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Judgment: approved by the Court for handing down | *Delivered:* **28/04/05**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

STEVEN SHEPHERD

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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KERR LCJ

Introduction

[1] Leave to appeal was granted by the single judge. This is therefore an appeal by Steven Shepherd against his conviction on the charge of murder. The appellant was tried at Antrim Crown Court before Gillen J and a jury for the murder of Miss Vera Waring on a date unknown between 29 December 1981 and 1 January 1982. He was convicted on 27 November 2002 and was sentenced to life imprisonment on 20 January 2003. Under article 11 of the Life Sentences (NI) Order 2001 the judge ordered that the minimum period that the appellant should serve was 14 years imprisonment.

Background

[2] Miss Waring was 82 years old. She lived alone at 3 Dunluce Road, Bushmills, County Antrim. She played the organ at the local church. When she failed to arrive there for the midnight service on 31 December 1981 the alarm was raised. Police went to her home some time after this. They found that an upstairs bedroom window had been broken at the front of the house. Most of the broken glass was on the floor of the bedroom. Miss Waring was found lying on the floor in the hall. It was clear that she had been dead for some time.

[3] A post mortem examination of the deceased was carried out by Dr Derek Carson on 1 January 1982. He concluded that death was due to asphyxia and that this had been caused by the compression of her mouth, neck and chest. Dr Carson considered that her injuries were consistent with pressure having been applied to the mouth and throat, possibly by a hand and a gag. Miss Waring had suffered rib fractures which the pathologist thought had possibly been caused by someone kneeling or sitting on her chest. She had also been the victim of a serious sexual assault. Gross injuries to her genitalia indicated that some item had been forcibly inserted into her vagina.

[4] Two hairs were removed from Miss Waring's left hand before her body was removed to the mortuary. These were lost in a fire at the Forensic Science laboratory in 1992. A pubic hair was found on her vest. Several years after Miss Waring was killed DNA analysis of that hair was carried out. The root of the hair provided a DNA profile which matched the appellant's DNA. Dr Ruth Griffin, a senior scientific officer in the Forensic Science Agency of Northern Ireland, gave evidence that the chances of the pubic hair coming from someone other than the appellant were one in 340 million. A bloodstain on linoleum on the floor of the bedroom where the window had been broken was also analysed. The Forensic Science Agency was able to obtain only a partial profile but this was then subjected to more sophisticated analysis in a laboratory at Chepstow. As a result of this, a DNA match with Shepherd was established. Evidence was given that the chances of the blood coming from someone other than Shepherd were one in a billion.

[5] Four hairs were recovered from Miss Waring's clothing, one from a cardigan, one from a polo neck pullover and two from a skirt. At the time of the trial no forensic evidence was available connecting any of these hairs with the appellant. On the hearing of the appeal, however, we acceded to an application by the Crown to hear evidence from Ms Jill Brookes, a forensic scientist from Birmingham, who conducted mitochondrial DNA tests on the hairs in June 2004. She was able to obtain mitochondrial DNA from the hair recovered from the cardigan. The match observed between the mitochondrial sequences of this hair and the DNA profile of Shepherd provided moderately strong support for the proposition that this hair originated from Shepherd or a person who was maternally related to him. It proved impossible to obtain mitochondrial DNA from the hair that was found on the pullover. The hairs found on the skirt were analysed. The results indicated strongly that these hairs did not come from Shepherd. Ms Brookes also gave evidence about comparison of the hairs with DNA profiles obtained from two brothers named P. We shall refer to that evidence later in this judgment.

The fresh evidence adduced by the appellant

[6] Part of the disclosed material provided to the appellant's solicitors by the prosecution before trial included interviews with a sixteen year old youth, A P, on 16 January 1982. These were overlooked by leading counsel who appeared for Shepherd at the trial. He has filed an affidavit in which he averred that, if he had been aware of this material, he would have cross examined the officer who had been in charge of the original investigation on it. Because he had not read the documents before trial, no assessment of their evidential potential had been made.

[7] On the application of the appellant this court heard evidence from police officers who had interviewed AP and from Cecil Russell, a retired detective superintendent, who had been in charge of the investigation into Miss Waring's death. We were also shown copies of notes made by interviewing officers. From these the following relevant summary can be given.

