Neutral Citation No: [2020] NICA 37 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:* McC11298** ***Delivered: 18*/08/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

-v-

SHAUN McCAUGHEY

_____

Before: Morgan LCJ and McCloskey LJ

_____

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] Shaun McCaughey (hereinafter "*the Appellant*") is attempting to challenge the verdict of a jury made on 09 April 2003, at the conclusion of a 16 day trial, whereby he was convicted of wounding Barry McSorley and Brian McSorley ("*the injured parties*") contrary to section 20 of the Offences Against the Person Act 1861, together with his ensuing sentencing on 04 July 2003 entailing the imposition of an order comprising two years in custody to be followed by one year on probation. The next significant event occurred some six years later, on 12 February 2009, when a handwritten notice incorporating grounds of appeal was received by this court. Some 17 years following the conviction and sentence of the Appellant and at a stage when the appeal has entered its 12th year of existence, this challenge remains undetermined. The more recent impetus for this judgment will become evident from a consideration of the chronology *infra*.

Chronology of Appeal

[2] This, therefore, is an appeal of considerable vintage. During its most recent phase the Public Prosecution Service ("*PPS*") was represented by Mr Ken McMahon QC and Ms Natalie Pinkerton of counsel. In compliance with one of the court's case management directions, counsel provided a detailed chronology which, given the vintage of the case, is helpful to reproduce in full (with some judicial editing and modification).

CHRONOLOGY

09.10.02	First trial began in Omagh.
14.10.02	First trial aborted.
18.10.02	Application made to the Court to move trial to Belfast granted.
07.01.03	Jury empanelled in second trial in Belfast. Both accused pleaded guilty to section 20 charges, accepted by the prosecution. Case adjourned for pre -sentence reports.
14.02.03	Newly instructed counsel appeared for the accused. An application to vacate the guilty pleas was granted.
19.03.03	New trial began in Belfast.
09.04.03	Guilty jury verdicts.
04.07.03	Appellant sentenced.
12.02.09	Handwritten Notice & Grounds received.
08.11.10	Letter from court requesting Mr McCaughey to provide grounds of appeal.
11.11.11	Mention adjourned to 09.12.11 to obtain legal representation.
09.12.11	Mention adjourned to 13.01.12 to obtain legal representation.
13.01.12	Mention adjourned to 27.01.12 to confirm legal representation of Jarleth Faloon. Documents received from the Appellant in court concerning animals on his land copied to prosecuting counsel.
27.01.12	Mention adjourned to 09.03.12 for legal representatives to consider transcript requirements.
09.03.12	Mention adjourned to 20.04.12 as defence still awaiting documents.
12.03.12	Judge's charge to the jury and sentencing remarks received.
20.04.12	Mention adjourned to 15.06.12 – waiver of privilege obtained by defence.
15.06.12	Defence lawyers off record - adjourned 29.06.14 to obtain legal representation.
29.06.12	Mention adjourned to 07.09.12 for legal representatives to attend.
07.09.12	Mention adjourned to 05.10.12 to decide how to proceed – Appellant's grounds to be lodged by 28.09.12.
05.10.12	Mention adjourned to 19.10.12 for McShane solicitors to contact previous solicitors to see if any advice given re appeal.

19.10.12 Mention adjourned to 07.12.12 for McShane solicitors to consider if they need waiver of privilege and if any submissions from previous legal team.

23.11.12 Mention listing. Legal aid granted for solicitor and junior counsel to provide advice. Adjourned to 22.02.13.

22.02.13 Mention adjourned to 12.04.13 for court to try and obtain recordings of the injured parties' evidence and the defence closing to the jury.

12.04.13 Mention adjourned to 24.05.13 due to the Appellant's apparent ill health.

24.05.13 Further mention listing adjourned to 21.06.13.

13.09.13 Mention - court has located some of the evidence which is being transcribed. Adjourned for mention on 20.12.13.

20.12.13 Mention - transcript is now available and will be sent out to parties. Adjourned to 07.02.14 to fix date for hearing.

07.02.14 Mention adjourned to 21.03.14 for defence to take further instructions. Court ordered DARD to provide material re forgery investigation in relation to the permit (regarding use of the agricultural lands concerned).

