

Neutral Citation No. [2009] NICC 77

Ref: **HAR7689**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **4/12/2009**

IN THE CROWN COURT IN NORTHERN IRELAND

**LONDONDERRY CROWN COURT
(SITTING AT BELFAST)**

THE QUEEN

v

ROBERT DEAN PORTER AND NIALL REGAN

HART J

[1] Robert Dean Porter and Niall Regan are jointly charged on an indictment containing three counts relating to the death of Gregory Paul Woods. They are charged with his murder in count one, with his manslaughter in count two and with his false imprisonment in count three.

[2] Mr John McCrudden QC (who appears on behalf of Porter with Mr Seamus McNeill), applied to the court under the provisions of s. 2(3) of the Grand Jury (Abolition) Act (Northern Ireland) 1969 for the entry of a No Bill in respect of each of the three counts against Porter. No application has been made on behalf of Regan. Having heard the submissions by the prosecution and the defence I stated that I proposed to enter a No Bill on the charges of murder and false imprisonment against Porter, but to refuse a No Bill on the count of manslaughter. I briefly stated my reasons, and said that I would give my reasons in full at a later date, which I now do.

[3] In order to determine whether there is sufficient evidence at this stage to justify Porter being placed on trial on these charges I must apply the well-established principles summarised in R v. McCartan and Skinner [2005] NICC 20.

(i) The trial ought to proceed unless the judge is satisfied that the evidence does not disclose a case sufficient to justify putting the accused on trial.

(ii) The evidence for the Crown must be taken at its best at this stage.

(iii) The court has to decide whether on the evidence adduced a reasonable jury properly directed could find the defendant guilty, and in doing so should apply the test formulated by Lord Parker CJ when considering applications for a direction set out in Practice Note [1962] 1 All ER 448.

[4] At approximately 3.00 am on the morning of Monday 4 February 2008 Niall Regan reported to the police that Gregory Woods was missing. His body was found on Tuesday 5 February 2008 lying on some bog land adjacent to a rough track leading into the Glenshane forest at an isolated spot overlooking the Glenshane Road at a point to the left of, and some distance from but in sight of, the Ponderosa Bar which is close to the summit of the Glenshane Pass. Professor Crane, the State Pathologist for Northern Ireland, concluded in his post mortem report that:-

“...The clothing he was wearing was sodden.

Death was due to hypothermia, a condition characterised by a progressive fall in the body temperature usually associated, as in this case, with exposure to adverse weather conditions. The development of hypothermia is progressive with increasing confusion, drowsiness and eventual loss of consciousness. In this case the circumstances leading up to his death would support the diagnosis of hypothermia.

He was also quite heavily intoxicated when he died. The report of Forensic Science Northern Ireland shows that, at the time of his death, the concentration of alcohol in the bloodstream was 232 mg. per 100 mls. The very high urine concentration indicates that the blood alcohol level would have been even higher prior to his death. There is no doubt that this alcohol intoxication would have predisposed to the development of hypothermia and in view of this should be regarded as a contributory factor in his death.

...

There were no serious marks of violence. Some small abrasions on the face, streaky abrasions on the left forearm and an abrasion on the right thumb were probably caused by contact with a rough surface such as the ground. There were also some areas of bruising on the right buttock and the backs of the thighs but these appeared to be a few days old. There was nothing to indicate that he had been assaulted.”

[5] The location at which Mr Woods’ body was found is central to the prosecution case and can best be described from the scene shown in the photograph album Exhibit 2. Photograph 5 shows that the body was found a few feet from a forest track shown on the area map, Exhibit 4, as the Coolnasillagh Road. The Coolnasillagh Road is a side road entered from the left of the main Glenshane Road when travelling from the Belfast direction. Then, according to the scale on the map, after approximately 1,300 yards one reaches the position at which Mr Woods’ body was found. From the body to the side of the Glenshane Road in a straight line towards the Ponderosa Bar is approximately 417 yards according to the scale on the map. As can be seen from photograph 5 the ground between where Mr Woods’ body was found and the side of the Glenshane Road is open but rough, boggy and difficult to cross. Although it is not evident from the photographs, the map shows that there is a small stream or burn which runs parallel to the Glenshane Road, then turns left and goes underneath the Glenshane Road through a culvert just opposite the Ponderosa Bar. The track itself is a flat, well-delineated, straight road of the type commonly found in or leading to forests. There are no obstructions between where the body was found and the side of the Glenshane Road that would obscure the lights from the Ponderosa Bar or from passing traffic, both of which would be clearly apparent to someone at that location as is apparent from photograph 7.