[8] In the course of the first interview P initially gave an account of his activities during the night of 30/31 December that was entirely exculpatory. When challenged about the truthfulness of that account he then said that his brother had entered Miss Waring's house on the night that she had been attacked. At first he claimed that only his brother had gone into the house but later he said that he had also entered it. He said that he saw the deceased lying on the floor, having been assaulted by his brother. According to P she was wearing a dressing gown which had a collar. He said that he walked around her and up the stairs and "ransacked", her room. He was asked if they had carried any weapons that night. P said he had a baton which he had given to his brother but he claimed that his brother later broke this on a kerb and "threw it over a wall near the toilets." After hearing the full facts about the attack on Miss Waring, including details of the sexual assault on her, some time later, he said that his brother told him that he had "fiddled about with her."

[9] During a second interview P was asked to relate the whole story. He gave an account that in general terms accorded with the initial account he had given during the first interview. He stated that he had gone to bed at 2.00 am and slept until 1.30pm when his brother came and wakened him. When asked why he had given the account about entering Miss Waring's house he replied that he had done so because he was scared.

[10] P's father was present from time to time during the third interview. On the occasions that he left the interview room he gave permission for the police officers to continue to question his son. At times he encouraged his son to tell the truth. AP gave various accounts of his movements during the night that Miss Waring was murdered. At one point he said that he had left the house at

3.00am and went down to a car park to get a car to go joyriding but that there was no car there. He said he then went to a public house and disconnected a barrel of beer but it was too heavy so he connected it up again and went home. He said he was back home at 5.00am and that he got up at 1.30pm that day when C came down to his room and woke him. Later in the interview he said that he left home at 4.00am, and saw three persons (whom he named) and claimed that he knew that these persons had broken into Miss Waring's house. In the course of this interview P was again asked if he had ever owned a baton. He said that he did and confirmed that he had had it "around the new year." He said that the bottom portion of the baton had been broken against a pole and he had thrown away the top part. A baton was produced to P and he was asked if he recognised it. P said that he did and repeated that it had been broken over a pole. He gave an account of how he had had the baton for two years or more; that he had last seen it on New Year's Eve; that he had broken it against a clothes line pole; and that he had kept the remaining portion in his hand. Immediately after saying this, however, he stated that he threw it over a wall. At a later stage in the interview P's father started to cry and left the interview room. The interview continued and some time later his father came back to the interview room and told P to tell the truth. P then said that he had not been out at all that night.

[11] During the final interview P said that on the night in question he got up at 4.30 am, left his home through the window, met his brother and went to Miss Waring's house. His brother, C, climbed up onto the ledge and broke the window. P then said that he climbed on to the wall and entered through the window. Both of them went downstairs; they went in to the front room and opened drawers. He said there were papers and rubbish in the room. P then stated that C had pushed Miss Waring when she was four steps from the bottom of the stairs and that she fell onto the stairs and slid to the bottom. He said he went around her and upstairs into the front room. He looked through some drawers. He then told his brother that they should leave but C said that he had forgotten something and went downstairs. P himself left the house through the top window and waited in the garden. When C came back out they went to the town centre, it was then about 8.30; C went to his own home and AP also went home. P was asked what Miss Waring had been wearing that night and he said that he was not too sure.

[12] After this P's father entered the interview room. P was asked to repeat to his father what he had told the police officers. P then said that he just wanted out of the police station and would say anything to achieve that. He said that neither he nor C had anything to do with the attack on Miss Waring.

The evidence of the police officers on the hearing of the appeal

[13] Stanley James Woods was one of the detective officers who interviewed P. He told this court that he formed the view that P was lying. He said that

he would have reported that view to his senior officer, then Detective Chief Inspector Russell. Others implicated by P, particularly his brother C, would have been interviewed and the result of those interviews would have played a part in the decision whether to prosecute. This witness was in fact the officer in charge of the prosecution of the appellant on his trial in 2002.

