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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

STEPHEN ANTHONY JOHNSTON

Before: Carswell LCJ, Kerr J and Coghlin J

COGHLIN J

[1] In this case the applicant, Stephen Anthony Johnston, seeks leave to appeal against his conviction of the offence of murder on 12 March 2002. Following a jury trial before Higgins J the applicant was convicted of the murder of Sean May on 8 December 1999 and on 22 March, 2002 Higgins J sentenced the applicant to be detained during the pleasure of the Secretary of State and specified a "tariff" of 21 years. The applicant was refused leave to appeal against conviction and sentence by order of the single judge, Campbell LJ, on 7 June 2002.

[2] The applicant's brother, Paul Johnston, appeared as a co-accused on the same indictment and he was also convicted of the murder of Sean May. Gerard Mark McMahon, who appeared on the same indictment, pleaded guilty to assisting offenders on 19 October 2001 and Leanne Clarke was found not guilty on one count of perverting the course of justice while the jury disagreed on two further counts.

[3] At approximately 6.15 am on the morning of Wednesday 8 December 1999 a fire was detected at No.68 Moyard Park, Belfast which was the home of the deceased Sean May. When firemen entered the premises they found the deceased on a bed and it was clear that he had sustained serious injuries. An examination by a forensic medical officer confirmed that severe head injuries had been inflicted upon the deceased and that he had also received 14 to 16 stab wounds. A knife was found protruding from his right side. Forensic examination of the house suggested that the fire had been started by the

ignition of two armchairs which had been stacked together close to a lounge fireplace.

[4] The Crown case against the applicant was wholly circumstantial and was accurately summarised by the learned trial judge at pages 126-130 of the transcript of evidence. The relevant pieces of evidence were:

(i) When the applicant was arrested on 9 December he was found to be wearing a pair of Reebok trainers and when these were examined by Sergeant Kennedy of the Canadian Mounted Police the Sergeant concluded that there was very strong support for the proposition that the wearer of those trainers was also the wearer of a pair of trainers which had been found beside the applicant's bed in 70 Moyard Park. The latter training shoes, when forensically examined, were found to bear watery traces of blood which, upon forensic analysis, was found to contain four components which matched similar components in the DNA profile of blood taken from the deceased. Two of those components could not have come from the blood of either the applicant or Leanne Clarke, the other occupier of No.70 at the material time. Those two components occur in approximately one in twenty of the general population.

(ii) During the course of his interviews with the police the applicant admitted that, on the night of the murder, he had been drinking and sniffing glue, namely, Evostik. A container of Evostik was recovered from No.70 Moyard Park during the course of the search on 9 December. On 10 December a further search of No.70 revealed a plastic JJB carrier bag behind a washing machine which contained two knives, a wheel brace, a china mug and two Evostick screw caps. These Evostick caps were found to fit an Evostick container found in No. 68 Moyard Park. The knives, the wheel brace and the mug bore spots and smears of blood which matched the DNA profile of blood from the deceased. The knives fitted the slots in a wooden block recovered from the kitchen of 70 Moyard Park.

(iii) At about 10.00 am on the morning of 8 December Mrs Johnston, who lived at 10 Rock Grove, about half a mile from 68 Moyard Park, noticed that a lot of clothing which she had placed in the washing machine and the tumble dryer the day before was lying all over the floor. She eventually found clothes in the tumble dryer that were dripping wet and when she put these clothes on the washing line she noticed that much of the clothing did not belong to her family. She recognised some of this clothing as being similar to clothing worn by the applicant. In particular,

Mrs Johnston recognised a Berghaus jacket as being a garment she had seen the applicant wearing on several occasions and this was identified as a garment being worn by an individual observed in videos taken from premises at Cairnshill, Burger King and Wineflair during the evening of 7/8 December. The applicant generally agreed that he was one of the persons featured in these videos during the course of his police interviews. During the course of interviews with the police the applicant maintained that he was in the company of his brother, the co-accused Paul Johnston, throughout the evening of the 7th and up to approximately 4.00 am on the morning of 8 December. The videos confirm that the brothers were together and a footprint found at the scene of the crime was identified by a forensic expert as having been made by the right Reebok Classic shoe worn by Paul Johnston.

