**Neutral Citation No. [2013] NICA 33** | *Ref:* **MOR8930**

*Judgment: approved by the Court for handing down* | *Delivered:* **25/06/2013**

*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**PATRICK LIVINGSTONE**

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**Before: Morgan LCJ, Coghlin LJ and McCloskey J**

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**MORGAN LCJ (giving the judgment of the court)**

[1] This is an appeal by way of reference from the Criminal Cases Review Commission ("CCRC") pursuant to the powers contained in Part II of the Criminal Appeal Act 1995. The appellant was represented by Ms McDermott QC and Mr Sayers and the prosecution by Mr O'Donoghue QC. We are grateful to counsel for their helpful oral and written submissions.

[2] The appellant was convicted at Belfast City Commission on 18 May 1977 of the murder of Samuel Llewellyn on 15 August 1975. The deceased was an employee of the Belfast City Council Cleansing Department and was delivering hardboard to the Falls Road area in the aftermath of a bomb. He was abducted and taken to a house in Leeson Street where he was shot a number of times in his head and body. His body was wrapped in a sheet and put on the back of a van which was then set alight.

[3] On 10 December 1975 the appellant was in custody in the Republic of Ireland in respect of another matter. Detective Chief Inspector McBrien, Detective Inspector Rawson and Detective Sgt McVicker of the Royal Ulster Constabulary interviewed him at Dundalk Garda Station about the murder. In September 1976 the appellant was arrested in Northern Ireland on suspicion of an unrelated offence and he was subsequently charged with the murder.

[4] The only evidence against the appellant at his trial was that of the three RUC officers who had interviewed him in December 1975 alleging that he had confessed to the murder. They stated that during the interview he was cautioned and shown a picture of the deceased. He replied, "That's the fucker.

Isn't he nice looking". He then admitted that he was at the address in Leeson Street on the evening of the murder and that he had murdered the deceased. He told the officers that there was nothing that they could do about it because if they tried to extradite him he would be given bail and would not be seen by them again. He was asked if he fully realised that he was admitting to murdering the deceased and he replied "Yes, I fucking well shot him".

[5] The appellant disputed this account. He said that on the day in question he was attending Dundalk District Court. During the lunch interval he was brought to Dundalk Garda Station where the custody sergeant showed him into an office upstairs and closed the door. He said that the three RUC officers were there and he told them that he did not want to talk to them. He tried to leave but the door would not open. He believed that the custody sergeant was pulling the handle on the other side of the door to stop him from opening it. He said that one of the officers showed him a photograph and the appellant told them that he did not recognise the man in the photograph. He denied making any admissions. He stated that the interview lasted only a few minutes whereas the RUC officers said that it had lasted for 30 minutes.

[6] Although it was not apparently introduced at the trial a report by a Garda Superintendent dated 29 April 1977 which appears to have been based on earlier documentation stated that the interview took place between 1.40 PM and 2.10 PM. That appears to support the police account. The report also notes that an extradition warrant in relation to the appellant on the murder charge was the subject of a court hearing in Dundalk on 23 June 1976. The extradition mater had not been resolved by the time of his arrest in Northern Ireland in September 1976.

[7] Lord Justice McGonigal conducted the trial on charges of murder and possession of a firearm and ammunition with intent. In his judgment he stated that having seen the officers concerned give evidence and having seen the accused give evidence he had no doubt that the evidence on behalf of the Crown was correct. He concluded that the statements were considered by the accused to be true at the time he made them and he made them as a true admission of what he had done. He convicted the appellant of murder and possession of a firearm with intent to endanger life and the conviction was upheld on appeal.

**The CCRC investigation**

[8] The CCRC examined the file in relation to the prosecution of Owen Farrell for the offence of acting with intent to impede the prosecution of the appellant for the murder of the deceased. Farrell was arrested on 4 September 1975 and interviewed by a team of detectives including DCI McBrien, DI Rawson and DS McVicker. On 6 September 1975 police searched the premises of his brother Henry and recovered ammunition from the roof space. Farrell

admitted having put the ammunition in the roof space and admitted to being a member of the IRA.

[9] Farrell was examined by Dr Irwin after he was charged at 1 pm on 7 September. Although there was some confusion about this on the papers it seems likely that the examination took place between 1.40 pm and 2.10 pm later that afternoon. He complained that he had been mistreated and assaulted by police. He claimed that on the night of 5 September 1975 he was put against a wall and hit across the stomach with an open hand, had chest and head hairs pulled and was hooded and spun round and hit across his feet for about 45 min. He said that during the morning of 6 September he was slapped on the face and stomach for 30 minutes. He stated that on the night of 6 September he was stripped, had cold water thrown over him and was hit with open hands. He also alleged that he had two hoods and a plastic bag put over his head as result of which he passed out on a number of occasions. He was also grabbed by the throat causing him to pass out. He said that he was stripped again and a revolver with one round in the chamber held to his chin and ear, that he was pulled along a corridor and put in a tank of cold water, had his head pushed into the water, was hit on the body and had his arms twisted.

