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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT BELFAST

THE QUEEN

-v-

ROBERT JAMES SHAW RODGERS

HORNER J

INTRODUCTION

[1] The defendant in this case is Robert James Shaw Rodgers. He is aged 59 years having been born on 18 October 1953. He is charged with the murder of Eileen Doherty on 30 September 1973 at Annadale Embankment, Belfast. At the time of her death Eileen Doherty was aged 19 years. The defendant was arrested for Eileen Doherty's murder on 15 December 2010 and cautioned. He was taken to Antrim PSNI Serious Crime Suite where a number of interviews were conducted. His fingerprints were taken. Apart from the defendant's solicitor giving the interviewing officer a pre-prepared statement signed by the defendant, he did not make any comment when questioned by investigating officers. He did not give evidence at his trial. Mr Mooney QC and Mr McCrudden appeared for the Crown; Mr Berry QC and Mr Devine for the defendant. I am indebted to all counsel for their industry and endeavour in this case. I have, where appropriate, summarised their arguments made during the course of the trial. By doing so, I will have inevitably failed to have done justice to the full submissions presented in writing and in court.

30 SEPTEMBER 1973 AND ITS AFTERMATH

[2] On 30 September 1973, Eileen Doherty, a Roman Catholic, who lived at 22 Slieveban Drive, Andersonstown, was shot dead on the Annadale Embankment. The bullet which killed her entered the left side of the back of her head and passed forward through the skull, lacerating the brain, before leaving through the left cheek. Two other bullets had struck Eileen in the body but these did not cause her death,

which occurred in the early hours of the 1st of October 1973 at the Royal Victoria Hospital. She never regained consciousness after being shot. The shooting was carried out by two men who the police were unable to identify at the time. It appears that the motive was purely sectarian. Eileen Doherty was murdered because she was a Catholic who happened to be in the wrong place at the wrong time.

[3] The events of that night can still, almost 40 years later, be pieced together. Eileen's boyfriend of some 3 years was Alexander McManus, known as "Alec". She was engaged to Alec to be married. Eileen visited Alec at his house at 42 Cooke Street, Belfast, which is proximate to where Atlas Taxis operated their business on the corner of the Ormeau Road. This is close to where NIFC sports grounds used to be. It was Eileen's practice to use Atlas Taxis to return her to her home in West Belfast when she had finished visiting Alec. More often than not she was accompanied by her fiancé. However, on the 30th of September 1973 they decided that it would be too burdensome for him to keep her company on the way home as he was due to start work at 4 am the next morning in Inglis's Bakery at Eliza Street, Belfast. So, after kissing goodnight and saying goodbye, they parted when John Sherry, now deceased, the owner to Atlas Taxis had pulled up and told her he was ready to take her home. He had just driven Robert Montgomery down to Cromac Street to meet his brother in the Markets for a drink.

[4] That night two young adult males had turned up at the depot of Atlas Taxis. They were looking for a lift over towards Finaghy Road. According to Gerard McAllister, a youth who lived locally and frequented the depot, and who was present at the depot that night, the two men were strangers to the area. He thought that they were both nervous, one particularly so. This was confirmed by the evidence of Mr Montgomery, who was in the depot for a few minutes before Mr Sherry ran him down to Cromac Street to meet his brother. Mr McAllister was unable to give a detailed description of either of them. Mr Montgomery had some difficulty describing them now. But after the murder he was able to provide a description of one of them that enabled the police to produce some sort of a sketch. There is no agreement from the eye witnesses as to their state of intoxication. Mr McAllister did not volunteer that either of them was intoxicated. Mr Montgomery thought one of them was more so than the other and indeed he described seeing one of them drink out of a bottle of Guinness. Mr Sherry also noticed that one of them appeared to be drunk.

[5] Mr Sherry noted that the one drinking from the Guinness bottle got into the seat in the rear behind the driver's seat. The other one tried to get into the front seat. However, Eileen Doherty had already taken her place there and Mr Sherry made him get into the back. They told Mr Sherry they wanted to go to Dalebrook Park. Mr Sherry drove up the Ormeau Road, right onto the Stranmillis Embankment, turned left across King's Bridge and right onto Annadale Embankment. He was then just about to turn right onto Governor's Bridge when he felt something being pushed against the back of his head. The passenger directly behind Mr Sherry told

him to turn left up the embankment but Mr Sherry was unable to do so because he had almost completed his turn onto the bridge. He glanced sideways to see that it was the barrel of a gun which was being pressed against his head. He was ordered to get over to the passenger's side by the man who was sitting behind him holding the gun. He said he could not. He was then told by the gunman to get into the back. He stepped out and then shouted at Eileen to run. He then ran down towards King's Bridge and up onto the grass. Eileen also made her escape at that time in the same direction.