21.02.14 Mention - grounds to be lodged today and waiver of privilege to be lodged in seven days. Adjourned to 02.05.14 to fix a date for hearing. Crown to indicate within 7 days any transcript request/s.

21.03.14 Mention - Grounds to go to previous legal team for comment. Adjourned to 02.05.14 for prosecution to consider possible transcript requirements – to be lodged by 28.03.14.

24.03.14 Grounds received.

26.03.14 Email to court – Crown request transcript of Mr McCaughey Transcript of McSorleys, closing of Mr McCrudden QC and sentence remarks received.

02.05.14 Mention adjourned to 30.05.14 for representatives to come off record. Appellant is ill and he sent letter to the court criticising his legal representatives.

30.05.14 Mention - Appellant's lawyers to make formal application to come off record and serve on the Appellant. Adjourned to 13.06.14.

13.06.14 Mention - Legal team off record. Court will write to the Appellant to inform him and request that his new solicitors attend court on 12.09.14.

12.09.14 Mention - No appearance by legal representatives. Court will write to PPS for submissions on way to proceed. Adjourned generally.

13.11.14 Letter from court re Crown submissions to be lodged in 28 days.

10.12.14 Prosecution submissions sent to the court.

15.12.14 Copy of prosecution skeleton argument and attachments lodged with the court office for them to post to the Appellant.

05.01.15 Correspondence from the Appellant received.

26.01.16 Court writes to the Appellant for an update, response directed by 12.02.16.

05.07.16 Court confirms appeal is still live.

05.04.17 Court confirms appeal is still live.

11.06.18 PPS ask the court to list the case on 22.06.18 for progress – not listed.

30.10.18 Court writes to the Appellant.

08.02.19 Case listed for mention 22.02.19.

22.02.19 No appearance by the Appellant. Court to write to him.

23.07.19 Listed for mention 06.09.19.

20.08.19 Doctor's letter received on behalf of the Appellant.

06.09.19 Court indicates appeal will proceed on the papers, prosecution to update skeleton and lodge by 16.09.19.

[3] Since the making of the last direction, which issued at a case management listing of the court, the case, upon the initiative of the court, was subjected to further review and case management. This gave rise to the following order, issued on 16 May 2020:

ORDER

1.1 PPS to confirm by 07/06/20 that everything – skeleton argument/s, appeal bundle, authorities bundle e*t al* - are all fully PD compliant. In particular: PD6/2011, as amended (most recently on 07 January 2016), applies fully to every remote hearing in the Court of Appeal (Civil and Criminal Divisions), Chancery Division, Queen's Bench Division and Family Division, other than cases which are managed in the Commercial Hub in accordance with PD 1/2019 (as amended), subject to any modification specified herein or in any order or direction of the court.

1.2 The court does not have the capacity or resources to make printed versions of any document sent electronically and no such document shall be printed for the judge/s or for any other purpose, with the exception of any document specifically authorised by this Protocol or by order or direction of the court to be provided electronically.

1.3 Hearing bundles and authorities bundles must, therefore, continue to be delivered physically to the court, in appropriate numbers, in the usual way.

1.4 Every skeleton argument, in a form compliant with paragraphs 8 and 9 of PD6/2011 as amended, to include the requisite schedules, will be sent electronically to the court.

1.5 Parties and legal representatives are reminded that, in accordance with PD1/2011 as amended:

(a) The skeleton argument of the plaintiff/applicant/appellant must be provided at least 13 working days before the hearing date.

(b) The replying skeleton argument of other parties must be provided at least 8 working days before the said date.

(c) Hearing bundles and authorities bundles must be provided, in appropriate numbers, ie 4 in Court of Appeal cases and 3 in Divisional Court cases, at least 7 working days before the said date.

(d) The provision of any additional skeleton argument or bundle requires the prior leave of the court.

(e) As per paragraph 9(b) of PD6/2011 as amended, the number of core authorities shall exceed 10 only rarely and with the prior permission of the court.

(f) The proposition of law which every party seeks to draw from a core authority will be clearly stated in the skeleton argument.