[6] This location where the body was found is at a considerable height above sea level, and the prosecution evidence is that on the night of Sunday 3rd February and the morning of Monday 4th February it was cold in this general area. The air temperature recorded at the nearest weather station at Lough Fea shows that it was between 0.7 degrees Celsius and - 0.2 degrees Celsius that night.

[7] The prosecution case is that Porter and Regan had been drinking with Gregory Woods on Sunday night, and that they took him up to this remote spot where he was put out of Regan’s car and left there. The admissible evidence against Porter is that he collected Woods from his home in Castledawson on Sunday 3rd February 2008, and then took Woods to Porter’s home in Main Street, Maghera where they spent some time drinking together. Porter admitted to the police that Woods had been drinking heavily with him, see

page 434 of the interviews, and he said that later Woods and Regan headed off together.

[8] The evidence of Robert Dawson, a taxi driver, is that he picked up Porter twice on Monday 4 February 2008. During the first journey Porter talked about “hitting” Gregory Woods, and putting Woods out of the car. In the second journey Porter asked Dawson to take him to the top of the Glenshane, and when Dawson did so directed him onto an isolated moss road where he stopped and Porter then searched for something, using a cigarette lighter to provide a light as it was dark at that time. Judging by the description this appears to have been the Coolnasillagh Road.

[9] Porter told the police in interview that when he had heard that Regan or someone else had rung the police and said that Woods was on the Glenshane Pass, he went in Dawson’s car to the Glenshane Pass to look for Woods. He kept an eye out to see if Woods would come walking along the road and, despite it being about 9.00 pm and dark, got out to search.

[10] The prosecution also rely upon the evidence of a number of witnesses showing that Porter had displayed animosity towards Woods as demonstrating a motive on the part of Porter to inflict harm upon Woods. This evidence falls into two categories.

[11] First of all, there is the evidence of a number of witnesses that Porter displayed or threatened violence towards Gregory Woods in their presence. June Evans said that in the summer of 2007 she saw Porter punch Gregory Woods on the face for no reason. Adrian Chambers said that in October 2007 he saw Porter break Gregory Woods’ finger by bending it back. Terence Woods, a cousin of Gregory Woods, alleged that when he told Porter that Porter could not beat Gregory Woods at boxing, Porter said “That he would beat him and that he was going to kill him”. This was on the Thursday before Woods went missing. John Gallagher said that on 31 January 2008 Porter came to Terence Woods’ home looking for Gregory Woods in an aggressive frame of mind, saying that he was going to “beat” Woods and “get him”. On 2 February 2008 Norma Kane alleged that she heard Porter saying to her son Stephen on the telephone, “can you get your hands on a trigger?” and that Gregory Woods had to be caught because he had sexually abused another person, A.

[12] On 2 February 2008 the police stopped a car in which Porter was travelling, and in the course of conversation Porter said to Constable Riddell, “I am going to kill Gregory Woods if I find him”. No response was made to this statement by the police and it would therefore seem that they did not take it seriously. Constable Conway, who was also present, alleges that Porter said that Gregory Woods is a dirty old perverted bastard and that he hated the bastard. It appears that the reason for these statements was that another person, B, alleged that he had been sexually assaulted by Woods.

[13] The second category of witnesses upon whom the prosecution rely make a number of allegations based upon hearsay statements to them as to acts of violence by Porter, or threats by Porter towards Gregory Woods and others. Mr Mateer QC (who appears for the prosecution with Mr Russell Connell) submitted that the court was entitled to take these into account at this stage by virtue of the provisions of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order). These allegations are hearsay allegations within the meaning of the 2004 Order, and they may amount to bad character under the 2004 Order, unlike those allegations to which I have already referred which do not come within the definition of bad character because Article 3(a) of the 2004 Order provides that bad character does not include “evidence which has to do with the alleged facts of the offence with which the defendant is charged”. I therefore consider that the allegations which point to Porter having a motive to inflict harm on the deceased in the days before his death are not within the meaning of bad character contained in Article 3 of the 2004 Order, and so may be taken into account at this stage of the proceedings because they do not come within the category of evidence considered below.