[6] Mr Sherry heard the rasping of gears as the car made its way over the bridge. Mr Withers was driving down the Stranmillis Road towards the bridge at this time. At the roundabout at the bottom of Stranmillis Road he noted a car travelling at speed, enter the roundabout and turn up the Stranmillis Road. Mr Withers drove on up to the lights at the King's Bridge which were red against him. Just as the lights turned green the same car he had seen at the roundabout at the bottom of Stranmillis Road came down Ridgeway Street, went across the bridge and turned right. Mr Withers describes only the front seat passenger getting out in his deposition to the Coroner. Mr Sherry and Eileen had stopped running at this stage along the Annadale Embankment when the car re-appeared. When Mr Sherry saw the car return, he told Eileen to run but she was unable to escape. According to the deposition of Mr Withers the gun was fired by the passenger. He said:

> "I saw the front seat passenger get out. As I drew nearer I saw him holding a girl by the arm. He then put a gun to her head and I heard 3 or 4 shots. I was almost alongside at this time. He then dropped the girl."

Mr McDonald who had just cycled past where the taxi had stopped at this time on the Annadale Embankment, heard 3 or 4 shots in quick succession. He saw Eileen lying on her side towards the wire fence and her feet towards Governor's Bridge. He then went to her aid.

[7] Mr Sherry reached a telephone kiosk and phoned for police and ambulance. Meanwhile, Mr McDonald tended to the prostrate and unconscious, Eileen, who was bleeding badly from her face. The police and ambulance arrived and Eileen was conveyed to the RVH hospital where she died next morning at 1.05 am.

[8] The taxi was later found at Fountainville Avenue, close to University Road. The car was taken to Castlereagh RUC Station where an examination was carried out by Sergeant Hillis and Constable Moffitt. Sergeant Hillis is unable to give evidence. Constable Moffitt is now deceased. A .45 copper jacketed bullet was found at the scene of the shooting. A fingerprint examination was carried out by Sergeant Hillis. He made 10 black powder lifts of various prints. These included lifts from the steering wheel of the taxi and from the rear nearside inner passenger window. They were marked, given references and identified in a file numbered 273/73F. I am

satisfied from the evidence primarily given by Mr Derek Thompson that that file had been safely stored first within the bureau and then in an archive store.

[9] The prints included a right palm print marked by Sergeant Hillis on the top left hand segment of the steering wheel, that is at 10 o'clock. That was marked 1(b). The second important print was taken from the rear nearside inner window and that was marked 7(a). Palm prints taken from the defendant on 14 December 2010 matched those prints exactly. Mr Denis Thompson who is employed as a fingerprint officer by the PSNI said under oath that he was 100% satisfied that the prints in the car at 1(b) and 7(a) were left by the defendant. It is not disputed that the prints at 1(b) and 7(a) are those of the defendant.

[10] The following year, that is 25 September 1974, the defendant was arrested with another man, Alan Gibson, after he had shot dead Kieran McIlroy at Parkend Street, Belfast, when Kieran McIlroy was leaving his place of work. The defendant fired the gun which killed McIlroy. Both the defendant and Alan Gibson were subsequently arrested because a member of the public who had witnessed what had happened, had the courage to follow the motorcycle they used and had been able to point them out to an army patrol. Caught red handed with the murder weapon, the defendant pleaded guilty to the murder of Kieran McIlroy at Belfast City Commission on 11 February 1975. He was sentenced to life imprisonment. The only possible motive for the murder was the victim's religion. Detective Inspector Stewart said:

> "The reason that Kieran McIlroy was shot was that he was a Roman Catholic and his assassination was part of a plan by the organisation of which Rodgers and Gibson belonged. Our enquiries failed to reveal the name of this organisation."

[11] The investigation into the murder of Eileen Doherty failed to identify who was responsible for her murder. No attempt seems to have been made to make a manual match, either at the time, or afterwards, of the prints of the defendant after Kieran McIlroy's murder and those prints which had been found in the taxi. No explanation for this omission has been provided to the court. It was only with improved technology and the introduction of new software programmes between 2001/2005 that it has been possible to compare prints electronically. I need not set out here the history given of technological advances save to record that although some palm prints were loaded onto the system in 2001, the process really took off in 2005 when 80,000 sets of prints were loaded onto the palm database. The process was complete by approximately October 2005.

[12] In the meantime Eileen Doherty's inquest file along with 41 other files had been referred to the Historical Enquiry Team (HET) on 18 January 2008. The HET is investigating "cold cases." It would appear from the evidence of David Thompson, the fingerprint expert, that the match between the prints taken by Sergeant Hillis

way back in October 1973 and the defendant's prints was made some time before 14 December 2010. There was a further match made on 14 December 2010 when the defendant's prints were taken from him following his arrest.