(g) The relevant passages in every authority shall be clearly highlighted, normally with yellow highlighting.

1.6 **Criminal cases**. The provisions of PD6/2011 as amended – ie paragraphs 2 to 4 and 8 to 9, together with Part B – apply fully to criminal appeals.

1.7 PPS to provide by same date a chronology of the appeal, dating from the dates of conviction & sentencing and their hearing time estimate. The existing PDF to be provided in WORD format.

[4] The court convened a further case management review listing on 11 June 2020 and both parties were notified in advance. Reflecting present circumstances, this was a listing of the remote variety. It was conducted by McCloskey LJ on behalf of the court. The participants were both prosecution counsel and the PPS public prosecutor concerned. The Appellant did not participate and was not represented. The court satisfied itself that he had been given effective and timeous notice of the listing. The court affirmed its previous direction that its adjudication would be by the mechanism of a paper determination.

[5] Subsequently, on 12 June 2020, the court received the following electronic communication from the Appellant:

> *"… sorry for the late reply... There is no Internet in my area...*
>
> *I will be in touch soon to get the book of appeal and see what all is in it...*
>
> *I will also get to a suitable place and download the link you sent...*
>
> *Furthermore could you please send me electronically the police photos in the case as the copies provided to McShanes were sent to Keith Borer forensics without any file being forwarded on to them and there was such a big time gap that Borers destroyed the photos rather than return them... This is the part which will really speed up the process...*
>
> *We are awaiting for written feedback from overseas police in regards to people within the appeal as this will explain the true nature of the attack upon ourselves and the reason and impact it had on the legal case brought against us including the 3 trials and the reason why they were mishandled...*
>
> *Looking forward to hearing from you soon...*
>
> *Shaun"*

The "*link*" mentioned without particulars in the fourth sentence evidently denotes the provision to the Appellant by electronic means of the mechanism which would enable him to enjoy distant, or remote, video and audio participation in the listing scheduled for 11 June.

[6] Noting the Appellant's request for the electronic provision of "*the police photos*" the court issued an appropriate direction to the PPS. This resulted in the

provision to the court by the PPS of a substantial quantity of colour photographs. These are of the kind which one would expect to be generated by a police investigation into offences of this kind. It would appear that they were not contained in the appeal bundles prepared by the PPS for the court. It was considered unnecessary to enquire further into this, the court confining itself to a direction (dated 23 June 2020) that the photographs be provided by the PPS to the Appellant. There is no assertion or indication that this was not fulfilled.

Prosecution and Trial

[7] The Appellant was prosecuted jointly with Seamus John James McCaughey, his father. The indictment comprised four counts namely:

(i) Unlawfully and maliciously wounding Brian McSorley with intent to do him grievous bodily harm on 27 April 2001.

(ii) Unlawfully and maliciously wounding Brian McSorley on the same date.

(iii) Unlawfully and maliciously wounding Barry McSorley with intent to do him grievous bodily harm on 27 April 2001.

(iv) Unlawfully and maliciously wounding Barry McSorley on the same date.

The injured parties were also father and son. The context of the alleged offending was one of contentious issues about the use of adjoining agricultural lands in circumstances of previous conflict involving the same people.

[8] As appears from the chronology there were three consecutive trials of the Appellant and his co-accused. The first, at which the charges were contested, was aborted after five days. The second, which entailed pleas of guilty to the lesser (section 20) charges, involved an uncompleted sentencing process which was interrupted by the advent of newly instructed counsel whose application to vacate the guilty pleas was granted. The third, at which both accused persons contested the charges, ended in guilty verdicts in respect of the less serious (section 20) counts following a trial of some three weeks duration. The sentencing of the Appellant was deferred in the usual way and, approximately three months later, he was punished as noted above. It is convenient to note that both accused persons were legally represented, by counsel and solicitor, at all stages of the trial processes just summarised.