(iv) The applicant was also identified as being in a car in which the box and receipt for the purchase of the Reebok Classic shoes worn by his brother were found. The knives and the wheel brace found at 70 Moyard Park were contained in a plastic JJB carrier bag, the same type of shop from which the co-accused's trainers had been purchased.

(v) At about 3.20 am on the morning of 8 December the police pursued a red Toyota Starlet vehicle from Highfield Pass along the Springfield Road eventually finding it abandoned in Watermount Street. During the course of the pursuit they noted that the vehicle contained two people in the front and a female with long dark hair in the rear. When the police inspected the abandoned vehicle they noted a strong smell of solvent glue and at about 3.50 am they stopped a female with long hair and two males crossing the mouth of West Circular Road proceeding in the direction of New Barnsley Police Station. These persons identified themselves and were searched and allowed to proceed. At approximately 4.00 am the police again observed the same three people and, on this occasion, the two males were sniffing glue. These three individuals were the applicant, his brother and Leanne Clarke.

[5] Two further pieces of evidence were relied upon by the Crown in the case against the applicant, each of which was made the subject of a voir dire with the consent of the trial judge. These were:

(a) Constable Davison, one of the first police officers to arrive at the scene of the incident, purported to identify the applicant standing at some steps on a pathway leading between Moyard

Park and Vere Foster Walk at 7.15 am. This evidence tended to contradict the evidence of the applicant and Leanne Clarke both of whom maintained that, at the material time, they had been in bed together at 70 Moyard Park.

(b) Evidence relating to the presence of four persons at a shop at the Bull Ring shortly after 7.00 am on the morning of the 8th. One of these individuals was identified as Gerard McMahon but, while the others were not identified, the Crown sought to persuade the jury to infer that the others included the applicant and his brother Paul. These four individuals ordered baps from the shop and witnesses noted the presence of a strong smell of glue. Gerard McMahon was later found by his mother in 10 Rock Grove at about 8 o'clock together with Paul Johnston and Patrick Joseph Clarke.

It was the admission of these pieces of evidence, primarily the evidence of Constable Davison, that formed the focus of the application for leave to appeal.

[6] Constable Davison and Constable Bell seem to have been the first police officers to arrive on the scene at about 7.03 am on the morning of 8 December 1999. The Fire Service were already present and Constable Davison entered the house observing the scene and the body. The officers then took steps to preserve the scene with tape after making arrangements for Constable Bell to act as a log keeper. In the course of seeking access to the rear of Moyard Park, Constable Davison walked along the front of the bungalows and, at about 7.15 am, he noticed two males in an alleyway leading to Vere Foster Walk. Constable Davison agreed that it was dark at the time but maintained that the street lighting at the location was sufficient to give him a clear view of the faces of these individuals who seemed to be staring down at the activity outside No.68. The Constable said that he observed both men for approximately two or three seconds at a distance of about 10 metres. During this time there was a low wall between the Constable and the males. On the following Sunday, some four days later, in the course of discharging his duties, Constable Davison was required to escort Patrick Joseph Clarke from Grosvenor Road Police Station to Belfast Magistrates' Court. While the Constable was present at court he saw a number of other persons brought in and he recognised one of them as being one of the two males he had observed at about 7.15 am on the previous Wednesday morning. Constable Davidson identified that individual as the applicant.

[7] Constable Davison was closely cross-examined on behalf of the applicant during the voir dire as to the detailed circumstances under which he observed the two males on the morning of 8 December. The defence emphasised that the observation took place in artificial lighting, over a very

brief period of time, that the face of the individual concerned was partially obstructed, that the Constable had not seen Stephen Johnston before and that the circumstances of this observation were not such as to alert the Constable to the fact that it would ultimately prove to be of any particular significance. The defence also pointed out that, on the day of his attendance at Belfast Magistrates' Court, Constable Davison had incorrectly recorded the name of the prisoner he was escorting and that he apparently did not mention his purported identification of the applicant until 3.00 or 4.00 pm on the afternoon of 12 December. Reliance was also placed on the statement of Paula McCann, which was read to the jury later, in the course of which Ms McCann referred to two persons on the steps at the material time as being youths aged between 17 and 18 whereas the applicant was 20 years old.

