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Judgment: approved by the Court for handing down | *Delivered:* **15/01/10**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

MATTHEW JAMES O'DONNELL

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Before: Morgan LCJ, Higgins LJ and Girvan LJ

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Morgan LCJ (delivering the judgment of the court)

[1] The applicant renews his application for leave to appeal against his conviction at Dungannon Crown Court on 18 December 2007 of the murder of Noel Alexander Williamson in Caledon on 13 October 2004.

The background to the offence

[2] He is a 29 year old man with an IQ of 63 and an understanding of spoken English equivalent to that of a 6 year old child. In October 2004 he was living at Castle Park, Caledon. The applicant spent most of the day and night of 12 October 2004 drinking in the company of the deceased and Samuel Houston who subsequently admitted the manslaughter of the deceased. Houston was behaving in a threatening and aggressive manner to a number of individuals including the deceased. He harboured a grudge against the deceased as a result of an earlier incident in which Houston had been attacked by a number of youths and claimed that he had not been defended by the deceased.

[3] The applicant also made threats about the deceased during that day. One witness described how the applicant said he intended to hit the deceased when the deceased came back to a nearby park later that night as planned. That witness also said that when Houston produced a knife and said he was going to kill the deceased the applicant encouraged him to "just kill him". There was also evidence that the applicant and Houston asked the deceased

to come out to fight with them on the evening of 12 October 2004 after they had been refused admission to a public house.

[4] Around 1:30 a.m. on 13 October 2004 Houston, the applicant and the deceased were seen making their way to the park area beside the Blackwater River where the deceased's battered and disfigured body was found on a pathway along the banks of the river on the morning of 13 October 2004. The post-mortem examination revealed that he had been extensively beaten before his death and that he sustained a number of knife wounds including a severance of the carotid artery. His death may have occurred over a period of hours and took place sometime between 2 am and 4 am.

[5] In light of the events of the previous day police searched the applicant's home at Castle Park, Caledon. There they found two sets of sweatshirts, a pair of blue jeans and a pair of beige and navy tracksuit bottoms all of which were heavily stained with the blood of the deceased. The beige and navy tracksuit bottoms had a name tag referring to the applicant ironed into the back of the garment. The distribution of blood on the garments indicated that the sweatshirts and trousers formed two sets of clothing and the pattern of projected blood staining on those garments was mainly of small widespread droplets most likely as a result of impact or expiration. The search of the applicant's house also led to the finding of a plastic bag in the kitchen containing a knife. The plastic bag and the knife contained blood which matched the blood of the deceased. The medical evidence indicated that the knife was one that could have been used to inflict the wounds sustained by the deceased.

[6] There was no material dispute about any of the matters set out above. In addition to this a witness stated that she was nearly certain that the applicant was wearing beige and navy tracksuit bottoms on the evening in question. All of this evidence formed a considerable circumstantial case against the applicant and his senior counsel in this appeal fairly accepted that there was a reasonable circumstantial case against the applicant. At the end of the Crown case senior counsel for the applicant applied for a direction that there was no case to answer but that application was refused. The applicant elected not to give evidence and was convicted.

The grounds of appeal

The exclusion of the video evidence

[7] In order to explain the first ground advanced on behalf of the applicant it is necessary to deal with some of the events after the murder. The PSNI were obviously anxious to speak to the applicant shortly after the murder but he had left Northern Ireland and travelled to the Republic of Ireland. He lived there for some time before he was arrested in Cork. While in Garda custody

he was interviewed in connection with the murder and videos are available of those interviews. The prosecution sought to rely upon the content of these interviews by way of admissions in his trial. He objected to the admissibility of the alleged admissions on the basis that he had not had access to a solicitor, he was not accompanied by an appropriate adult and because of his low IQ he was suggestible and liable to have been confused in his understanding of the questions. A *voire dire* was held on this issue and in support of the latter three points oral evidence was adduced from a clinical psychologist, Dr Davies, on behalf of the applicant who relied in part on a video of part of a Garda interview which Dr Davies said demonstrated the applicant's inability to understand the concept of an identification parade. The trial Judge acceded to the application made on behalf of the applicant on the basis that the prosecution had not discharged the burden placed upon it by Article 74(2) (b) of the Police and Criminal Evidence (Northern Ireland) Order 1989 to prove beyond reasonable doubt that in the circumstances the alleged confession was not rendered unreliable.

[8] Having thus established that the interviews were not admissible the applicant then sought to obtain a ruling from the trial judge pursuant to Article 4 (1) (b) of the Criminal Evidence (Northern Ireland) Order 1988 that it was undesirable for the applicant to be called to give evidence because of his mental condition. If successful such a ruling would prevent any adverse inference being drawn by the jury from his failure to give evidence. A second *voire dire* was held in respect of this application and again evidence was given by Dr Davies. He largely repeated his evidence that the applicant had an IQ of 63, that he had the receptive language of a child of six years old and that as a result he was likely to be suggestible, liable to have difficulty understanding the implications of questions and answers and liable to have difficulty giving a coherent account. In the course of the examination of Dr Davies during this second *voire dire* Mr McGrory QC sought to introduce videos of the applicant's questioning by the gardai to provide some examples of his difficulties. The learned trial judge ruled that since the interviews had been excluded in the first *voire dire* they could not be relied upon in this application. He went on to reject the application for a ruling that it was undesirable for the applicant to be called to give evidence.

