**Neutral Citation No : [2009] NICC 11**

*Ref:* **GIL7377**

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

*Delivered:* **28/01/09**

**IN THE CROWN COURT IN NORTHERN IRELAND**

________

**BELFAST CROWN COURT**

________

**THE QUEEN**

**-v-**

**STEVEN LESLIE BROWN**

________

**GILLEN J**

[1] In this matter the accused is charged with the murder of Andrew Robb and David McIlwaine on 19 February 2000.

[2] It is alleged that in the early hours of 19 February 2000 the accused, in the company of another man who is now deceased namely Noel Dillon, murdered the two victims at Druminury Road, Tandragee.

[3] At this stage the prosecution case has, with the exception of one witness, namely witness F, who is the subject of this application, presented to the court all of its witnesses and evidence. In essence it relies in the first place on the evidence of Mark Burcombe, who was allegedly at the scene of the murders in the company of the accused and Noel Dillon when the murders took place. He has been cross-examined by Mr McCrudden QC who appeared on behalf of the accused with Mr King. It is Mr Burcombe's evidence that the accused and Mr Dillon carried out the murders.

[4] Mr Kerr QC, who appeared on behalf of the prosecution with Ms Colgan, further relies on three pieces of forensic evidence which he submits amounts to the following:

(a) A piece of green plastic found at the scene of the murder matches two pieces of green plastic found by the police at the home of the accused. These were discovered when the police searched those premises shortly after the murder.

(b) Recent tyre marks found at the scene of the murder included tread and types of tyre (which were not standard) and which were similar to those on the Peugeot vehicle owned and kept by the accused.

(c) Two stains on the clothing of one of the deceased Mr McIlwaine contained the DNA of the accused.

**The current application**

[5] Mr Kerr now seeks to adduce in evidence a statement made by a female witness described as witness F. She commenced to give evidence in this case for a short time but she was unable to continue. She was examined by a general practitioner and by Dr Fred Brown consultant forensic psychiatrist during a break in the trial. Dr Brown has reported, and has given evidence before me, that he considers that witness F is suffering from a mixed anxiety and depressive disorder. It was his view that if she continued to attempt to give evidence in the current trial she would become acutely anxious and emotionally distressed and would be unable to give effective evidence during either her evidence-in-chief or during cross-examination. He did not consider that her condition was readily amenable to any form of treatment such as medication or psychological therapy. As regards her prognosis, he expected that she would continue to experience symptoms for a substantial period after this trial for perhaps up to several years but in the longer term he hoped there would be some prospect of improvement. I invited him to indicate whether or not he considered there was any prospect of her being fit to give evidence in this trial if I was to adjourn proceedings for a reasonable period. His view was there was not any such prospect.

[6] Since she is unable to give evidence, Mr Kerr seeks to adduce her evidence under the terms of the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order").

**The contents of the statement**

[7] The statement has been adverted to on many occasions during the submissions and I therefore can mention its contents in brief compass. Witness F met the accused in April 2004 and shortly thereafter commenced to live with him. She recalled finding a newspaper cutting in his wallet referring to charges of murder being dropped against him. When she spoke to him about the matter he referred to two boys coming to his flat one night, a discussion about Richard Jameson deceased wherein the two boys spoke disparagingly of him and of Brown's decision "to do them in". After describing them being driven away he described one of them trying to run away and that Brown cut his throat and stabbed him. Witness F did not think he had any admitted any involvement in the death of the other man. Brown

allegedly went on to mention something about a knife, about cleaning his car, bits of an aerosol can or lid being found at the scene and near his car.

[8] The statement went on to describe the deteriorating nature of their relationship because of Brown's violence. Something had come on to the television about the matter and Brown had allegedly made some further comments about his involvement. He had mentioned the death by suicide of Dillon and how Brown might still be connected to the crime by the authorities. In short therefore it amounted to an admission by Brown of his involvement in these murders.