[14] Mr Russell also gave evidence. He confirmed that he asked the views of other interviewing officers about the reliability of P although it was his responsibility ultimately to decide whether further action should be taken in relation to the admissions that he had made. He said that he did not believe P's account that he and his brother had gone into Miss Waring's house. Indeed, he did not believe anything that P had said. His brother had been interviewed and denied being in the house. That claim was checked and it was confirmed by police that he could not have been there at the time that his brother AP had said he was in Miss Waring's house. On the basis of the description given by P about the mode of entry to Miss Waring's house; of what he had found inside; and of what he had done in the house, Mr Russell said that he knew that what P was saying was not the truth. Even the most agile person could not have done what P claimed was done in order to gain entry to the house. He had described how his brother had stood on the ledge and kicked the window in with his foot. This, Mr Russell suggested, was physically impossible. He also pointed out that, contrary to P's claim, Miss Waring was not wearing a dressing gown. Indeed no dressing gown was found at the scene. Finally, it was quite untrue that the house had been ransacked as P claimed. The house was in fact quite clean and tidy, considering the age of Miss Waring. This was confirmed by photographs taken in the course of the police investigation.

[15] Mr Russell agreed that part of a billiard cue was found by a householder near lavatories in Main Street, Bushmills where it had been thrown over a wall. Mr Russell also agreed that P had told interviewers that he had given his brother C a baton when he intruded into Miss Waring's house. He suggested that the other part of the broken cue had been sent to the Forensic Science laboratory. He heard that no forensic evidence had been found on either part of the cue.

[16] John Scott also gave evidence. He had also been one of the interviewing officers. He stated that during the interview that he conducted, P had not used the word 'ransack' to describe what he had done in the house. But he said that P had claimed that Miss Waring had fallen at the foot of the stairs and that this was not accurate. He was among the group that discovered Miss Waring and she was to the side of the stairs. He formed the view that P was a complete liar. He believed that P would have said anything to get out of the police station. He told this court that he would have conveyed his views on these matters to Mr Russell.

The arguments based on the fresh evidence

[17] Mr Terence McDonald QC (who appeared for the appellant on the hearing before this court but who did not appear at the trial) claimed that the evidence of what had been said by P at interview, if it had been adduced on trial, would have raised at least a reasonable doubt as to the appellant's guilt. He suggested that the rejection of P's account by the police officers who interviewed him was based on nothing more than an instinctual rejection of his story. While their experience was not to be discounted, it did not follow that a jury, properly directed, would have shared their confidence that P was lying. If the jury considered that there was at least a possibility that he was giving a truthful account when he had told the police that he and his brother had entered Miss Waring's house and that his brother had attacked her, there was a substantial chance that the jury would not have convicted the appellant of murder. In those circumstances the verdict could not be regarded as safe. The conviction should be quashed, Mr McDonald argued, and the appellant should have a retrial where the evidence of P's admissions could be given to the jury.

Hearsay

[18] An issue arose on the appeal as to whether the evidence relating to the statements made by P would be admissible on a retrial of the appellant. Mr McDonald accepted that these were *prima facie* hearsay but relied on the decision of the Court of Appeal in England in *R v Greenwood* [2004] EWCA Crim 1388 which, he said, established that if a defendant has evidence which proves that someone else did the murder, he must be able to adduce it. It is unnecessary for us to express a concluded view on this argument as we are prepared, for the purposes of this appeal, to assume that on a retrial of the appellant on the charge of murder this evidence could be placed before the jury.

The safety of the jury's verdict – the principles to be applied

[19] In *R v Pollock* [2004] NICA 34 this court dealt with the reviewing function of the Court of Appeal in considering the safety of a jury's verdict. The judgment drew heavily on the decision of the House of Lords in *R v Pendleton* [2002] 1 WLR 72. In the latter case much debate was engaged as to whether the role of the Court of Appeal should be confined to an investigation of the likely impact of fresh evidence on the minds of the jury. This proposition formed the centrepiece of Mr McDonald's submission. He argued that this court should conclude that the jury, if it had heard the evidence about P's interviews, would have entertained a reasonable doubt as to the guilt of the appellant.