[9] No statutory authority was cited in the brief exchanges between the learned trial Judge and Mr McGrory QC on the issue of the exclusion of the video evidence and the matter was not raised again before the end of the trial. At the hearing of this application for leave to appeal McGrory placed reliance on Article 74(4) (b) of the Police and Criminal Evidence (Northern Ireland) Order 1989.

> "(4) The fact that a confession is wholly or partly excluded in pursuance of this Article shall not affect the admissibility in evidence-

(a) of any facts discovered as a result of the confession; or

(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so."

At least part of the reason for which the applicant wished to admit the videos was to demonstrate how the applicant expressed himself in his exchanges with the Gardai. Mr Reid, for the prosecution, was disposed to accept that on this basis the evidence was admissible and we consider that it was admissible for the purposes set out in Article 74 (4) (b).

[10] It was submitted on behalf of the applicant that this evidence was significant because it would have enabled the applicant to demonstrate his suggestibility. However, the portion of video on which the applicant intended to rely did not in fact touch on suggestibility and in any event it was common case between the experts retained by the applicant and the prosecution that the applicant was suggestible as one would expect with a person with the applicant's IQ. In fact this evidence was no more than an opportunity to demonstrate examples of the difficulty that the applicant might have in dealing with relatively straightforward concepts, a matter on which Dr Davies had already given extensive evidence which was not significantly in dispute. The omission of this evidence would not, therefore, have had any material effect on the decision-making of the learned trial Judge.

The ruling under Article 4(1)(b) of the Criminal Evidence (Northern Ireland) Order 1988

[11] The second ground of appeal pursued at the hearing concerned the reasoning of the learned trial Judge in rejecting the applicant's submission that it was undesirable for the applicant to be called to give evidence. It was contended that the learned trial Judge failed to appreciate the extent to which the mental handicap of the applicant impaired his ability to appreciate the consequences of his answers. This was based on the evidence of Dr Davies who expressed concern in an exchange with the learned trial Judge about whether the applicant could give a coherent account.

> "**Mr Justice Hart**: If it were the case that the procedures and particularly the questions were simplified as much as possible both in terms of their length, complexity and the basic language used would he be able to express himself satisfactory?
>
> **Dr Davis:** He understands language approximating to that of a six year old so the

questions and the procedures would have to be simplified quite dramatically. I think he would also have difficulty understanding the implications of his questions, of his answers, I'm sorry, and I'm not sure how that issue could be addressed.

Mr Justice Hart: You see although it's not, fortunately, very common, there have been instances of children even younger than six giving evidence in court, usually nowadays by way of a pre-recorded video statement. I'm sure you have seen these in the course of your practice.

Dr Davis: Yes.

Mr Justice Hart: Where everybody tries as hard as they can to keep it as simply as possible for the child. So if it were the case that everyone tried to keep it as simple as possible for the accused is it not the case that he would be able to give a coherent account, as best he can within his limitations that you referred to?

Dr Davies: I think he can give an *account*. Whether he could give a coherent account I don't know, my Lord."

[12] The learned trial Judge dealt with this concern in the following passage of his ruling.

"I have referred to Dr Kennedy's report and I will just read the two relevant passages which have been referred to. The first is to be found at the foot of page 10 and paragraph 4.4 of her statement where she says:

> 'He was obviously limited in intellectual functioning with poor sense of chronology and specifics of events. He was suggestible and gave the impression of understanding more than he really did. This was evident when asked to explain something.'

Then at the foot of the page 11 and paragraph 5.4 she says:

> 'Regarding fitness to plead Mr O'Donnell is aware of the charge against him. He is able to instruct counsel and enter his plea. He is able to understand the concept of challenging a juror if this were necessary. He states that he has no contacts in North of Ireland.'

Those observations do not touch upon the issue I have to determine other than in a tangential way, but Dr Kennedy continues:

> 'He reports having had difficulty in comprehending court proceedings in the past as long words are used and people talk at speed. However, if account is taken of his need to have material simply phrased and to allow for adequate consultation with others to ascertain his understanding and clarify where necessary, it is my opinion that he should be capable of following proceedings and actively contributing to them.'