The Appeal

[9] On 20 January 2009 the court received what purported to be a completed "Form 3" signed by the Appellant. This stated, firstly:

> "*Grounds for extension of time and reasons for delay will follow. Also to follow will be evidence for this extension and delay.*"

The actual grounds of appeal were completed in terms which ranged from the unparticularised to the unintelligible. The single ground which can be distilled from the text is that the Appellant's conviction was unsafe because the prosecution had unlawfully engaged in "*concealment of evidence*". This has three identifiable elements namely "*… forensic evidence … relevant medical evidence … relevant witnesses*". This, manifestly, was an unacceptable Notice of Appeal.

[10] On 21 March 2014 the court received from McShanes solicitors a revised Form 3 entitled "Amended Grounds of Appeal or Application for Leave of Court". This is a five page document signed by counsel. It consists of approximately three and a half pages arranged under the heading "Application for Leave to Appeal against Conviction", followed by a single page entitled "Grounds of appeal – inadequate legal representation". Consideration of the whole of this document confirms that the sole ground of appeal was that of inadequate legal representation, constituted by a series of particularised, culpable omissions on the part of the Appellant's legal representatives.

[11] Pausing, the materials before this court include a total of three Forms 3, the thrust and substance whereof are set forth above.

[12] On 08 November 2010 the court formally requested in writing that the Appellant provide proper grounds of appeal. The next five years were marked by multiple listings before and interventions by the court, issues of legal representation and the generation of some transcript of the trial. On 24 March 2014 the court received a five page document entitled "Grounds for Appeal" undated, unsigned and emanating directly from the Appellant. This is couched in vague, diffuse and unparticularised terms. A flavour of this document can be gleaned from the following extracts:

> "*PPS conceded to barrister* [XY] *the McSorleys interfered with jury …*
>
> *McSorley's clothes had no punctures in them …*
>
> *McSorley's Sinn Fein/IRA background was not disclosed to the jury …*
>
> *Judge Finnegan lied and misled the jury by telling them that the trial had been stopped for legal reasons …*
>
> *Sergeant Donnelly, who was the senior policeman in control of the scene, was later disciplined by the*

Ombudsman for failure to protect myself and family from attacks from the likes of Kees and McSorley …

Judge Finnegan after being forced to direct the jury to acquit my father of all the charges he faced, then went and unlawfully introduced new charges …

Throughout this case I was repeatedly intimidated, approached and harassed by Detective Paul Armstrong, who wanted to recruit me into the dissident IRA …

He said he … could arrange for the charges to be dropped …

No forensic results presented to the court on the knife supposed to be taken from toolbox beside our house ….

No forensic results on knife supposedly taken from me by Sharon Warnock. Who did this knife belong to? These were 'throw away' knives supplied by RUC/PSNI in order to deflect an honest investigation …

Judge Foote had been barred from trial around April/May 2002 due to bias ….

McSorleys stated that they do not know what re – bar is …

No one tested our clothes/hands for blood as would be normal if we had attacked McSorleys …

None of the blood at Kees which the whole country is able to now tells us was pigs' blood, was ever DNA tested ….

SOCO officer Ian McNicholl's findings have been totally hidden from us …

He is supposed to have confirmed that my father's blood was found at the scene …

No jury heard this evidence ….

McSorleys did not suffer any serious or really serious bodily harm and no medical expert was brought in by either prosecution or defence to claim or state that they had ….

My criminal record for driving was brought up against me … I was persuaded not to mention that most of this record was and is falsely convicte [sic] *upon me by the police*

> *inspector who first scammed and then prosecuted me, Inspector Derek Robinson, then went to jail for this …*
>
> *Dr Bownes' report from 2003 is totally at odds and conflicts with the reports from 2008 and 2009 …*"

[13] We have omitted from the extracts reproduced above the purely fanciful, speculative and manifestly irrelevant. These include allegations and claims of the Appellant relating to incidents occurring long after the event of his conviction and sentence. We have noted his reference in this document to "*the severity of the mental health issues that have been inflicted on me throughout all this …*": see [14] *infra.*

[14] Some six years have elapsed since the aforementioned document was received. As the chronology (above) demonstrates, the beginning of this lengthy discrete period was marked by confirmation that certain newly instructed solicitors were no longer representing the Appellant. To this day the Appellant has no legal representation. He has supplied certain materials from time to time. These include:

(a) A manuscript letter from the Fintona Group Practice dated 24 November 2008 documenting extreme stress of the Appellant.