[13] Unfortunately, no police file relating to the original investigation was preserved and it has not been possible to reconstitute one. Accordingly, statements taken by the police at the time are missing, although these statements may have been identical to those provided by way of depositions at the inquest. A "photo kit" prepared with the assistance of Robert Montgomery, of one of the murderers, is missing.

[14] There was an inquest. However, no one was arrested in connection with the murder of Eileen Doherty at the time. When the defendant was arrested in December 2010, Sergeant Hillis was unable to give evidence, Constable Moffitt was dead, Mr Sherry was dead, Mr McDonald was dead and the memories of the others who had been present on the night of the 30th of September 1973 had undoubtedly been dimmed by the passage of time. However, Mr Suiter who gave evidence about hearing the gun shots, claimed still to have a clear recollection of that night. The result is that there are documents which are not now available which would in normal circumstances have been available to both sides. These include, and this is not intended to be comprehensive, the "photo kit" prepared on Mr Montgomery's promptings, statements of evidence of the witnesses although these are likely to have been the same as the contents of their depositions to the Coroner and there are no documents whatsoever relating to the examinations of the 3 scenes of crime, that is the depot of Atlas Taxis where the murderers got a lift, Annadale Embankment where the murder took place and Fountainville Avenue where the car was abandoned. The notebook of the investigating officer is missing and any documents of record kept by Atlas Taxis have long since disappeared.

[15] The reason for the delay is that the police were not able to match the prints taken in October 1973 with the prints of the defendant, and as I have said the match is not in doubt, until the introduction of a new computer software in 2005. The match was made by the HET in 2009 but due to what appears to have been resource issues, this was not followed up until the following year when the defendant was arrested and further prints taken from him. Complaints were made by the defence team that the police should have tried to manually match the prints back in 1975. There is some force to these complaints, although undoubtedly the police were under very considerable pressure at that particular time.

[16] Murder is murder. The passage of time, whether it is 5 years or 55 years, in no way dilutes the seriousness of such a crime. The tragic loss of Eileen Doherty, aged 19 years, remains 40 years later just that, a tragic loss. It has obviously affected all those who knew her – her fiancé, her sisters and her wider circle of family and friends. Their lives, touched by the ineffable sadness of such a pointless loss, will have been altered permanently. Their hurt remains; their need for justice continues; their desire that the guilty should be held to account has not changed. A decent

society requires that anyone who commits such a dastardly act should be required to answer for that crime in a court of law. The defence claims that to continue with a trial in the present circumstances will be an abuse of process, that the defendant cannot now after all this time have a fair trial. That is an issue which I will come back to in due course. Of course, it is essential that in any civilised society the Rule of Law must prevail.

THE ISSUES AND RELEVANT LEGAL PRINCIPLES

[17] The trial has raised a number of different issues. I propose to look at those issues and to consider what are the correct legal principles which should be applied to the relevant evidence.

Burden of Proof

[18] The onus of proof rests on the prosecution. It has to establish the defendant's guilt beyond reasonable doubt. Thus the defendant can only be convicted if I am satisfied so that I feel sure that he is guilty. Being satisfied beyond reasonable doubt is a requirement which relates to the material facts which have to be proved in order to establish the defendant's guilt. I, of course, bear in mind that the defendant is presumed innocent and that he has no burden to discharge.

Circumstantial Evidence

[19] The Crown did not rely on direct evidence to establish the defendant's guilt beyond reasonable doubt. The Crown relies on circumstantial evidence. Lord Normand in Teper v The Queen 1959 AC 480 said in respect of circumstantial evidence at page 489:

> "Circumstantial evidence may sometimes be conclusive, but must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, **put my cup, the silver cup, in the sack's mouth of the youngest**, and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

[20] The following passage from the judgement of Pollock CB in R v Exall (1866) 4F and F at pages 922-928 said:

> "What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances

> before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise … . Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fail. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved."

[21] In The Queen v Gary Jones 2007 NICA 28, Higgins LJ said at paragraph 33:

> "Circumstantial evidence can be very compelling. It requires to be approached with care. Not only must the judge and jury be satisfied that the circumstances are consistent with guilt, but they must also be satisfied that they are inconsistent with any other rational conclusion than that the accused is guilty. Thus a fact or circumstance which is proved in the evidence and which is inconsistent with a conclusion of guilt is more important than all the other circumstances, because it undermines the proposition that the accused is guilty. In a case that depends on circumstantial evidence, a court or jury should have at the forefront of its mind four matters. Firstly, it must consider all the evidence; secondly, it must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, it must be satisfied that no explanation other than guilt is reasonably compatible with the circumstances and fourthly, it must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together."

It is important to look at the circumstantial evidence carefully in the light of those remarks. In particular, it is essential to consider whether there was any fact which is inconsistent with the case made by the Crown against the defendant.