**The statutory framework of the application.**

[9] The relevant articles of the 2004 Order are as follows:

> "Admissibility of hearsay evidence
>
> 18.-(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if –
>
> (a) any provision of this Part or any other statutory provision makes it admissible …
>
> …
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under sub-section (1)(d), the court must have regard to the following factors (and to any others it considers relevant) –
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);

(c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appear to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which any difficulty would be likely to prejudice the party facing it.

**20.-(1)** In criminal proceedings a statement made in oral evidence in the proceedings is admissible as evidence of any matter stated if –

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter;

(b) the person who made the statement ('the relevant person') is identified to the court's satisfaction' and

(c) any of the five conditions mentioned in paragraph (2) is satisfied.

(2) The conditions are –

(a) …

(b) that the relevant person is unfit to be a witness because of his bodily or mental condition.

….

**Court's general discretion to exclude evidence**

30.-(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if –

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in due waste of time, substantially outweighs the case for admitting it taking account of the value of the evidence.

(2) Nothing in this Part prejudices –

(a) any power of a court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12) (Exclusion of Unfair Evidence), or

(b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)."

[10] Article 76 of Pace 1989 provides, inter alia,

> "In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[11] Of the comparable section and legislation in England and Wales Sir Igor Judge P said in R v Davis and Ellis(2006)4 All ER 646 at paragraph 63:

> "In this constitution we have recently addressed the principles relating to the exercise of the trial judge's discretion under s 78 of the Police and Criminal Evidence Act 1984……….. On the basis of the elementary principle at common law summarised in

> the 'birthright' of the defendant to a fair trial, and repeated in art 6 of the convention, we observed:
>
> 'Trial judges should not admit evidence if notwithstanding the robust safeguards provided by the trial process itself, the effect of doing so would produce a trial which could properly be stigmatised at its end as an unfair trial. If this court were satisfied that the admission of the evidence would or did produce an unfair trial, the decision to admit it would not be upheld'

[11] I observe at this stage that a statement falling within Article 20(2)(b) gives no discretion to the court, merely providing that a statement is admissible if the relevant conditions are satisfied. This is a significant difference from the earlier legislation under the Criminal Justice (Evidence etc) (Northern Ireland) Order 1988 which rendered all such statements subject to the "interests of justice" discretion, with the presumption being against admission when it was apparent that the statements in question had been prepared for the purposes of criminal proceedings or a criminal investigation. Now the court's discretion to exclude statements under Article 20(2)(b) derives from Article 30 of the 2004 Order and thus Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (NI 12) (Exclusion of Unfair Evidence) and the other specific discretions therein referred to.

[12] In considering the manner in which the court should apply the exclusionary discretion under Article 30 of the 2004 Order, Mr Kerr drew my attention to comments made by Lord Phillips CJ in R v Cole and Keet (2007) 1 WLR 2716. The court in that instance was dealing with evidence automatically admissible under the provisions of s. 116 Criminal Justice Act 2003 (the equivalent to the 2004 Order). Lord Phillips transposed herein the nine criteria for consideration prior to a decision on admissibility under s. 114(2)(a) to (i) (the equivalent to Article 18(2)(a)-(i)) of the 2004 legislation) into factors which assisted in the decision on exclusion under s. 78 of the Police and Criminal Evidence Act 1984. He said at paragraph 7:

> "It seems to us that the test in PACE 1984 s. 78, is unlikely to produce a different result from that of the 'interests of justice' in 114(1)(d). In either event the court must ensure that the requirements of a fair trial, as laid down by Article 6 of the European Convention on Human Rights are observed."

[13] I note that in the commentary on this case in Blackstone 2009 Section F16.18 the authors express the view that such a statement makes more sense if restricted to cases where the sole or main evidence comes in hearsay form in order to ensure that the legislative changes on the "absent witnesses"

provisions are not substantially defeated. For my own part, given the wording of Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989, I have some difficulty envisaging how in any circumstances a consideration of the exercise of that power would not in any instance necessarily involve a consideration of most if not all of the concepts contained within Article 18(2).The interests of justice seem to me to be a relevant test. Nonetheless, the fact of the matter is that the 2004 legislation does confine the considerations of Article 18(2) to instances where oral evidence is to be admitted under Article 18(1)(d) and to that extent the court is confined to exclusion under Article 30 in order to ensure that the intention of Parliament is implemented. However the matters to be considered under Article 30 may vary from case to case. In this instance I consider that the factors set out in Article 18(2), inter alia, do provide some of the factors which I should take into account in exercising my discretion.