[8] Strictly speaking this was not a case in which the Crown depended wholly or substantially upon identification evidence as in R -v- Turnbull and Another [1977] QB224. Rather, it seems to us that Constable Davison's evidence could be seen as one of a number of strands of circumstantial evidence alleged by the Crown to constitute the case against the applicant. His evidence placed the applicant in the alleyway shortly after the crime was discovered thereby undermining the applicant's alibi. As such, the evidence of the Constable might have been challenged by way of a submission that its prejudicial effect outweighed its probative value and that, therefore, it should have been excluded in the interests of fairness in accordance with the discretion afforded to the trial judge by Article 76 of the Police and Criminal Evidence (NI) Order 1989.

[9] On behalf of the applicant Mr McDonald QC submitted that the impact of Constable Davison's evidence was fundamental since it effectively destroyed the applicant's alibi that, at the material time, he was in bed with Leanne Clarke. In such circumstances, Mr McDonald QC argued, once the trial judge had determined that the evidence should be admitted he became subject to a clear duty to ensure that the jury received a coherent, fair and objective warning about the potential weaknesses of this type of evidence. In particular, Mr McDonald QC submitted that:

(i) When warning the jury about the evidence of Constable Davison the trial judge had potentially reduced the impact of certain weaknesses in the evidence by introducing them as being referred to, relied upon or highlighted by the defence. Mr McDonald QC argued that this was contrary to the decision of the Court of Appeal in R -v- Elliott [1997] (Court of Appeal transcript.)

(ii) Mr McDonald QC further argued that the trial judge had failed to adequately and effectively analyse the potential weaknesses of Constable Davison's evidence in an objective way.

[10] The evidence of Constable Davison was dealt with by the trial judge at pages 99-106 of the transcript and again at pages 196-198 in response to a defence requisition. The trial judge dealt with the circumstances of how Constable Davison had arrived at the scene and observed the two males in the alleyway leading to Vere Foster Walk. He reminded the jury that it was dark at the time but that there was street lighting although the Constable had been unable to identify the location of individual lamp posts. He reminded them of the distance of some 10 metres between the Constable and the males and that the period of observation had only been 2-3 seconds. He also pointed out to the jury that the Constable had not known the applicant at that time and that the issue of his identity had only arisen some four days later when he was on escort duty at Belfast Magistrates' Court. He also reminded the jury of the presence of the low wall between Constable Davison and the person he identified although the Constable had said that he was still able to clearly see that person. He pointed out to the jury that the Constable was unable to describe any of the applicant's features, that he could not give a description of the other person who was present and that, as far as the Constable was concerned, "… it wasn't a matter of any great significance".

[11] At page 103 of the transcript the trial judge emphasised to the jury that there was a special need for caution before relying on evidence of visual identification. He recalled that, in past criminal cases, honest witnesses had made a mistaken identification and emphasised the importance of a careful examination of the circumstances in which any identification was said to have been made.

[12] In R -v- Elliott the Court of Appeal said, at page 10 of the transcript:

> "Again, to refer throughout to points which the jury ought properly to consider when weighing the evidence simply in terms of arguments raised by defence counsel can leave the jury with the impression that they are no more than that, as opposed to constituting matters which the judge considers the jury should weigh carefully in the course of their task".

[13] We accept that the judgment in R -v- Elliott contains useful advice as to how issues of identification should be put before a jury but we would be anxious to avoid any suggestion that it is necessary to adhere to a rigidly defined formula. Provided he is aware of the relevant authorities and complies with any relevant practice directions the trial judge should be free to adapt his charge as he considers best to the particular circumstances of the case. In this case the trial judge did give a "Turnbull" warning about the dangers of mistaken identification in relation to the evidence of Constable

Davison. He dealt with Constable Davison's evidence and its potential weaknesses in a specific section of his charge. His references to points "highlighted" or "relied on" by the defence were not the only references to those points but followed passages in which he himself had drawn to the attention of the jury the circumstances of the lighting, the short time of the observation, the inability of the Constable to describe any features of the applicant and the circumstances in which the Constable came to recall the person observed some four days later.