Hearsay Evidence

[22] Some of the evidence in this trial, and notably the critical evidence of Mr Sherry and Sergeant Hillis is hearsay. Further, part of the evidence of Mr Withers is hearsay, namely his deposition to the Coroner made within months of the murder. Their evidence cannot be tested under cross-examination. It is important that such evidence be considered carefully and that it should be given such weight as is considered appropriate in the circumstances. This involves the court in assessing the quality of the hearsay evidence: see F16.46 and 47 of Blackstone's Criminal Practice where this is discussed in rather more detail. I have taken into account those matters set out at Article 18(2) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. In particular I note the hearsay evidence of Mr Sherry and Mr Withers comprises depositions to the Coroner for the inquest of Eileen Doherty which took place within months of the murder. Both Mr Sherry and Mr Withers are likely to have wanted to assist the Coroner. No reason has been volunteered as to why I should doubt their veracity. In respect of the statement of Withers it was expressly agreed that it was a matter for me as a trial judge, to determine what weight I should give to it. I consider it to be reliable. In respect of the hearsay evidence of Sergeant Hillis I am satisfied from the testimony of Mr Derek Thompson that this was the product of his efforts and in accordance with Sergeant Hillis's normal work procedure. I am in fact completely satisfied by his testimony and the evidence given of the paper trial that:

(i) The print 1(b) was lifted off the steering wheel of Mr Sherry's taxi that was hijacked on 30 September 1973.

(ii) The print 7(a) was lifted off the inside rear passenger window of the said taxi.

(iii) The prints are those of the defendant.

(iv) Those prints taken by Sergeant Hillis are preserved in the fingerprint file Ref 273/73F which relate to Eileen Doherty's murder.

(v) Sergeant Hillis as per his normal practice recorded the locations from where the prints had been taken in Exhibit 11 which refers inter alia to the reference number of the fingerprint file, Eileen Doherty, the date of the murder and the registration number of the blue Chrysler taxi driven by Mr Sherry and abandoned later in Fountainville Avenue.

[23] In the present case it is important to emphasise that:

(i) The statements of Mr Sherry and Mr Withers relied on as hearsay evidence were made at a time when the events of the 30th of September 1973 would have been very fresh in the minds of the statement makers.

(ii) There is no credible reason why any of those statement makers wanted to provide anything other than accurate accounts of what they had witnessed.

(iii) The records of Sergeant Hillis include his sketch showing where he had taken the prints from the taxi represented the fruit of his investigations. I am satisfied that the plan is accurate.

(iv) Sergeant Hillis clearly intended to rely on the drawing he made which recorded the locations from which he took the various prints and to which he gave various references.

Delay

[24] It is important to recognise that a lot of time has passed and the evidence of those who have given sworn testimony is likely to be adversely affected by the passage of time. Their memories will be dimmer and it will be difficult for them to recall clearly what happened forty years ago. It is also important to remember that delay will have created difficulties for the defendant. He is unlikely to be able to call on records such as a diary to remind him of what he was doing on any particular day. He will not be able to call on the assistance of friends or relatives to assist him in reminding him of what he was doing at any particular time.

[25] In R v James Wright Girvan LJ delivering the judgement of the Court of Appeal said that at paragraph 13:

> "The problems for a defendant inherently created by delay in relation to both civil claims and criminal prosecutions are well recognised. In the civil law context statutes of limitation seek to cater for the need to protect defendants against stale claims. In many criminal law systems statutes of limitations prevent the pursuit of criminal charges after defined periods. Our legal system of criminal law does not preclude the bringing of criminal charges after lengthy periods of delay and it has been clearly established that the passage of time does not of itself lead to an obligation on the part of the court to stay as an abuse of process criminal proceedings brought after a lengthy delay in the making of a complaint laying the foundation for the charge. To counter balance the inherent problems created by delay, what our legal system does require is a scrupulous care by the court in ensuring that the jury fully appreciates the dangers to a defendant created by a passage of time with the potential for unfairness to a witness when faced after many years

> with an allegation of criminal actions when the complainant cannot be subjected to the same kind of rigorous investigation as one to which a recent complaint of sexual abuse would be subjected."

[26] This case is rather different from the sexual abuse case that Girvan LJ was dealing with because:

(i) There is not a complainant who is giving evidence in this case.

(ii) Often the dates of the abuse are not known.

(iii) This is not the case in which there is only the testimony of one person against another because there is no independent forensic evidence to support or contradict the claims of the injured party as a result of the time that has passed.

(iv) In sexual abuse cases often delay in the prosecution might well be due to the injured party's failure to report sexual abuse earlier. This delay might cast doubt on the injured party's complaints.

