potential for the "trial unreasonably to be diverted into an investigation of matters not charged on the indictment" (to adopt the words of Rose LJ in <u>R v Hanson</u> [2005] 2 Cr. App. R. 21) is obvious, and is a danger to which courts must be alert, and is a factor which must be taken into account when deciding whether the evidence is of substantial importance in

the context of the case as a whole as required by art. 5(1)(b)(ii) of the 2004 Order.

[45] Against the backdrop of these considerations we now turn to consider the four unproved allegations which were later withdrawn.

(1) Sean Devlin was alleged to have assaulted his mother Marie Devlin on 29 May 2008. She alleged he came home drunk in the early hours of the morning, there then was an argument and he punched her in the face and on the head before punching the bedroom door and banging his head on the door. There is no evidence before us from any police witness as to whether Sean Devlin was questioned in relation to this matter, and on 8 June 2008 Marie Devlin made a written statement saying she no longer wished to make a complaint and wished no further police action.

(2) On 17 October 2008 the police went to the Devlin house and found Thomas Holmes lying on his side. Sean Devlin and his mother were both extremely intoxicated and using foul and abusive language towards each other. Allegations were made, which Sean Devlin denied at the time, that he had pushed Holmes down the stairs. Sean Devlin was arrested, but there is no evidence before us as to whether any further police action was taken, and we therefore assume the complaints were withdrawn.

(3) In the early hours of 9 April 2009 the police were sent to the Devlin home when Marie Devlin reported that Sean Devlin had threatened her with a knife. She made an allegation that her son had waved a knife at her and said to her "I am going to cut your throat, I'm going to make you suffer like Gerald did". Sean Burke, her partner and carer, said that Sean Devlin "… was pushing the knife towards himself. He was shouting, 'I'm gonna stab myself and stab you'. Sean was shouting this in my direction." When the police arrived Sean Devlin was arrested for common assault, aggravated assault and possession of an offensive weapon. After caution he replied "weapon, what fucking weapon". Later he said "I gave me ma's boyfriend a battering". A knife with a broken handle was found at the scene. Sean Devlin was later interviewed and charged with these offences. However, on 15 May 2009 Marie Devlin and Paul Burke made statements in which they said that they believed Sean Devlin was trying to do harm to himself and not to anyone else, and they both withdrew their complaints.

(4) Paul Burke alleges that on 10 November 2009 Sean Devlin was drunk and started to punch him on the face and head, knocking him to the ground and punching and kicking him. He alleged that as well as cuts and bruises he had suffered damage to his teeth. He alleged Sean Devlin threatened to kill him and the police arrived. He subsequently withdrew the complaint, saying that Sean Devlin had apologised for his actions.

[46] Mr McCartney argued that each of these episodes should be viewed as inextricably linked to Sean Devlin's conduct on the night of the murder. Firstly because they demonstrated a propensity on his part to threaten and intimidate, as well as using extreme violence towards those to whom he is close. By implication Mr McCartney was arguing that these episodes made it more likely that it was Sean Devlin and not the defendant who was, or may have been, the killer. Secondly, he argued that these episodes may affect the credibility of Sean Devlin.

[47] We carefully considered the evidence relied upon in relation to each of these four episodes, but concluded that the defendant had failed to show that any of them could be said to be of substantial probative value, or be of substantial value for understanding the case against the appellant as a whole. In each case the complaints were withdrawn or not pursued, and so the allegations (which is what they are) must be regarded as having little probative value.

[48] In addition, in the episode of 9 April 2009 where it is alleged that Sean Devlin threatened this mother and Paul Burke with a knife, not only was the complaint withdrawn, but a close analysis of the accounts given by those involved reveals that there was a major dispute between Marie Devlin and Paul Burke on the one hand and Sean Devlin on the other as to what actually happened that night. Sean Devlin denied that he used a knife at all. As there is no agreement between the prosecution and the defence for the purposes of the present case as to what happened on that occasion, these differences could only be resolved, if at all, by the respective witnesses giving evidence at a trial. This would inevitably mean that a form of satellite dispute within the trial would take place, with all the potential that such a dispute would entail to divert the jury from consideration of the question before it, namely has the prosecution proved beyond reasonable doubt that the defendant murdered Gerald O'Hagan?

[49] We have already referred to the possibility that circumstances may arise where a witness is unwilling or unavailable to give evidence. In the present case it appeared that Marie Devlin and Paul Burke may not be willing to give evidence. This is because the original application to admit their evidence stated that a witness order would be sought, subject to the position adopted by the prosecution. Indeed in the course of the appeal an application

for such an order in respect of Paul Burke was placed before the court. In the end Mr McCartney did not ask for a witness order in relation to Paul Burke, but had he done so, and had the witness then declined to appear or give evidence, it might have been necessary for the defendant to seek to invoke the hearsay provisions of the 2004 Order. We mention this merely to illustrate another of the many difficulties that could arise were these applications to be granted, difficulties which would have to be taken into consideration under art. 5(1)(b)(ii) of the 2004 Order when deciding whether the evidence of the witnesses on these matters could be regarded as being of substantial importance in the context of the case as a whole.

[50] We now turn to the fifth episode upon which the defendant seeks to rely, namely Sean Devlin's conviction on a charge of aggravated assault on his mother, and threats to kill her and Paul Burke, on 27 May 2010, in respect of which we were told he had pleaded guilty and it appears he was sentenced to three months imprisonment. As Mr Ramsey QC (who appears on behalf of the prosecution on the appeal together with Mr Chesney) conceded, the conviction places this episode in a different category to the other four episodes, but he argued that nevertheless the circumstances of that episode were such that it too failed to pass the "substantial probative value" test in art. 5(1)(b) of the 2004 Order. He pointed out that what occurred was that Sean Devlin only uttered verbal abuse as well as threats to his mother and Paul Burke. Deplorable though Sean Devlin's admitted conduct was, in our opinion it falls very far short of being capable of proving that he had a propensity to attack his best friend in the way the killer attacked the deceased when he stabbed the deceased 15 times. In truth Sean Devlin's behaviour amounts to no more than the sort of deplorable verbal abuse regrettably all too frequently uttered by drunken males to members of their family. Whilst their family undoubtedly find such utterances distressing, they do not remotely support an inference, without more, that those who utter such abuse are capable of murder. We consider that Mr Ramey's submission is correct, and therefore concluded that the defendant had failed to establish that this episode should be admitted as fresh evidence.

[51] For these reasons we were satisfied that the evidence in relation to all five episodes was inadmissible under art. 5 of the 2004 Order, and it followed that the defendant failed to show that the evidence would have been admissible at the trial under s. 25(2)(c) of the 1980 Act, and we therefore refuse leave to adduce this as fresh evidence.

[52] The forensic and other circumstantial evidence relied upon by the prosecution at the trial was extremely strong, and amounted to a compelling case that proved it was the defendant who inflicted the fatal blows on Gerald O'Hagan. We are satisfied that the conviction is safe and we dismiss the appeal against conviction.