[10] Farrell claimed that as a result of this treatment he agreed to sign a statement which was put in front of him at about midday on 7 September. In the statement, which he maintained was neither true nor voluntary, Farrell stated that he was told on the day of the murder that he was wanted by the appellant at a house in Leeson Street, Belfast. He went there and saw the appellant and another man carry the body of the deceased down the stairs. Farrell said that he kept watch for a van and then kept the door open so that the appellant and the other man could place the body in the back of the van. It was alleged that the appellant then admitted to Farrell that he had shot the deceased. This formed the basis for the charge that Farrell acted with intent to impede the prosecution of the appellant.

[11] Dr Irwin recorded the following injuries to Farrell:

(i) A faint scratch mark 2 ½" long on the right renal area;
(ii) Two bruises 2" in diameter on the left scapular region;
(iii) A small bruise in the right axilla;
(iv) A linear scratch mark 3 "long on the left arm;
(v) A bruise on the right deltoid;
(vi) A faint bruise on the left deltoid;
(vii) A 1" bruise above the left elbow;
(viii) A bruise on the right knee 1 ½" below the patella.

In Dr Irwin's opinion those injuries occurred within 48 hours of the examination and he considered it possible but highly unlikely that the bruises and scratches could have been self-inflicted.

[12] Farrell had been interviewed by a team of detectives between 8:05 PM on 4 September and 1 PM on 7 September 1975. The only detectives to interview him on the evening of 5 September 1975 were DI Rawson and DS McVicker between 8:10 PM and 9:35 PM and DCI McBrien and another officer between 9:35 PM and 11:25 PM. That was the first period when Farrell claimed he was mistreated and fell within the 48 hour window for the infliction of injuries suggested by Dr Irwin. DS McVicker and another officer had interviewed him between 3:30 AM and 4:40 AM on 7 September 1975.

[13] On 30 November 1976 Farrell pleaded guilty to offences under the Firearms Act (Northern Ireland) 1969. Senior Counsel for the prosecution entered a Nolle Prosequi in relation to the count charging him with acting with intent to impede the prosecution of the appellant. Prior to this there were several consultations with both the interviewing officers and the doctor which did not disclose any explanation for the injuries to Farrell other than the conclusion that he had been assaulted whilst in police custody. In those circumstances it was concluded that the prosecution could not sustain the voluntary nature of his statement of admission.

[14] Mr Farrell had lodged a complaint in relation to his treatment while in custody but the complaint was withdrawn when the Nolle Prosequi was entered. As a result no investigation of the complaint took place. The papers do not indicate that there was any disclosure to the appellant's legal team of Farrell's complaint or the reasons for entering the Nolle Prosequi in his case.

[15] The second matter investigated by the CCRC related to the quashing on appeal of the convictions of a Mr Bradley who was convicted on 16 November 1977 of assault occasioning actual bodily harm against four officers including DS McVicker and of common assault against DI Rawson. The offences were alleged to have taken place on 2 June 1976 at Springfield Road police station where Bradley was in custody in relation to the murder of a police officer earlier that day. The police stated that while in an interview office he became violent, assaulted officers and had to be restrained.

[16] Although Bradley complained that he had been assaulted by at least seven policemen the police records suggest that there were initially four officers in the interview with him including DI Rawson and DS McVicker and that DCI McBrien who had been next door came in as a result of the commotion. A report by Dr Irwin identified 17 areas of bruising over Bradley's body the appearance of which suggested that they had been sustained during the period in police custody. Dr Irwin concluded that these

showed evidence of the receipt of a number of blows to his body which it would have been difficult, in the main, to have self-inflicted.

[17] Bradley appealed his conviction on the basis that none of the police officers involved gave any explanation as to how these injuries had been sustained. The Court of Appeal allowed the appeal observing that it found that the police evidence could not have been the entire truth of the incident. The evidence at trial from the doctor was that if Bradley had turned up at casualty with these injuries in the absence of a history the conclusion would have been that he had received a severe beating.

[18] The CCRC concluded that the evidence relating to Farrell's case should have been disclosed to the appellant's defence lawyers. To a lesser extent there was new evidence relating to Bradley's case which post-dated the appellant's case. The CCRC considered that if the trial judge had been aware of the evidence he might reasonably have altered his assessment of the credibility of the RUC officers' disputed evidence that the appellant had admitted the murder to them during interview at Dundalk Garda Station on 10 December 1975.

**Disclosure at common law**

[19] The obligation on the prosecution to make pre-trial disclosure is now the subject of a careful statutory regime. No such regime was in place, however, at the time of this trial or the subsequent appeal. The obligation to make pre-trial disclosure at common law was considered by the Court of Appeal in R v Foxford [1974] NI 181. That was a case dealing with the production of previous statements made by Crown witnesses. The court considered that if the facts relating to the making of the statements were unusual that would justify the trial judge in directing the prosecution to furnish the statements to the defence although it remained a matter of discretion for him and the Court of Appeal would rarely interfere. Otherwise the trial judge had to rely on the Crown's discretion and propriety.