Obviously in this case there is forensic evidence, namely palm prints, linking the defendant to the car which was used in the commission of Eileen Doherty's murder. However, there will still be some prejudice caused by delay. The evidence of the eye witnesses is likely to be less reliable, although such evidence is not crucial. The forensic evidence will be no less reliable because of the passage of time, although the defendant cannot now confirm independently that the prints came from the areas of the car that Sergeant Hillis marked on his plan. This pre-supposes that Sergeant Hillis made a mistake in marking where the prints came from, which as I have remarked is very unlikely, but one which cannot ever be completely ruled out.

[27] Mr Berry QC did point out that a manual comparison could have been carried out, especially after the defendant's conviction for murder in 1975. No doubt such an exercise should have been carried out in a perfect world, but it was not. As I have said the match only came to light with the advent of new computer software technology and HET's investigations of what had become "cold cases".

Bad Character

[28] Evidence of the defendant's bad character had been admitted in this case. The defendant was convicted of a sectarian murder committed in the following year. Although there is only one conviction and it occurred after this murder, it is for me to decide the extent to which, if at all, this conviction assists me in determining whether the defendant committed this offence.

[29] In R v Hanson (2005) 1WLR 3169 the Court of Appeal offered general guidance:

> "The starting point should be for judges and practitioners to bear in mind that Parliament's purpose in the legislation, as we divine it from the terms of the Act was to assist in the evidence based conviction of the guilty without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because the defendant has previous convictions, but will be based on the particular circumstances of each case."

[30] For the reasons which appear subsequently, I do not consider that this is a weak case which has to be bolstered by bad character evidence. The conviction is relevant in that it shows what the defendant did was not out of character and that he had a propensity to involve himself in the most serious and reprehensible of crimes, namely sectarian murder. Of course, such evidence does not, of itself tell me whether he has committed the murder with which he is charged in this case.

Joint Enterprise

[31] In R v Brian Shivers (2013) NICA 4 at paragraph [13], Morgan LCJ said:

> "The principal is the actual perpetrator of the crime, in this case the persons who fired the shots and possessed the weapons. Secondary parties are those who aided and abetted, counselled or procured the commission of the crime."

In R v Bryce (2004) EWCA Crim 1231 paragraph 71 the court set out what must be proved to establish liability of the secondary party who assists another to commit a crime:

> "(a) an act done by D which in fact assisted the later commission of the offence;
>
> (b) that D did the act deliberately realising it was capable of assisting the offence;
>
> (c) that D at the time of doing the act contemplated the commission of the offence by A, ie he foresaw it as a **real or substantial risk** or **real possibility**; and

(d) when doing the act intended to assist A in what he was doing."

[32] In this case there can be no doubt that the driver of the hijacked taxi assisted the gunman by driving the taxi back to where Mr Sherry and Eileen Doherty were, he did it deliberately knowing that it would assist the gunman in shooting Mr Sherry or Eileen Doherty. He quite clearly contemplated that the gun which had been held against Mr Sherry's head before would be used. He drove the taxi round onto the Annadale Embankment and stopped beside Eileen Doherty and Mr Sherry permitting the gunman to get out of the taxi and shoot Eileen Doherty dead. Accordingly, there can be no doubt that the driver of the taxi was guilty as a secondary party of the murder of Eileen Doherty.

Failure to give evidence

[33] Article 4(1) of the Criminal Evidence (Northern Ireland) Order 1988 provides that where an accused fails to give evidence in his defence "it will be permissible for the court or jury to draw such inferences as appears proper from the failure to give evidence or his refusal, without good cause, to answer any question".

[34] In R v Cowan (1996) QB 373 the Court of Appeal in England considered the equivalent provision. Lord Taylor of Gosforth CJ giving judgement said at page 381:

"But there are certain essentials which we would highlight.

(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 provided for 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 a silence or in the absence of any such evidence, the jury conclude that 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."

Later on in his judgement he drew attention to the decision of Kelly LJ in a case of R v McLarnon (1990) 10 NIJB 91 which he referred to as "a Northern Ireland case concerning provisions of Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 which are in terms similar too but stronger than those of section 35 of the Act of 1994 which he was discussing where Kelly LJ said:

"… the court has then a complete discretion as to whether inferences should be drawn or not. In these circumstances it is a matter for the court in any criminal case:

(1) to decide whether to draw inferences or not; and

(2) if it decides to draw inferences what their nature, extent and degree of adversity, if any, may be.

It would be improper and indeed quite unwise for any court to set out the bounds of either steps (1) or (2). Their application will depend on factors peculiar to the individual case."

[35] In R v Becouarn (2005) UKHL 35 Lord Carswell giving the lead judgement of the House of Lords approved the statement of Lord Taylor of Gosforth CJ. He then went on to specifically approve "the specimen JSB Direction on drawing inferences as sufficiently fair to defendants, emphasising as it does that the jury must conclude that the only sensible explanation of his failure to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination"; see paragraph 25.