[20] It is necessary once again to make clear that the 'jury impact' test, as it has been called, is not the exclusive means by which the Court of Appeal will

determine the safety of a conviction. This is the clear effect of the opinions of the members of the House of Lords in *Pendleton.* Mr McDonald's submissions had echoes of those advanced by counsel for the appellant in that case. Lord Bingham of Cornhill at paragraph [12] of his opinion summarised the argument of counsel on this issue in the following passage:-

> "Where the Court of Appeal receives fresh evidence … it must assess the quality of the evidence and allow the appeal if it judges that the fresh evidence combined with the original evidence might have caused the jury, or a reasonable jury properly directed, to acquit. The test is what impact the evidence, if called at the trial, might have had on the jury. It is not permissible for appellate judges, who have not heard any of the rest of the evidence, to make their own decision on the significance or credibility of the fresh evidence."

[21] That argument was not accepted in its unvarnished form. Lord Bingham said that the House of Lords was right in *Stafford v DPP* [1974] AC 878 to reject the submission that the Court of Appeal was wrong to take as the test the effect of the fresh evidence on their minds and not the effect that that evidence would have had on the mind of the jury. He accepted that the argument of counsel for the appellant had some merit but only as an aid to the discharge of the court's essential function of deciding whether *it* considers that the verdict is unsafe. At paragraph [19] he said:-

> "… the test advocated by counsel in *Stafford v DPP* and by Mr Mansfield in this appeal does have a dual virtue to which the speeches I have quoted perhaps gave somewhat inadequate recognition. First, it reminds the Court of Appeal that it is not and should never become the primary decision-maker. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the

> decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

[22] Although he expressed agreement with Lord Bingham on the point, Lord Hobhouse rejected more forthrightly the suggestion that the Court of Appeal should regard the conviction as unsafe merely because of the possibility that the jury, if it had heard the fresh evidence, would have acquitted. He pointed out that the criminal jurisdiction of the Court of Appeal derived exclusively from statute and was defined by statute. In England and Wales section 2 (1) of the Criminal Appeal Act 1968 (as amended by the Criminal Appeal Act 1995) provides:-

> "Subject to the provisions of this Act, the Court of Appeal—(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case."

(Section 2 (1) of the Criminal Appeal (Northern Ireland) Act 1980, also amended in 1995, is in precisely the same terms.)

[23] Lord Hobhouse suggested that the test proposed by the appellant contradicted the terms of the statute and that the focus of the statutory injunction was on the evaluation of the fresh evidence by the Court of Appeal itself. At paragraph [35] he said:-

> "Therefore the sole criterion which the Court of Appeal is entitled to apply is that of what it thinks is the safety of the conviction. It has to make the assessment. That is made clear by the use of the words 'if they think'. The change in the language of the statute has reinforced the reasoning in *Stafford v DPP* and shows that appeals are not to be allowed unless the Court of Appeal has itself made the requisite assessment and has itself concluded that the conviction is unsafe. Lord Bingham of Cornhill CJ put the point clearly in *R v Jones* (1996) 33 BMLR 80 at 88 (cited also in the judgment of the Court of Appeal in the present case):-
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> > 'It seems plain on the language of the statute and on authority that the court is obliged to exercise its own judgment in deciding whether, in the light of the new evidence, the conviction is unsafe.'"

[24] The task of the Court of Appeal can therefore be expressed simply; as we said in *Pollock*, the court should concentrate on the single and straightforward question 'does it think that the verdict is unsafe'. This does not require any undue speculation as to what influenced the jury on the trial or what effect on its process of reasoning the fresh evidence might have had. The primary function of the court is to evaluate for itself the impact of the new evidence on the safety of the conviction. It can 'proof' that assessment by considering how the further material might reasonably have affected the decision of the trial jury. But the final judgment on safety must be that of the court.

[25] This court must therefore consider whether the evidence of P's interviews leads us to think that the verdict is unsafe. Lord Bingham's reference to a provisional view suggests that the court should first reach a preliminary conclusion without reference to the impact that such evidence might have on a jury. This would seem sensible since it is implicit in his speech that consideration of how the jury's verdict might be affected will not be necessary in every instance. Be that as it may, we have approached this task by asking ourselves whether we are persuaded that the verdict is unsafe and we have also tested the preliminary view that we reached by a consideration of how the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. It seems to us that the purpose of the latter exercise is to contextualise the assessment of the fresh evidence. It must be considered as an element of the entire case rather than simply for its own intrinsic strength or weakness.