**Principles to be observed in implementing the legislation**

[14] The onus is on the party seeking to have the statement admitted, in this case that party being the Public Prosecution Service, to satisfy the court that it ought to be admitted. I observe at the outset that I am fully satisfied by the medical evidence placed before me that witness F is unfit to be a witness because of her mental condition. Accordingly the evidence of F is admissible unless I exercise my discretion under Article 30 of the 2004 Order.

[15] The Strasbourg jurisprudence very strongly favours the calling of live witnesses, available for cross-examination by the defence. The express language of art 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) provides that:

> 'Everyone charged with a criminal offence has the following minimum rights . . . to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . .'

Article 6(3)(d) of the European Convention of Human Rights and Fundamental Freedoms ("the Convention") is thus an aspect of the right to fair trial guaranteed by Article 6(1), which, in principle ,requires that all evidence must be produced in the presence of the accused in a public hearing with a view to adversarial argument. As with the other elements of Article 6(3) it is one of the minimum rights which must be accorded to anyone who is charged with a criminal offence. As minimum rights the provisions of Article 6(3) constitute express guarantees and cannot be read as illustrations of matters to be to be taken into account when considering if a fair trial has been held. See paragraph 34 of the decision of the of the European Court of

Human Rights (ECHR) in Al-Khawaja and Tahery v The United Kingdom ("Al-Khawaja")Application Nos. 26766/05 and 22228/06 where the court went on to state:

> "Equally, even where those minimum rights have been respected, the general right to a fair trial guaranteed by Article 6(1) requires that a court ascertain whether the proceedings as a whole were fair ."

[16] In Luca v Italy (2003) 36 EHRR 807 at paragraph 40 of the judgment of the ECHR the court said:

> "The corollary of that, however, is that where the conviction is both solely or to a decisive degree based on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with a guarantee provided by Article 6."

[17] In R v Geoffrey Singleton (2003) NICA 29, in the context of Article 3 of the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988, concerning the admission of a statement of evidence of a child, Carswell LCJ addressed the principle in the following way:

> "The provisions of the 1988 Order are so framed that the court must ensure that the trial will be fair if the statement is admitted. The provisions of Article 6 incorporate the safeguard which appears prominently in the Strasbourg jurisprudence, that the prosecution case must not be founded solely or to a decisive extent upon the statement admitted. In the present case there was other evidence given orally and subject to cross-examination, directly implicating the appellant and Denise Vennard's statement was in our judgment ancillary to that. We therefore considered that the judge was entitled to admit her statement if satisfied that the trial would be fair if it was admitted. That would not in our opinion constitute a breach of Article 6 of the Convention ….. We should observe however that the judge did not spell out why he thought that it was in the interests of justice that the statement should be admitted and it was preferable that this should be done."

[18] At paragraph 34 of Al-Khawaja the ECHR court said

> "The court notes that ….the Government …..argue that the Court's statement in Luca and other similar case is not to be read as laying down an absolute rule, prohibiting the use of statements if they are the sole or decisive evidence, whatever counterbalancing factors might be present …….the Court doubts whether any counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant."

[19] The facts of Al-Khawaja and Tahery are illustrative of the circumstances where these principles will be enforced by Strasbourg. Tahery allegedly stabbed S three times in the back and was subsequently charged with wounding with intent and attempting to pervert the course of justice by telling the police that he had seen two black men stab S. T. made a statement to police that he had seen the applicant stab S. In S's statement to the police, it is clear that he did not see who stabbed him. The prosecution successfully applied for leave to read T's statement under section 116(2) (e) and (4) of the Criminal Justice Act 2003 on the ground that T. was too frightened to appear in court. There was no suggestion that T. was afraid of the applicant himself. T's witness statement was then read to the jury in his absence. The Court of Appeal, upholding the admission of the statement acknowledged that, had T's statement not been admitted, "the prospect of a conviction would have receded and that of an acquittal advanced."