(b) A letter from the same source dated 20 February 2019 asserting that the Appellant would be unable to attend court due to sickness.

(c) A letter from the same source dated 15 May 2019 stating that the Appellant's father has a diagnosis of atrial fibrillation, the Appellant is his primary carer and, finally, that the Appellant "*… continues to suffer from depression*".

(d) A detailed electronic communication dated 23 April 2019 from the Appellant to the court making various representations relating to recent court proceedings involving him.

(e) The further recent electronic communication from the Appellant noted in [5] above.

The Single Judge Issue

[15] We have identified the following procedural issue concerning the function of the single judge in this species of appeal. The context in which this arises is that there has been no single judge involvement in this case. Section 1(1) of the Criminal Appeal (NI) Act 1980 (the "*1980 Act*") provides:

> "*A person convicted on indictment may appeal to the Court of Appeal against his conviction –*
>
> *(a) with the leave of the court …*"

By section 16(1):

> "*Subject to subsection (2) below, a person who wishes to appeal under this Part of this Act to the Court of Appeal, or to obtain the court's leave to appeal, shall give notice of appeal, or of his application for leave to appeal, in the prescribed manner within 28 days from the date of the conviction, verdict or finding appealed against or, in the case of an application for leave to appeal against sentence, from the date on which sentence was passed or, in the case of an order made or treated as made on conviction, from the date of the making of the order.*"

Section 16(2) provides:

> "*The time for giving notice of appeal or of application for leave to appeal may be extended at any time by the court.*"

Finally it is provided by section 45, in material part:

> "*(1) Subject to section 44(4) above, the powers of the Court of Appeal under Part 1 of this Act which are specified in subsection (2) below and the powers of the Court under Part II of this Act which are specified in subsection (3) below* ***may be exercised by a single judge of the court****.*
>
> *(2) The said powers under Part I of this Act are the following, namely –*
>
> *(a) To give leave to appeal ….*
>
> *(c) The said powers under Part II of this Act are the following, namely:*
>
> *(a) To extend the time for applying for leave to appeal …*
>
> *(4)* ***An appellant who is aggrieved by the decision of a single judge on any matter under this section shall be entitled to have the matter reheard and determined by the court as constituted under section 44 of this Act.***"
>
> [Emphasis added.]

The composition of the court required by section 44 is a panel of three judges or of two where Lord Chief Justice so directs.

[16] The statutory provisions rehearsed above apply to appeals to the Court of Appeal in cases involving non-scheduled offences. There is a different statutory regime in scheduled cases. Previously, per section 75(8) of the Terrorism Act 2000:

> *"(8) A person convicted of an offence on a trial under this section without a jury may, notwithstanding anything in sections 1 and 10(1) of the Criminal Appeal (Northern Ireland) Act 1980, appeal to the Court of Appeal under Part I of that Act-*
>
> *(a) against his conviction, on any ground, without the leave of the Court of Appeal or a certificate of the judge of the court of trial;*
>
> *(b) against sentence passed on conviction, without that leave, unless the sentence is fixed by law.*
>
> *(9) Where a person is convicted of an offence on a trial under this section, the time for giving notice of appeal under section 16(1) of that Act shall run from the date of judgment if later than the date from which it would run under that subsection."*

[17] The Northern Ireland specific part of the Act (Part VII) contained temporary provisions which were due to lapse in February 2006. The Terrorism (Northern Ireland) Act 2006 came into force on 18 February 2006. This measure extended the relevant provisions of Part VII until 31st July 2007. The Justice and Security (Northern Ireland) Act 2007 (the "*2007 Act*") in effect replaced Part VII of the Terrorism Act.