[36] It would also be noted that in that case the House of Lords held that the jury did not have to be specifically directed that there might be reasons for not giving evidence other than the inability to give an explanation or answer the prosecution case.

[37] I will apply the principles set out in R v Cowan when I consider the defendant's failure to give evidence later in this judgement.

Abuse of Process

[38] At the end of the prosecution case and when all the evidence had been adduced, the defence team asked that the proceedings be stayed as to continue would be an abuse of process. I dismissed the application and continued with the trial. I said that I would give my reasons later.

[39] It is important to note that such applications should be treated cautiously. In Re DPP's Application (1999) NI 106 Carswell LCJ said:

> "1. The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons: ex parte Bennett (1994) 1 AC 42 at page 74, per Lord Lowry.
>
> 2. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express a court's disapproval of official conduct: ibid.
>
> 3. The element of possible prejudice may depend on the nature of the issues and the evidence against the defendant. If it is a strong case, and a fortiori if he has admitted the offences, there may be little or no prejudice: see ex parte Brooks (1984) 80 Cr App R164 at page 169 per Sir Roger Ormrod."

[40] In R v SR (2011) NICA 49 Morgan LCJ giving the judgement of the court drew attention to the fact that there had been further guidance given by the Court of Appeal in England since that decision. He said at paragraph 15:

> "Since the hearing of this case the Court of Appeal in England and Wales has reconsidered the basis on which a case might be stayed as an abuse of process for delay in CVS v F (2011) EWCA Crim 1844. The court restated the principles which were clear from the earlier cases and in particular confirmed an application to stay for abuse of process on the grounds of delay must be determined in accordance with Attorney General's Reference (No.1) of 1990. It cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the defendant occasioned by the delay which cannot fairly be addressed in the normal trial process. The presence or absence of

> explanation or justification for the delay is relevant only insofar as it bears on that question. In this case there was no suggestion that a fair trial would not be possible at a later date. We were satisfied there was nothing exceptional which required departure from the normal rule and in those circumstances the basis for stay as an abuse of process was not made out."

[41] One of the main thrusts of the application made on behalf of the defendant was that the behaviour of the police was "disgraceful" and that accordingly it would be an abuse of process to continue. It was asserted that this was so because, inter alia, the police file had been lost or destroyed. There was no evidence that the loss of the file had been the result of a deliberate act. If the file had been destroyed maliciously, then it would have been incumbent on the Crown to have disclosed that to the defence and to the court. There has been no such disclosure. The overwhelming inference is that the police (and the Crown) after 40 years do not know what has become of the file. That is unsatisfactory, but to categorise it as disgraceful is an over-statement, it introduces unnecessary heat into the debate and dilutes the force of other better arguments available to the defence. The test remains whether a fair trial is possible after all the time that has elapsed (see supra).

[42] Mr Berry QC and Mr Devine made a number of points about why it would be an abuse of process for me to continue with this trial after the prosecution case had finished. They are set out in the comprehensive written submissions of the defendant which were amplified in considerable detail in court by Mr Devine. I do not need to repeat them seriatim. They include the following:

(i) A fair trial is no longer possible after 40 years delay.

(ii) The behaviour of the police has been "disgraceful" as discussed above.

(iii) The police file is no longer available and it could have included exculpatory evidence.

(iv) Many of the witnesses are dead or unfit to give evidence and cannot be cross-examined.

(v) Much of the evidence is hearsay including the crucial evidence of Sergeant Hillis and Mr Sherry and so cannot be tested.

(vi) The evidence is only of a circumstantial nature.

(vii) The records of Atlas Taxis are not available.

(viii) The investigating officer's notebook is not available.

(ix) There are no documents available which deal with any inspections of the three crime scenes.

[43] I do not accept the passing of 40 years of itself makes a fair trial impossible. It all depends on the particular circumstances of any case. Even in a sexual abuse case a fair trial may not be impossible after 40 years although it is effectively in such a case only the accuser's word against the accused's word. In this case the key evidence is that of palm prints of the defendant found on the nearside rear inner window and on the steering wheel. The evidence of Mr Sherry suggests that the driver of the hijacked taxi first sat in the nearside rear seat of the car. This is corroborated by the specific contemporaneous evidence of Mr Withers. What then are the chances that palm prints can have been innocently deposited by the defendant at these two locations? Is the defendant unfairly prevented from adducing such evidence as would cast doubt on the case made by the Crown that they were left by the defendant at the time of the murder?