[20] Al-Khawaja was a consultant physician in the field of rehabilitative medicine who was charged on two counts of indecent assault on two female patients while they were allegedly under hypnosis. One of the complainants committed suicide (taken to be unrelated to the assault) before the trial but, prior to her death, had made a statement to the police. It was decided that her statement should be read to the jury. The judge ruling on that question stated that the contents of the statement were crucial to the prosecution on count one as there was no other direct evidence of what took place; "putting it bluntly, no statement, no count one".

[21] Hence the sole or decisive evidence in both these instances were the statements read to the court. I pause to observe that it must be strongly arguable that in similar circumstances under the 2004 order an exercise of the discretion of the court pursuant to Article 30 and the application of Article 78 of PACE would have yielded the same result. Hence if in the instant case if the prosecution case was to be based solely or to a decisive degree on the evidence of witness F I would not permit it to be admitted irrespective of any counterbalancing factors.

[22] Mr McCrudden sought to invoke, as a definition of the phrase "to a decisive degree ", the description of T's impugned evidence in Tahery as being "both important and probative of a major issue in the case and that had it not been admitted the prospect of a conviction would have receded and that of an acquittal advanced." In my view the definition of what constitutes reliance on evidence" to a decisive degree" is a question of fact to be determined in the particular circumstances of each case and is not a term of art defined by law. The phrase should be interpreted according to its normal usage in the English language and not placed in an idiomatic straitjacket as a result of a phrase emanating from a concession by Crown counsel in the Tahery case.

[23] Even if I determine that the prosecution is not founded solely or to a decisive degree on the evidence of witness F I must still follow the invocations of the ECHR to which I have referred in paragraph of this judgment and Article 30 of the 2004 Order must be considered.

[24] I have touched on some of the matters to be taken into account in R v White [2007] NICC 20. In deciding how to achieve the fairness of the trial a balance must on occasions be struck between the interests of the public in enabling the prosecution case to be properly presented and the interests of a particular defendant in not being put in a disadvantaged position by the illness of a witness. The public has a direct interest in the proper protection of the individual accused (see R v Cole 90 Cr. App. R. 478 at page 8).

[25] The decision by an accused whether or not to give evidence or call witnesses is to be made by him by reference to the admissible evidence. The accused has no right for the purposes of these provisions to be treated as having no possibility of controverting the statement because of his right not to give evidence or to call witnesses. Equally, the fact that the court concludes that it is likely to be possible for the accused to controvert the statement of the person making it who cannot be cross-examined does not mean that the court will therefore necessarily be of the opinion that admission of the statement will not result in unfairness to the accused or that the statement ought not to be admitted in the interests of justice. See R v Cole supra.

[26] The weight to be attached to the inability to cross-examine and the magnitude of any consequential risk that admission of the statement will result in unfairness will depend in part upon the court's assessment of the quality of the evidence shown by the contents of the statement sought to be admitted.

[27] Any potential unfairness arising from the inability of cross-examination on a particular statement may be effectively counter-balanced by a warning and explanation given by the judge to the jury of all the dangers and weaknesses inherent in relying on an unchallenged statement. In a

Diplock trial, this would be by the judge appropriately reminding himself of these matters (see Lord Griffiths in Scott v R (1989) AC 1242 at p. 1258 and Lord Bingham in Grant v The State [2006] 2 WLR at paragraph 21(4) .