[18] The 2007 Act, which received Royal Assent on 24 May 2007, established a new system of non-jury trial. It empowered the Director of Public Prosecutions to make a certificate that a case be tried by judge alone. As regards onward appeals, sections 5(7) and (8) of the 2007 Act, deriving from s 75 of the 2000 Act, provide:

> *"(7) A person convicted of an offence on a trial under this section may, notwithstanding anything in sections 1 and 10(1) of the Criminal Appeal (Northern Ireland) Act 1980 (c. 47), appeal to the Court of Appeal under Part 1 of that Act –*
>
> *(a) against his conviction, on any ground, without the leave of the Court of Appeal or a certificate of the judge of the court of trial;*

> *(b) against sentence passed on conviction, without that leave, unless the sentence is fixed by law.*
>
> *(8) Where a person is convicted of an offence on a trial under this section, the time for giving notice of appeal under section 16(1) of that Act is to run from the date of judgment (if later than the date from which it would run under that subsection).*"

[19] Brief consideration of a third category of criminal appeals to the Court of Appeal, namely prosecution appeals, completes the panorama. In *R v Jamison* [2008] NICA 32 the prosecution sought to invoke the provisions of Article 16(4) of the Criminal Justice (NI) Order 2004 by appealing against a ruling by the trial judge in the conduct of a trial on indictment. Article 16(3) of the 2004 Order provides that an appeal of this species "*… may be brought only with the leave of the judge or the Court of Appeal*". Rule 10 of the Criminal Appeal (Prosecution Appeals) Rules (NI) 2005, as amended, (see now rule 10A), provided that an application for leave to appeal under this statutory regime "*may be*" heard by a single judge of the Court of Appeal. The appeal was dismissed by the Court of Appeal, which held that it did not have jurisdiction as the prosecution had not notified its intention to appeal in accordance with the procedural requirements of Article 17(8) and (9) of the 2004 Order. The court also dealt with the role of the single judge at [14]:

> "*Where the single judge has refused an application the party making the application may have it determined by the court. In the present case the matter was not heard by a single judge and came directly to the court. We do not accept that because a single judge is empowered to hear such an application it cannot be made directly to the court. Jurisdiction to hear the application remains with the court even where a single judge is given the same jurisdiction.*"

[20] Historically, the legislature has consistently accorded different and special treatment to the prosecution of scheduled offences. This extends to the regime for appealing against both conviction and sentence in such cases. The main feature of the appeal regime is that leave to appeal is not required. No function is conferred on the single judge. In short, in scheduled cases appeals against conviction and sentence lie to the Court of Appeal as a matter of right, presumably devised by the Westminster legislature as a counterbalance to the controversial loss of the defendant's previous right to trial by a jury introduced almost five decades ago.

[21] To summarise, in two of the three criminal appeal statutory regimes considered above, a role is conferred on a single judge of the Court of Appeal. The judge's function is to determine whether leave to appeal should be granted. In practice the single judge determines such applications by applying a test of arguability. This is a filter mechanism, designed to identify cases which the judge

does not consider to be of sufficient merit to warrant consideration by the plenary Court of Appeal. The ruling of the judge may also refine the grounds of appeal, identifying the manifestly unarguable and, where appropriate, determine extension of time requests. The question which arises is whether the performance of this function is obligatory in criminal appeals involving non-scheduled offences.

[22] Having conducted the comparative exercise rehearsed above, we are satisfied that the relevant statutory provisions, namely sections 1, 16 and 45 of the 1968 Act (see [15] above], do not require a referral to a single judge of the Court of Appeal to determine whether leave to appeal should be granted in appeals to this court in non-scheduled cases. Such a determination is not a prerequisite to the plenary court assuming jurisdiction to exercise all or any of the powers of the court. Alternatively phrased, an appellant in non-scheduled case has no right to a decision of a single judge on leave to appeal. There is no right to two bites at the cherry, while acknowledging that the bites are not qualitatively the same. This analysis and conclusion are dictated by according to the applicable statutory provisions their ordinal and natural meaning in a context which does not require resort to any special canon or principle of statutory interpretation and wherein there is no binding precedent decision to the contrary.

[23] There is one further procedural issue to be considered. Form 2 is contained in the Schedule of the Criminal Appeal (Northern Ireland) Rules 1968 as amended ("the 1968 Rules") and is titled "*Notice of appeal or application for leave of Court*". In particular, Rule 5(7) provides:

> *"(7) In the case of an appellant who does not require leave to appeal or who is given leave to appeal, a notice of application for leave to appeal shall be treated as notice of appeal, and in the case of an appellant who requires leave to appeal but who serves on the proper officer notice of appeal, the notice of appeal shall be treated also as an application for leave to appeal."*

This pre-eminently sensible procedural provision is self-explanatory.