[15] Whilst the prosecution have served hearsay and bad character notices, these give rise to issues which cannot be determined at this stage of the case because they will require the court to make an order that they should be admitted in evidence, and, as I will endeavour to show, that is not something upon which the court can or should embark at the No Bill stage. In so far as the bad character allegations are hearsay, Article 35(3) of the 2004 Order states that rules of court may require a party proposing to tender hearsay evidence to serve on each party a notice to that effect. Rule 44O (1) of the Crown Court Rules applies to a party who “wishes to adduce evidence on one or more of the grounds set out in Article 18(1)(a) to (d) of the 2004 Order”, and Rule 44O (2) and (3) provide that where the application is made by the prosecutor the prosecutor has to give notice of the application “within 14 days of the committal of the defendant”.

[16] Similar provisions are to be found in relation to bad character applications, because Article 16(2) of the 2004 Order states that where the prosecution wish to adduce evidence of bad character rules of court may provide for the prosecution to serve a notice of its intention to adduce such evidence. Rule 44N (4) of the Crown Court Rules requires the prosecution to serve a notice of its intention to adduce such bad character evidence within 14 days of the committal.

[17] I consider that the effect of both sets of provisions is to defer the decision of the court as to whether, and if so to what extent, bad character and hearsay evidence should be admitted, because whilst bad character and hearsay evidence is admissible under the 2004 Order, it is not admissible until and unless a party applies to have such evidence admitted, and the court has

decided to admit the evidence. Were bad character and hearsay evidence to be considered at the No Bill stage the court would be required to determine whether or not this evidence should be admitted in order to decide whether or not there is a sufficient case to put the accused upon trial, evidence which in all probability would be the subject of defence counter notices and objections. This would require the court to embark upon satellite litigation when a No Bill application should be determined purely upon the basis of the material contained in the committal papers. Indeed, as Mr McCrudden pointed out, until a defendant is arraigned there will be no trial in which this evidence can be admitted, and whether there will be an arraignment is contingent upon the No Bill application being refused. I am therefore satisfied, contrary to Mr Mateer's submissions, that any evidence that depends upon the granting of bad character or hearsay applications must be ignored for the purposes of a No Bill application, notwithstanding that the prosecution have already served hearsay and bad character applications in respect of that evidence.

[18] I propose to deal with the counts on the indictment in reverse order because the false imprisonment count relates to the circumstances in which the deceased arrived at the scene where it appears he met his death. Mr Mateer submitted that false imprisonment was established in two respects. First of all, the deceased was taken to the location where he was abandoned against his will. The short answer to this submission is that there is no evidence against Porter to that effect. It may be thought that the deceased must have been taken against his will, but that would be to speculate and not to draw a justifiable inference based upon admissible evidence against Porter.

[19] The second basis upon which the prosecution allege that the deceased was falsely imprisoned was because, as it is put in the written submissions, it was "no less a confinement for the deceased to have been placed at the location where he was placed in all of the circumstances". It may well be that in certain circumstances to abandon a person in an isolated location might amount to false imprisonment where the person has no means of leaving that location, as when Robinson Crusoe was abandoned on a desert island. However, in the circumstances of the present case, the deceased was abandoned by Porter at a point where, depending upon his state of sobriety and other circumstances, in particular how dark it was, it was possible for him to walk from the scene to the main road along the Coolnasillagh Road to which I have referred. Whilst this may have been difficult for him to do at night, particularly as he was considerably intoxicated, I do not consider that in all of the circumstances he can be considered to have been falsely imprisoned at the point where he was put out of the car and left by the road side. In order to constitute false imprisonment a person has to be subject to constraint, whether by words, as in Alderson v Booth [1969] 2 QB 216, or by actions, as where there is a physical detention. In the present case, there is nothing to show, or to justify an inference, that the deceased was physically restrained or detained after he was

put out of the car, indeed the evidence is to the contrary. For these reasons I grant a No Bill against Porter on the third count.