[28] Finally an application of this nature is normally made at the outset of a trial. At that stage the judge will determine the matter having read the statements before him. In the present case the situation was somewhat different in that by the time the application was made all of the evidence to be relied on by the prosecution had not only been laid before me in statements but had all been given in evidence with the exception of course of most of the evidence of witness F. In my view the basic task facing the judge remains the same. At whatever stage of the trial the judge in a Diplock trial is called upon to make a determination he must consider what is the evidence as it stands at that time –whether that be all in statement form, part statement and oral testimony or all oral testimony. For example in this case the prosecution rely on the evidence of Burcombe and the supporting forensic evidence to mount the proposition that it does not rely on the statement of F as the sole evidence or to a decisive degree .I have to determine whether the objective state of the evidence of Burcombe at this stage is either so manifestly unsatisfactory that it would have an adverse effect on the fairness of the trial to permit it to remain in front of the notional jury thus rendering the evidence of F to be the sole or decisive evidence or, because it is so manifestly weak that it is impossible to characterise the evidence of F as anything other than the sole or decisive evidence in the case if admitted. Those are the same principles which will guide a judge at whatever stage he approaches such a matter as that now before me .One of the advantages of a Diplock trial is that if I was to admit the evidence of witness F at this time I can continue to keep the progress of all the evidence under review and if at any stage my perception of the evidence changes I can revisit my determination.

**The submissions on behalf of the accused**

[29] Mr McCrudden submitted that the court should not admit this statement because in fact prosecution does rely to a decisive degree on witness F's statement. It amounts to a volunteered confession to the murders. As it stood, unchallenged and not subject to cross-examination, it was potentially superior to what he contended was the flawed and damaged state of Burcombe's evidence. In short, counsel's submission is that Mr Burcombe's evidence is so discredited that that it was unworthy of belief or alternatively that it was so damaged that in fact F's evidence is the sole or decisive evidence against the accused.

[30] Mr McCrudden conducted a detailed analysis of the evidence-in-chief and cross-examination of Mr Burcombe to sustain that argument. At the same time counsel made it clear to me that at the end of the prosecution case,

whether I admitted the statement of F or not, he would be making an application that there was no case to answer based, inter alia, upon the same factual analysis of Burcombe's evidence. Hence he left no stone left unturned and took me, over the course of several days, through a detailed analysis of the transcript and statements addressing what he submitted were the flaws in Burcombe's evidence. Although he had not raised the matter in his skeleton argument counsel submitted in the course of argument that this matter should be heard by a satellite judge. I considered that my approach should be that adumbrated by me in paragraph 28 of this judgment. I refused his submission on the basis that I was in a position to make such a determination and that there was no need for such a further interruption and delay of this trial .

[31] It was counsel's contention that the forensic evidence in this case was entirely circumstantial in nature and did not directly implicate the accused in the murders. It was insufficient either alone or as supportive of Burcombe's evidence to be characterised as the decisive evidence in the case

**Conclusions**

[32] I have come to the conclusion, having considered my discretion within the terms of Article 30 of the 2004 legislation, that I should admit this statement and not exercise my power to exclude this evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 in the interests of justice. I have looked at the circumstances in which it was obtained. I am satisfied that there are compelling reasons to admit it, that to do so will accord with meeting the accused's rights under article 6 of the Convention and that the trial of this accused will be fair if I do admit it. I have come to this conclusion for the following reasons.

[33] I do not consider that the prosecution case as it stands now before me is founded solely or to a decisive extent upon the statement of witness F. There is other evidence implicating the accused in these alleged offences namely the evidence of Burcombe - even if as seems inevitable his evidence must be looked at with caution per the principles in R v Makanjuola (1995) 1 WLR 1348 – which when coupled with the supporting forensic evidence renders the evidence of F outside the category of the sole or decisive evidence in the case. This case is wholly distinguishable from the factual situations for example in Luca's case and Al-Khawaja where the impugned evidence constituted what amounted to the only evidence against the defendant. Of course if at any stage in this trial – whether at the direction stage or, if I refuse that, thereafter I come to the conclusion that the state of the evidence is such that witness F has become the sole or decisive evidence then I can revisit my decision and discard that evidence.