[24] As noted in [9] above the Appellant first initiated this attempted appeal by providing an inadequately completed Form 3. This is one of the pro-formae contained in the 1968 Rules. It is entitled "Grounds of Appeal or application for leave of court". As noted in [10] above, in the body of the form provision is made, separately for (a) "*grounds of application for extension of time (including reasons for delay)*" and (b) "*grounds of application for leave to appeal against conviction/sentence*". This court, subsequently, issued the case management directions noted above. In short, there is no insuperable procedural deficiency in the appeal.

Extending Time

[25] As appears from [2] above, the Appellant purported to initiate this appeal almost six years after his convictions. As noted in [15] the statutory time limit is 28 days from the date of the conviction, verdict or finding challenged on appeal. Section 16(2) rehearsed above, empowers this court to extend time. The principles governing an extension of time have been identified by this court in *Davis v Northern Ireland Carriers [1979] NI 19, R v Brownlee [2015] NICA 39 and [2017] NI 71*, *R v Harte and Roberts [2016] NICA 57* and *R v BZ [2017] NICA 2.* The requirement that notice of an application for leave to appeal against conviction is required to be given within 28 days is one of the many aspects to the principle of finality, see *R v Guinness (Patrick Anthony)* [2017] NICA 47. As Jackson LJ stated in *R v Smith* [2013] EWCA Crim 2388

> *"The need for finality in litigation is a basic principle, which applies in all areas including criminal justice."*

The question as to whether time should be extended affects not only appellants but also victims of crime and the wider community. There is an obligation on an applicant for an extension of time to set out fully and openly the explanation for failing to comply with the 28 day time limit. This is a reflection of the triangulation of interests in play in every criminal case. The principle of finality must also be considered.

[26] As previous decisions of this court in *R v Winchester* [1978] 3 NIJB and *R v Bell* [1988] 5 NIJB make clear, one of the factors to be reckoned in the exercise of this court's discretion to extend time for appealing is the likelihood of the appeal succeeding. More recently, in *Brownlee*, this court formulated the applicable principles in the following terms:

> *"(i) Where the defendant misses the deadline by a narrow margin and there appears to be merit in the grounds of appeal an extension will usually be granted. This occurs most frequently when the application to extend time for a conviction appeal is lodged immediately after sentencing.*
>
> *(ii) Where there has been considerable delay substantial grounds must be provided to explain the entire period. Where such an explanation is provided an extension will usually be granted if there appears to be merit in the grounds of appeal.*
>
> *(iii) The fact that a person involved in the crime subsequently receives a more lenient sentence will generally not be a satisfactory explanation for any delay in an appeal against sentence. A defendant should take a view about his attitude to the sentence at the time that it is imposed.*

(iv) A convicted defendant will usually get advice on any grounds for appeal from his legal representatives at the end of the trial. It will normally not be an adequate explanation for considerable delay that the defendant has sought further advice from alternative legal representatives.

(v) Where the application is based upon an application to introduce fresh evidence the court may extend time even where a considerable period has elapsed as long as the evidence has first emerged after the conviction, the circumstances in which the evidence emerged are satisfactorily explained, the applicant has moved expeditiously thereafter to pursue the appeal and the evidence is relevant and cogent.

(vi) Even where there has been considerable delay or a defendant had initially taken the decision not to appeal, an extension of time could well be granted where the merits of the appeal were such that it would probably succeed."

[27] We apply the governing principles in the following way. The detailed chronology set forth in [2] above discloses that this purported appeal was initiated well over five years out of time. In his Notice dated 20 January 2009 the Appellant stated that his grounds for securing an extension of time and the reasons for his delay would be provided "*… when court transcripts are obtained*". The issue of transcripts featured intermittently in the multiple reviews conducted by this court. At a listing on 20 December 2013 it was confirmed that the relevant transcripts had been provided and would be transmitted to the parties. This issue has not been raised subsequently. The Appellant's aforementioned representation has not been fulfilled. Thus there are no grounds for securing an extension of time before the court. Notwithstanding we have approached this issue broadly and fairly.