[19] This leads me to the second count, the count of manslaughter. Mr McCrudden advanced his argument on two grounds, first of all that there was nothing to show that Porter was guilty of an unlawful act by abandoning the deceased at this point, or in the alternative that he could not be guilty of gross negligence manslaughter because there was no duty of care upon which the allegation could be based.

[20] I am entirely satisfied that there is evidence from which a jury could properly conclude in the present case that Porter was guilty of at least gross negligence manslaughter. There is evidence from which a jury could conclude that Porter had been in the company of the deceased for some time prior to their going to the top of the Glenshane Pass. The evidence of Professor Crane shows that the deceased was considerably intoxicated. It was a very cold night, with the temperature in or around 0 degrees Celsius. The deceased was abandoned by Porter in circumstances which were such, given the darkness, the cold, his considerable intoxication and his not wearing any clothing capable of providing him with adequate protection from the elements, as to place him in considerable danger because he could easily become disorientated and get lost in the forest, or end up stumbling across a bog towards lights in the distance, and in either event falling and dying from hypothermia. When one also takes into account the evidence of Porter's considerable hostility towards Woods, in my opinion a jury would be perfectly entitled to regard the circumstances as: (i) creating an obvious risk of serious harm to Woods, and (ii) indifference to that risk on Porter's part. That would be sufficient to amount to gross negligence manslaughter, see the authorities cited in *Archbold 2010* at 19-110. It is therefore unnecessary to consider whether a conviction could be arrived at on the basis of unlawful act manslaughter, and I refuse to grant a No Bill on the manslaughter count.

[21] This brings me to the final count of murder. Mr McCrudden argued that the evidence was insufficient to establish that Porter had an intention to inflict grievous bodily harm when he left the deceased in these circumstances. Mr Mateer's response to that was that murder can be committed by omission. There is ample authority for that proposition as can be seen from *Smith and Hogan Criminal Law* 12th ed. at page 64 where it is stated "The courts have long accepted without debate that murder and manslaughter are capable of commission by omission".

[22] As the old authorities cited at *Archbold 2010* 19-5 make clear, it is possible to commit murder if a man does any act of which the consequences is death, even though no blow is struck by himself, such as in R v. Huggins (1730) 17 State Trials 309 at 376 where a gaoler caused the death of a prisoner by imprisoning him in unwholesome air. Equally, for a mother to throw her child

on to a heap of ashes and leave it there in the open air exposed to the cold, thereby causing its death, may amount to murder. See R v. Waters (1848) 1 Den. 356. To abandon Woods in the circumstances described above could constitute the act necessary to commit murder.

[23] However, the prosecution also has to establish the necessary intent to kill or cause grievous bodily harm to Woods on the part of Porter when he abandoned Woods in these circumstances. Although there is considerable evidence from which a jury could properly conclude that Porter wished to cause some harm to Woods, it is significant that Professor Crane found no signs of Woods having been assaulted, which militates against any assault on Woods and therefore against an inference that Porter intend to kill Woods , or cause him grievous bodily harm. In order to establish the necessary intent a jury would have to be satisfied beyond reasonable doubt that Woods' death was a virtual certainty as a result of Porter's actions in leaving Woods in those circumstances, and that Porter appreciated that was the case. This is the test enunciated by Lord Lane CJ in R v Nedrick 83 Cr. App. R. 267 and approved by the House of Lords in R v Woolin [1999] 1 AC 82 per Lord Steyn at p. 96. Whilst a jury could properly decide that to abandon Woods created a risk of serious harm to him for the reasons I have already given, despite Woods' intoxication and the circumstances in which he was abandoned, the possibility that he could have made his way along the Coolnasillagh Road to the main Glenshane Road and got a lift there could not be excluded. I do not consider that a jury could properly conclude that his death or serious bodily harm was a virtual certainty, substantial though the risk undoubtedly was. For these reasons I concluded that the evidence was insufficient to place the defendant Porter on trial for the count of murder and I therefore enter a No Bill on the count of murder against him.