[34] This statement does have probative value in relation to a matter in issue in these proceedings. I do regard it as important evidence supportive of other evidence in the case namely that of Burcombe and the forensic evidence. I have considered the circumstances in which it was made, namely to a police officer by a witness who had lived with the accused and I find nothing suspicious in that. I find at the moment no evidence challenging the reliability of the making of the statement such as would persuade me to exclude it. Clearly oral evidence of the contents cannot be given by anyone other than F. The accused can challenge this statement by giving evidence in the witness box and thus any prejudice can be reduced.

[35] As a judge sitting alone, I will ultimately have to determine the outcome of this case both on fact and law. Mr McCrudden intends to make an application to dismiss this case at the end of the prosecution evidence at least on the basis that the evidence is so weak or discredited that it could not conceivably support a guilty verdict. Hence I feel it would be inappropriate at this stage of the trial that I should set out in this judgment a detailed analysis of the state of evidence of Mr Burcombe and the forensic evidence as they currently stand. Suffice to say at this stage that, the onus being on the prosecution in this application, I consider the prosecution is entitled to maintain that the combination of the evidence upon which they rely from Mark Burcombe taken with the supporting forensic evidence renders the statement of F to be supportive evidence for the prosecution but not the sole or decisive evidence in the case. The prosecution have persuaded me firstly that the objective state of Burcombe's evidence is not such that no court could place any reliance on it at this stage and, secondly, that it is not so weak and damaged that F's evidence can only be characterised as the sole or decisive evidence before the court. If it becomes necessary at a later stage to outline my reasons for so concluding I shall then do so.

[36] On the evidence currently before me I see no basis for a suggestion that F is tainted. On the face of her statement as it now stands some of the contents therein have already emerged in evidence e.g. the suggestion that the two victims called to the house of the accused, there were tyre marks and pieces of plastic at the scene and the accused through counsel has suggested to a police officer that there was discussion between the accused and F about a newspaper article referring to charges of murder being withdrawn against him albeit in a different context from that suggested by F. Mr McCrudden has drawn my attention to certain areas where there is a conflict with Burcombe's evidence e.g. she makes no mention of a fifth party at the scene .However these are matters that will be relevant when I come to consider the weight of her evidence. Provided that I ensure that I warn myself of the dangers of such evidence in the terms outlined by Lord Griffith in <u>Scott's</u> case (see paragraphs 27 and 38 of this judgment) I see no reason why the interests of justice and of the accused cannot thus be protected. In a case where I am sitting as a judge alone, I must give my reasons for the acceptance or rejection

of any witness relevant to the hearing and thus any analysis of the witness and her credibility will be transparent and open to consideration. I shall of course apply a rigorous scrutiny to the statement of F when considering the case as a whole.

[37] Even if the accused does not give evidence, I will expressly remind myself that the weight which I attach to the evidence of witness F will be less than if it were oral testimony subjected to cross-examination. I will be aware of the risks of reliance on untested evidence. More than a jury I will be aware of any risk of accepting what might be an apparently plausible statement on its face value by an author at the moment whose reliability I have no extraneous reason to doubt and that it should not be given more weight than the oral evidence that is being heard. I will also be conscious of the context of all the other evidence and if there are discrepancies between the statement and the evidence of other witnesses, I will take them into account. I am therefore satisfied that I will be able to ensure the proceedings as a whole, including the way in which the evidence was taken, are fair. Its admission does not place the defendant at an unfair advantage with which I cannot deal within the trial process.

[38] Finally I must bear in mind, as Strasbourg jurisprudence has recognised, that there is a need for a fair balance between the general interest of the community and the personal rights of the individual. I must not only safeguard the rights of the individual to have a fair trial, but the interests of the community and the victims of crime must also be respected. It is important that all the relevant evidence in this case be examined and that all the material witnesses who have come forward be given an opportunity to have their evidence heard even where as in this case the witness is now unfit provided the proceedings on a whole are fair. In these circumstances I have come to the conclusion that this statement merits admission.