[20] Pre-trial disclosure obligations at common law developed further culminating in a number of cases in England during the early 1990s. Those cases established that in order to secure a fair trial pre-trial disclosure should be made of material that was relevant. In R v Keane [1994] 1 WLR 746 Lord Taylor considered that this included any material which could be seen on a sensible appraisal by the prosecution:

(1) to be relevant or possibly relevant to an issue in the case;

(2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or

(3) to hold out a real as opposed fanciful prospect of providing a lead on evidence which goes to (1) or (2).

[21] Although it appears that the practice in relation to pre-trial disclosure at common law at the time of the hearing of this trial and appeal was materially different from that which was required by Keane we consider that we should apply the Keane standard. We have previously approved in R v Brown and others [2012] NICA 14 a passage from Lord Bingham's judgment in R v King [2000] 2 Cr App R 391 where he said:

> "In looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy."

We have applied that principle in this case.

**Discussion**

[22] The sole issue at the trial was the truthfulness or otherwise of the police witnesses. It was the essence of the defence case that these three witnesses unlawfully had concocted amongst them an account of the interview which was then untruthfully supported by their evidence in order to obtain the appellant's conviction. The circumstances relating to the entry of the Nolle Prosequi in relation to Farrell now raise an issue as to whether the police interviewers had participated in acts of violence in order to secure from Farrell a statement in writing which would implicate the appellant in the murder.

[23] All three officers concerned in the appellant's case had interviewed Farrell during the evening of 5 September 1975. Farrell claimed that this was the beginning of the ill-treatment designed to get him to sign the statement incriminating the appellant. That alleged ill-treatment occurred within 48 hours of the medical examination which recorded the injuries to Farrell.

[24] We consider that this material was concerned with the issue of whether there was bias on the part of the three police interviewers in the appellant's case as a result of which they were prepared to implicate the appellant and secure his conviction by unlawful means if necessary. We are satisfied that it would have provided a real prospect of providing a lead on evidence which would have been material to the issue of bias which was relevant in the case. Applying the Keane test the material should, therefore, have been disclosed.

[25] Mr O'Donoghue correctly invited us to consider the use which could have been made at the trial of the Farrell material if it had been disclosed. None of the allegations by Farrell had been tested and none of the police officers who interviewed the appellant was specifically identified by him. His claim in relation to the night of 5 September did, however, raise allegations which appeared to be directed at the three interviewers. There was medical evidence which supported the allegation that he had been injured at some stage. The interviewing police officers were unable to explain those injuries. Farrell's case was that the attacks upon him were designed to force him to sign a statement implicating the appellant in the murder.

[26] Where it is contended that facts show that a witness is biased in relation to a party such facts may be independently proved as well as being the subject of cross-examination. Bias is an exception to the rule against collateral attack on credit (see AG v Hitchcock (1847) 1 EXCh 91). It would, therefore, have been open to the appellant's lawyers to call Farrell in support of the bias case, to call the doctor who examined him and to prove the interview roster. In light of the entry of the Nolle Prosequi it is difficult to know how the Crown would have responded to this case being made. They would have had to call the interviewers to prove the alleged oral confession and the interviewers would then have been subject to cross-examination on the Farrell allegations. The Nolle Prosequi suggests that the prosecution would have had to consider whether it should concede some infirmity on the part of the police witnesses on those allegations. If so that plainly could have affected the assessment of their credibility.

[27] The second issue concerns the Bradley material. It is unnecessary to review the evidence in any detail. The important point is that the Court of Appeal concluded that the police evidence about the alleged fracas could not have been the entire truth. Two of the interviewers under scrutiny were among the four policemen in the interview room when the event started and the third interviewer came in later. The finding of the Court of Appeal is clear evidence that the officers in the room had not truthfully stated all of what had occurred.

[28] It may be said that the circumstances of the discreditable act in Bradley's case were different from those alleged in the appellant's case but a similar submission was rejected in R v Malik [2000] 2 Cr App 8 where Lord Bingham said:

> "If there is clear evidence that a police officer, whose credit and credibility are significant in the case before the jury, has been guilty of serious malpractice on an earlier occasion, that necessarily damages his credibility when it falls to be judged on the second

> occasion, even though the malpractice alleged on the second occasion is of a different kind."

We consider, therefore, that the police officers could have been cross-examined on the basis of the finding of the Court of Appeal and the finding of that court could have been introduced in evidence in the appellant's case if it had been available.

**Conclusion**

[29] In light of our analysis of the material for which the appellant has made an application to adduce fresh evidence pursuant to section 25(1) of the Criminal Appeal (Northern Ireland) Act 1980 we consider that the material in relation to Farrell and Bradley should be introduced for the purpose of developing the points made in argument above. Thus we accede to his application. We have concluded that the Farrell material, which has never been tested, would have opened a line of enquiry which might have affected the credibility of the police witnesses. Because of the non-disclosure the appellant lost the opportunity to pursue that line of argument. We have also concluded that the Bradley material raised evidence of wrongdoing in relation to the giving of evidence in that case by some at least of the police interviewers which may have influenced the assessment of the credibility of those witnesses by the learned trial judge in the appellant's case.

[30] The principles which we should apply have been helpfully set out in R v Pollock [2004] NICA 34.

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

For the reasons set out we have a significant sense of unease about the correctness of this verdict and accordingly allow the appeal.