[44] I do not consider that the passage of time has prevented a fair trial from taking place for a number of different reasons, these are:

(i) While it has to be accepted that the passage of 40 years will make it difficult to remember, this is not invariably so. Mr Suiter, for example, claimed his memory of events of that night remain clear. Of course, he has been asked to remember a single traumatic incident. But it has never been the defendant's case that he has had difficulty in remembering. Indeed, he asserts positively that he has no involvement in this murder. In the circumstances of this case, I reject the submission that delay of itself provides an explanation why the defendant cannot give evidence explaining why his prints were found in two separate locations in the taxi used to murder Eileen Doherty.

(ii) The accused has never suggested that he could possibly have used Atlas Taxis in the past but simply cannot now remember. His statement says:

> "I can confirm that I was not involved in, nor have any knowledge of this incident."

(iii) There is no evidence that the defendant had ever used Atlas Taxis in the past or that he had carried out valeting of any of its taxis or that he repaired any of the Atlas cars. The evidence is that the defendant was a stranger to the Atlas Taxis depot and certainly was not known by Mr Sherry the proprietor of Atlas Taxis, nor to Mr McAllister or Mr Montgomery. Accordingly, this is not a case of the applicant being denied evidence that would provide him with support for an innocent explanation as to how his two prints came to be in the taxi.

(iv) He has not been prevented from making the suggestion that he could have left the prints in the taxi on two separate occasions when he innocently took a lift from Atlas Taxis. Clearly a court would have to accept as a possibility that on these different occasions, he was firstly, a back seat passenger and then a front seat passenger. It would have to accept that while in the front passenger seat he must have lost his balance and lent forward and grabbed the steering wheel. Alternatively at some stage he sat in the driving seat and grabbed the steering wheel. It would also have to accept that he obtained a lift from the same taxi at Atlas Taxis. It is not suggested that 40 years later he cannot remember what taxi companies he might have used in 1973.

(v) The suggestion that he could have had involvement with the taxi after it was abandoned following the murder, makes no sense either. It is highly likely that 40 years on he is going to remember if he was asked to deal with a stolen car, especially as he has no criminal record for motor vehicle theft. This is so when the car for which he was asked to provide assistance subsequently turns out to have been involved in a murder. This information as to what the car had been used for is likely to have been publicised in the news at the time.

(vi) It is simply not accepted that any of the missing evidence or the fact that the Crown relies on circumstantial evidence or hearsay evidence, should affect the defendant's ability 40 years later to explain how or why his palm prints were found in the taxi after the murder in the exact locations where the person who had assisted the gunman to carry out the murder had been on the night of 30 September 1973. These prints are not just consistent with his guilt, they are highly probative of it.

[45] For the record, I also reject the suggestion that the police in some way have manipulated the evidence. Of course, it would have been infinitely preferable if the file had been preserved. Justice would have been better served if the palm prints taken by Sergeant Hillis had been manually compared with those of the defendant when he was arrested the following year. But I have no doubt the defendant is able to receive a fair trial. I do not consider that the defendant has been inhibited by the passage of time in offering an innocent explanation for the presence of his palm prints in the hijacked taxi recovered after the murder.

NO CASE TO ANSWER

[46] It was submitted at the close of the Crown case that taking the prosecution evidence at its height, I could not convict the defendant of murder. I received submissions both in writing and orally from Mr Berry QC and Mr Devine. Mr Mooney QC on behalf of the Crown made oral submissions. I rejected the application and said I would give my reasons at a later date. I am mindful of repeating myself. The evidence adduced by the Crown established that:

(a) The defendant had left palm prints in the taxi used in the murder of Eileen Doherty on 30 September 1973.

(b) Those palm prints on the rear inside passenger window and steering wheel were completely consistent with where prints would have been left by the person who assisted the gunman on 30 September 1973. He first accepted a lift in the rear passenger seat and then drove the taxi back to where Eileen Doherty and Mr Sherry were standing, so permitting the gunman to shoot Eileen Doherty in the head.

(c) The defendant was a stranger to those at the Atlas depot and in particular to Mr Sherry, the proprietor of Atlas Taxis.

I have taken into account and applied the principles set out in R v Galbraith (1981) 1 WLR 1039. I considered that a judge sitting without a jury could quite reasonably, taking the Crown's evidence at a reasonable height, conclude that the prints had been left by the defendant in the taxi on the night of the murder while assisting the gunman. It is inherently unlikely that any other person could have left the prints in the car consistent with those which the person assisting the gunman on 30 September 1973 was likely to leave.

[47] If there was any lingering doubt, which I do not accept there is, that doubt was dispelled by the evidence of the conviction of the defendant in 1975 for the sectarian murder of Kieran McIlroy, carried out in 1974.

[48] It is true that on that occasion the defendant actually pulled the trigger of the gun that killed Kieran McIlroy as opposed to acting as the getaway driver. But it still reveals a propensity to be involved in sectarian murders. There is no doubt that I am entitled to rely upon it even though it post-dates the offence in question: eg. see R v Alec Edward A [2009] EWCA Crim. 513 at paragraphs 20, 21 and 23, Breslin and Others v McKevitt and Others [2011] NICA 69 at paragraph [5] and Blackstone's Criminal Practice at F12.4. Accordingly, I have no hesitation in rejecting the application by the defence team.