The safety of the verdict

[26] The police officers concerned in the interviews of P and the officer in charge of the case clearly did not believe the statements that he made about having been in Miss Waring's home on the night that she was killed. Mr Russell gave evidence that if he considered that the admissions that he had made were in any way reliable, he would certainly have faced charges in relation to Miss Waring's death and a file would have been submitted to the Department of the Director of Public Prosecutions. He told this court that this was a notorious murder in the small community and it is not difficult to imagine that there would have been considerable pressure to make the perpetrator amenable for it.

[27] The fact that the police disbelieved P does not of itself mean that the evidence is incapable of casting doubt on the safety of the conviction. Moreover, as Mr McDonald submitted, it is at least open to question whether police officers would be permitted to give evidence of their opinion on the veracity of P's account. Of course it is unlikely that the significance of P not having been prosecuted would be lost on the jury but we consider that, in assessing the safety of the verdict, it is far more important that his version could be shown not to coincide with the circumstances of the killing in a

number of material ways. The description of Miss Waring's clothing, of her position on the floor after she had been attacked and of the ransacking of her home were all at odds with what was found by police on their arrival at the scene. These discrepancies speak loudly of the unreliability of P's statements.

[28] Likewise P's continually changing accounts about his movements on the night in question call directly into question the credibility of his admissions. We have recalled that he was sixteen years old at the time and that he was not only willing to say anything in order to get away from the police station but he told his interviewers that he had given a false account because he was scared.

[29] The evidence in relation to the timing of Miss Waring's death also tends to contradict the statements made by P about the time at which his brother attacked Miss Waring's. Dr Carson indicated that the passing off of rigor mortis (which was apparent at autopsy) suggested that death had occurred between thirty-six and forty-eight hours before his post mortem examination at 11am on the 1 January 1982. On the basis of this estimate Miss Waring had been killed some time between 11 am and 11 pm on 30 December. Dr John Hanna who attended the scene at 1.20am on 1 January considered that Miss Waring had been dead for at least twenty-four hours (and no more than seventy two hours) before he examined her body. P told the police that he and his brother had entered Miss Waring's home after 2am on 31 December. On the basis of the medical evidence it is highly likely that Miss Waring had been dead for more than twenty four hours before that.

[31] Quite apart from the medical evidence, what was discovered in the house is completely at odds with P's account. It is to be expected that an eighty-two year old woman would have been in bed after 2 am. But when her body was discovered it was fully dressed. She had clearly made some preparations to retire to bed because a hot water bottle, with her night dress wrapped round it, had been placed there. The bed was made, however, and had not been slept in. Clearly Miss Waring had not gone to bed and indeed the forensic evidence showed that the attack on Miss Waring commenced in the kitchen. All these indications point strongly to the conclusion that she was killed long before 2 am on 31 December.

[32] It must also be noted that no DNA trace connecting AP or his brother C was ever found in Miss Waring's home or on her person. The material examined by Ms Brookes from which she was able to obtain a DNA profile was compared with samples from both C and AP and no match could be made. By contrast the DNA evidence against the appellant was compelling. The blood found near where entry to the house had been effected is by itself convincing evidence of his presence in a part of the house for which no innocent explanation is possible. The pubic hair found in Miss Waring's inner clothing that has been attributed to the appellant alone provides

overwhelming proof of his guilt. Finally, the evidence in relation to mitochondrial DNA from the hair found in Miss Waring's cardigan is further significant scientific corroboration of his presence in the house and contact with the deceased. Taken together these items of evidence create what we have concluded is an unanswerable case against him. We do not consider that the jury could have been left in any doubt of his guilt in the face of such devastating evidence, even if they had heard of the statements made by AP.

[33] We are entirely satisfied of the safety of the verdict of the jury. The application for leave to appeal against conviction is therefore dismissed.