[14] Furthermore, in response to a requisition by Mr O'Rourke the trial judge again asked the jury to consider the period of time during which the observation took place, the fact that it was an early December morning and that the observation was taking place in artificial light, the fact that Constable Davison only saw the applicant's face and not all of his face and the fact that he was unable to give a description of the applicant at a later stage. Standing back, and viewing the circumstances in which the trial judge dealt with this evidence in the course of his charge, we do not consider the criticisms made by Mr McDonald QC can be sustained.

[15] Mr McDonald QC also criticised the section of his charge to the jury in which the learned trial judge dealt with the "Bull Ring" evidence. A number of witnesses, Patricia Quinn, Lyla McKeavney, Paul O'Brien and Anthony McCabe described how Gerard McMahon and three other males had entered a shop at the Bull Ring at about 7.05 am on the morning of 8 December 1999 and ordered four baps. The staff, Patricia Quinn and Lyla McKeavney, felt unsettled by the presence of the males and they noticed a strong smell of glue. When Paul O'Brien came into the shop some sort of angry exchange took place between him and one of the males and, shortly after Anthony McCabe entered, these males left the shop and went towards the Springfield Road via the Dinsmore side of Glenalina Road. The applicant was not identified specifically as being one of these male persons but, on his own case to the police, the applicant had been in the company of his brother Paul, Patrick Joseph Clarke and Gerard McMahon and he agreed that they had been stopped by the police after being chased in the red Toyota. The applicant admitted that, during this time, as well as drinking alcohol, he had been "on the glue" and that the glue had been Evostik. At approximately 8.00 am Gerard McMahon's mother found Gerard, Paul Johnston and Paddy Joe Clarke in Gerard's bedroom at 10 Rock Grove and later she discovered wet clothing in her house similar to that identified as having been worn by the applicant when in the company of the others earlier in the evening. The trial judge decided to admit the evidence of the presence of the four males at the Bull Ring after a voir dire.

[16] In dealing with the evidence relating to the Bull Ring the learned trial judge reminded the jury that there was no positive evidence that the applicant was in the company of Gerard McMahon at that time and that there was no

positive evidence that he was not. While Gerard McMahon was identified as being present by several witnesses the trial judge reminded the jury that the witnesses produced varying descriptions of the other three males. He suggested that the jury should consider whether the descriptions were inconsistent with the prosecution case, neutral or supporting the prosecution case against the applicant. He suggested that the evidence of those present at the Bull Ring should be considered by the jury in conjunction with all the other evidence in the case reminding them that, apart from Gerard McMahon, there was no positive identification of any of the other three persons.

[17] As the trial judge was careful to point out to the jury the only person identified at the Bull Ring was Gerard McMahon. The Crown sought to persuade the jury that this was a further significant strand in the circumstantial case against the applicant providing a link between his accepted association with McMahon, Paul Johnston and Paddy Joe Clarke earlier in the evening and the presence of the applicant's clothing at the house in which the other three were found later in the morning. The weight and significance to be attached to the Bull Ring evidence in the case against the applicant was entirely a matter for the jury when considering it in conjunction with the rest of the evidence. Mr McDonald QC did not raise any criticisms of the trial judge's direction to the jury upon the topic of circumstantial evidence.

[18] Without developing the matter in detail Mr McDonald QC also referred the court to paragraph 19 and 20 of his skeleton argument in which he was critical of the fact that the police interviews with the applicant contained references to what had been said by McMahon and Clarke. Most of these passages did not elicit any response from the applicant.

[19] We do not consider that there is any substance in this point. The applicant himself admitted that he was in the company of McMahon and Clarke at the material time and the facts put or suggested clearly related to the movements of this group.

[20] In the circumstances, having carefully considered his submissions, we have reached the conclusion that Mr McDonald QC's criticisms of the trial judge's directions cannot be sustained. The conviction is safe and, accordingly, the application for leave to appeal against conviction will be dismissed. We shall defer the application for leave to appeal against sentence until a future date.