DISCUSSION

[49] There are three strands of evidence relied upon by the Crown in asserting that I should be satisfied beyond reasonable doubt that the defendant was guilty of murder. Those strands comprised:

(a) The forensic evidence identifying the defendant as having left his palm prints in the taxi used in the commission of the murder.

(b) The bad character of the defendant as evidenced by his conviction for a sectarian murder the following year.

(c) The failure of the defendant to give evidence.

None of these strands involve direct evidence. Some of them involve hearsay and circumstantial evidence. In assessing the weight to be given to both types of evidence, I take into account that such evidence should be looked at carefully for the reasons given above. I have applied the principles which I have set out above to that evidence. I have scrutinised it carefully. I have looked for any other evidence that is inconsistent with guilt on the part of the defendant. I am completely satisfied that no explanation other than the guilt of the defendant is reasonably compatible with the circumstances. I have looked for any other evidence that is inconsistent with guilt on the part of the defendant. I have been unable to find any that might give rise to a reasonable doubt.

[50] It is claimed that I should have a reasonable doubt because, inter alia:

(a) Sergeant Hillis might have made a mistake in preparing his plan. I consider that there is no factual basis for such a claim. I am satisfied from the evidence that his notations and references are accurate being made as they were in the course of his employment as a police officer.

(b) The witnesses who gave hearsay evidence could have been persuaded to change their evidence or alternatively, their evidence could have been undermined by cross-examination. I consider this to be mere speculation.

(c) The crime scenes might have produced evidence which would have exculpated the defendant. This evidence has been lost along with the police file which may or may not have been deliberately destroyed. Again, I did not consider there was any realistic factual basis for the claims that should such evidence have been available it would raise a doubt, sufficient to exculpate the defendant. This is speculation.

(d) The "photo kit" produced with the help of Mr Montgomery at the time might have demonstrated that the defendant was not involved in the murder. But, of course, not only is this speculation, the fact is that the picture was only of one of the murderers and would not have exculpated the other. So even if it did not show somebody who looked like the defendant, it, on its own, could not have created a reasonable doubt in favour of the defendant.

(e) The fingerprints might have been left at different times by the defendant when using the taxi as a member of the public. This was a taxi to which the public had access. I reject this as highly unlikely because it would require:

    (i) the defendant to use the same taxi on different occasions;

    (ii) the defendant to sit on one occasion in the front and on the other in the back;

(iii) the defendant to lose balance and fall over and grab the steering wheel or in same way have taken hold of the steering wheel;

(iv) alternatively for the defendant to have used the steering wheel to steer the car even though he was only a passenger;

(v) the defendant to have remained unknown to those using the Atlas Taxis depot in general and to Mr Sherry in particular.

(f) The palm prints or at least one set of palm prints was left in the car, after it was abandoned in Fountainville Avenue. Again, I consider this to be a very unlikely circumstance.

(g) There might have been two steering wheels. I think that this demonstrates a desperation to leave no stone unturned by defence counsel. I have no hesitation in rejecting it.

In those circumstances I do not consider that there is any possible innocent explanation for the presence of the defendant's fingerprints in the hijacked taxi.

[51] Then there is the conviction for a sectarian murder committed the following year by the defendant when he shot dead a young man solely because he was a Roman Catholic. Admittedly, on that occasion he was the gunman and not the driver of the getaway vehicle. I do not consider that this is a point in favour of the defendant. It was committed a year afterwards. But it is still relevant to propensity. I consider that any shadow of a doubt is removed by this conviction. It is not a case, I emphasise, of bad character shoring up weak foundations. But rather it is a case of bad character underlining and emphasising the defendant's guilt.

[52] Finally, I conclude taking all the requirements of Cowan into account that the defendant's silence can only sensibly be attributed to the defendant having no innocent explanation for his palm prints being on the inner nearside rear window and steering wheel when the vehicle was recovered on 1 October 1973.

[53] For the avoidance of doubt, I conclude that the taxi was hijacked on the Annadale Embankment, that the defendant assisted the gunman by driving the taxi. The defendant knew that the gunman had a gun and intended to use it. With that knowledge he drove the gunman back to the Annadale Embankment via Ridgeway Street to allow him to shoot Eileen Doherty and take her young life.

CONCLUSION

[54] On the basis of all the evidence I am satisfied beyond reasonable doubt the defendant assisted in the murder of Eileen Doherty. Although he did not pull the trigger of the gun that shot her dead, he was an integral part of the joint enterprise. In those circumstances I have no hesitation in finding him guilty of the murder of Eileen Doherty.