[28] It is incontestable that none of the first five of the *Brownlee* principles can be applied in the Appellant's favour. The sole question is whether, in accordance with the sixth principle, the merits of the appeal are such that it would probably succeed.

[29] The various incarnations of the Appellant's grounds of appeal are summarised in [9] – [12] above. The Appellant highlights in particular that the prosecution case did not include any inculpatory forensic evidence against him. However, as emphasised in the written submission of Mr Ken McMahon QC and Ms Natalie Pinkerton (of counsel) on behalf of the prosecution, the two central issues at the forefront of the Appellant's trial were his protestation – and that of his father – that they had been acting in self-defence, together with the credibility of the injured parties. The transcripts confirm that there was no dispute about the fact of the physical altercation involving the injured parties. In these circumstances forensic evidence was not required in order to establish the Appellant's guilt beyond reasonable doubt.

[30] Nor can there be any material concern about the trial judge permitting the jury to be informed of the Appellant's criminal record, given that this unfolded in the context of (a) cross examination of the two injured parties relating to *inter alia* their character (confirmed by the transcripts) and (b) the evidence of the Appellant's criminal record being provided by him. In passing, the trial judge's ruling about this matter predated the advent of the elaborate machinery devised by the Criminal Evidence (NI) Order 2004.

[31] Next the Appellant complains that the evidence of a photograph of a knife recovered by the scenes of crime officer from a tool box in the Appellant's tractor at the scene of the alleged offending should not have been adduced, essentially as there was no suggestion of any blood traces on this knife. The transcripts confirm that the "knife issue" featured prominently at the trial. The weight, if any, to be attributed to this evidence was a matter for the jury. We consider that its adduction did not render the Appellant's convictions unsafe, even arguably.

[32] The Appellant's grounds focus substantially on allegations of inadequate legal representation. He was represented by a solicitor, senior counsel and junior counsel. These allegations consist of bare and unsubstantiated assertions. On further enquiry and examination some of them are exposed as manifestly false. This applies with particular force to his assertions that no medical evidence was obtained on his behalf and that the issue of whether the complainants possessed the requisite authorisation to move cattle on to certain fields at the time of the relevant altercation was ignored. Both assertions are unfounded.

[33] Furthermore the Appellant's grounds fail to engage with the principle articulated by this court in *R v Bradley* [2013] NICA 36 at [6]:

> "*The authorities clearly establish that it is not enough to simply be 'wise after the event' or to establish that different counsel might have approached cross examination in a different manner.*"

This court endorsed the decision of the English Court of Appeal in *R v Day* [2003] EWCA Crim 1060 that in an appeal founded on the alleged incompetence of legal representatives it is necessary to establish that their inadequacies have given rise to identifiable errors or irregularities in the trial such as to render the process unfair or unsafe. The same theme emerges from *R v Wood* [2008] EWCA Crim 587, at [2] – [3] especially, cited with approval by this court in *R v Bradley* [2011] NICA 22.

[34] Finally there has been a manifest failure by the Appellant to discharge his duty to provide a full and candid explanation for his delay: see [25] above.

Conclusion

[35] The conclusion which must follow from the foregoing analysis is that this appeal is manifestly devoid of merit. Speculation, unsubstantiated assertion and demonstrable inaccuracies are its hallmarks. It is inconceivable that this appeal would succeed in the event of time being extended. Thus there is no basis for extending time. While the prosecution of this appeal has been dogged by further inordinate delay, now of some 11 years proportions, we do not dismiss the appeal on the ground of want of prosecution as it would be otiose to do so. Considered argument on the power of this court to do so will be required in an appropriate future case.

[36] To summarise:

(i) This court, constituted by a panel of two judges in accordance with section 44 of the 1980 Act, is competent to decide all aspects of this appeal and to exercise all of its powers notwithstanding the absence of any decision on leave to appeal by a single judge.

(ii) The application to extend time for appealing is refused.