Dr Davies recognised that if the court were to ensure that procedures were simplified, particularly in ensuring that questions were simply phrased and avoided complex concepts, that the defendant may be able to participate in the proceedings. Nevertheless it is right to say that he entered a significant reservation in relation to that because he gave his opinion that he did not know whether even in such circumstances the defendant could give a coherent account. Mr McGrory quoted the passage from the trial judge in *Friend* who referred in a phrase which is a useful aid in these circumstances to the 'grey area'. Cases will inevitably fall on different sides of the line depending upon the circumstances of individual cases, but I am satisfied that the present defendant's ability to understand and to follow the proceedings and to express himself, subject to a caveat I shall mention in a moment, is such that I should not exercise my discretion in the way sought by Mr McGrory and I decline to do so. I will, therefore, if necessary give an

> adverse inference direction in the event that the accused does not give evidence.
>
> The caveat to which I refer, however, is the way in which his testimony is to be placed before the Jury in the event that he chooses to give evidence, and I do the utmost that I can to ensure that any questions that he is asked are expressed in as simple a fashion as possible, that they are phrased in such a way as not to guide or suggest the answer to him, and in all respects to ensure that he can give such account of the events of that night as he wishes to do."

[13] It is accepted that in determining this issue the test that should be applied is that it is only proper to interfere with the learned trial Judge's conclusion if it is "Wednesbury unreasonable" (see R v Friend [1997] 1 WLR 1433 at 1443). The court had the benefit of evidence on this issue from Dr Christine Kennedy, a consultant psychiatrist. The passage quoted from the ruling at paragraph 12 above demonstrates that the learned trial judge was alert to the point made by Dr Davies. There is no basis for the suggestion that he failed to take it into account. It appears to us that the learned trial Judge reached his conclusion in a proper and balanced manner taking into account all material considerations and that there is no substance in this ground of appeal.

The direction on a case to answer

[14] The third ground of appeal related to the learned trial judge's charge to the jury on the issue of whether they should draw an adverse inference from the fact that the applicant did not give evidence. In support of this ground the applicant relied on the decision of the English Court of Appeal in R v Cowan and others [1996] QB 373 which dealt with similar provisions in the Criminal Justice and Public Order Act 1994. That was a case in which the appellant had resisted a direction that the jury could draw an adverse inference from the fact that the appellant had not given evidence on the basis that if he had given evidence he could have been exposed to cross-examination about his previous convictions. The court rejected that submission but highlighted certain essentials which such a direction should contain.

> "(1) The judge will have told the jury that the burden of proof remains upon the prosecution throughout and what the required standard is. (2) It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice. The right of silence remains. (3) An inference from failure to give evidence cannot on

> its own prove guilt. That is expressly stated in section 38(3) of the Act. (4) Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence. (5) If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

The JSB specimen direction was subsequently changed in England and Wales in 1998 to include a requirement that the jury must find that there is a case to answer on the prosecution evidence before drawing an adverse inference from defendant's silence.

[15] In this jurisdiction the JSB specimen direction does not entirely follow the Cowan direction. In particular it is left to the judge in each case to decide whether to direct the jury that they should consider whether the prosecution case is so strong that it calls for an answer. Further assistance on how to address this issue is set out at Note 4 of the relevant specimen direction.

> "Where the judge has refused an application for a direction, or no application has been made, it is considered that it is normally inappropriate to state that the jury has to be directed to consider whether the defendant has a case to answer, despite the remarks of Lord Taylor CJ in *R v Cowan & others* [1996] 1 Cr. App. R.1. However, there may be circumstances (e.g. where the defence case is that the evidence against the defendant is so weak that it does not require an answer) where a direction along these lines may be appropriate."

[16] In this case the learned trial Judge followed the specimen direction meticulously but did not invite the jury to consider whether the prosecution case was so strong that it called for an answer. That clearly reflected his view that this was not one of those cases where the evidence was so weak as to

require such an approach. We have set out at paragraphs 2 to 6 above the substantial body of evidence which supports that view. We do not consider that the absence of this direction rendered the trial unfair or the conviction unsafe. This conclusion is similar to that reached by the English Court of Appeal in R v Chenia [2002] EWCA 2345 at paragraph 55 and R v Whitehead [2006] EWCA Crim 1486 at paragraph 47 despite the clear terms of the specimen direction applicable in each case.

[17] In support of his submission on this point Mr McGrory QC also relied upon R v Becouan [2005] UKHL 55 in which the only reasoned opinion was delivered by Lord Carswell. That was another case in which the issue was whether it was fair to invite the jury to draw an adverse inference from the failure of the appellant to give evidence where he would be subject to cross examination on his bad character if he did so. It was essentially a direct challenge to the decision in Cowan on this point and was rejected. The issue of whether it was necessary to invite the jury to consider whether they were satisfied that the appellant had a case to answer did not arise. It is, however, notable that the trial judge in that case did give such a direction and Lord Carswell did not comment adversely on it. We consider that there is force in the reasoning set out in Cowan and that it is now appropriate to amend the JSB specimen direction in this jurisdiction by adding a direction that the jury should not draw an adverse inference unless they consider that the prosecution's case is such that it clearly calls for an answer.

Conclusion

[18] Although the applicant also made an application for the receipt of new evidence in relation to suggestibility in the papers Mr McGrory recognised that this was unnecessary having regard to the evidence on suggestibility and did not pursue the mater further at the hearing. The issue for us is whether the conviction is unsafe or whether we are left with any significant sense of unease in relation to it (see R v Pollock [2004] NICA 34). For the reasons set out above we are not so satisfied and not left with any sense of unease. The application must be rejected.