

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

Delivered: **29.06.2007**

IN THE CROWN COURT SITTING IN NORTHERN IRELAND

—————
Bill No: 226/05
—————

THE QUEEN

-v-

**RICHARD CEDRIC BARRY
ROBERT PHILIP MONTGOMERY
DAVID SWINDLE
ARTHUR MCCHESENEY
NEIL DAVID HUGH MOORE
RICHARD HUGH JACKIE DALZELL
JOHN STEPHEN MISKIMMIN**

—————
WEIR J

[1] This case relates to allegations against each of the accused that he was a member of the UDA. There are also charges relating to drugs and some other charges, a total of 50 counts in all. At the commencement of the trial pleas of guilty were entered to Counts 5, 9 and 10 (Barry), 30 to 36 inclusive with 37 to remain on the file and not to be proceeded with without leave (Moore), 44 and 45 (Dalzell) and 50 (Miskimmin).

[2] Much of the evidence relied on by the Prosecution was given by three civilian witnesses, Noel Lee, Frederick Hamilton and Stanley Patterson of whom the first two claimed to have been accomplices of the accused. I shall later deal in some detail with the evidence of Noel Lee but that of the other two can be dealt with shortly. Frederick Hamilton gave his evidence in a most unconvincing and at times frankly bizarre fashion so that it would have been quite impossible to know how much if any of it was true. Such was the extent of its unsatisfactory nature that, even before his cross-examination had been completed, Senior Counsel for the Prosecution indicated that the Prosecution would not ask me to rely upon his evidence to support any of the charges. In my view that concession

was entirely appropriate. As a result those counts that depended upon Mr Hamilton fell and upon the application of Defence counsel I entered verdicts of not guilty on Counts 12 to 16 (Montgomery), 21 and 22 (Swindle), 24 to 29 (McChesney), 39 to 41 (Dalzell) and 46 to 49 (Miskimmin).

[3] The evidence of Stanley Patterson which was directed to proving Count 19 against Montgomery was also unsatisfactory. There were a number of aspects of concern, the most significant of which was that he misidentified Mr Montgomery in the dock. I accordingly acceded to a Defence application made at the direction stage in relation to that count.

[4] I also gave directions at the conclusion of the Prosecution case on Counts 11 and 23 in which Montgomery and McChesney respectively were charged with membership of the UDA. That being the sole remaining count against McChesney he was discharged.

Summary of the direct evidence given by Noel Lee relevant to the remaining charges

[5] In 2002 Lee was living in Newtownards and was in the habit of drinking with a Sammy Swindle in the Ivy Bar in Newtownards. On one occasion towards the end of that year he needed to borrow £20 which Sammy Swindle obtained for him from another regular in the bar, Barry, whom at that time he really only knew to see. On the following Friday he returned the £20 to Barry and after that he began to become friendly with him and had the odd drink with him. Soon after this he was in the bar one evening when Barry invited him to go with Moore to an address in Bangor where Moore called at a house, collected a bag which he handed to Lee and they drove back to Newtownards. Lee saw that the bag contained Ecstasy tablets and "Speed". They had used Barry's car for the journey and on returning to Newtownards the bag containing drugs was left in the car. On that night Lee borrowed another £20 from Barry and Barry told him that instead of repaying it he could take a bag of drugs from Moore and sell them in "Brandy's Nightclub" nearby to a man called Noel whom he would meet there. He took a small bag of Ecstasy tablets and handed the bag to the man.

[6] The following weekend or so he was in the pub again when Barry asked him to take Ecstasy tablets up to "Brandy's" and sell them. He said he would give him £1 for each tablet sold and Lee agreed and sold about 30 for £5 each. He was told to bring the proceeds to the Ivy the following Friday which he did, handing over a couple of unsold tablets and the money from sales. This was the start of a routine in which he collected the tablets on a Friday and sold them on that Friday and sometimes Saturday and then would account to Barry on the following Friday, usually handing over £200 to £300. This pattern continued until

the end of January 2003 during which time he had seen Barry giving bags of drugs to Dalzell and another man. He had known Dalzell from school.

[7] While this activity was going on and Lee was frequenting the Ivy Bar, Dalzell asked him if he wanted to join the UDA but he initially declined. Dalzell also asked him to patrol up and down outside David Swindle's house in Newtownards because there was some sort of feud in progress between the UDA and the UVF. David Swindle is the older brother of Lee's drinking companion in the Ivy Bar, Sammy Swindle. Lee had little enthusiasm for the task but did go down on a few occasions. On one occasion he was in Mr David Swindle's house having a drink when Mr Swindle told Lee that he, Swindle, was the brigadier. At about that time Dalzell had told Lee that he, Dalzell, was Lee's commander and that if Lee wanted to deal in drugs he should have gone to him and not to Barry. Lee reported this to Barry because he knew Barry was higher in rank than Dalzell, Dalzell having told Lee that he, Dalzell, was "four in charge" having been promoted following the imprisonment of "Billy the Boxer". Barry had told him not to worry about Dalzell. After that Lee had seen Dalzell a few times when he had given him Ecstasy tablets which Dalzell had not paid for but said he would sort it out with Barry. Barry seemed to accept that arrangement because he never complained about the shortfall in the money.

[8] Meanwhile Dalzell had continued on several occasions to invite Lee to join the UDA and between Christmas and New Year he agreed to do so. A few days later he was telephoned by Dalzell and told that everything was arranged for that night and to be outside the "North Down Advice Centre" for 9.00 p.m. He was there picked up by a man who called himself "Paul", taken to Donaghadee and brought to a housing estate where he was sworn in by "Paul", welcomed to "D" company and brought back to Newtownards. Dalzell met him a few days later and asked how it had gone.

[9] Around the beginning of February 2003 Swindle spoke to Lee and told him that "all Newtownards" would have to go to the funeral of a John Gregg, a leading "loyalist" who had been murdered in an internal UDA feud, otherwise there would be serious repercussions. He took this to mean that all UDA members from Newtownards had to go. A coach was arranged to depart from near the Advice Centre and Lee saw there Swindle, Barry and Dalzell among others. They all went on the coach to the funeral, pausing en route for refreshments, and then back to Newtownards.

[10] Just before this, towards the end of January 2003, problems began to arise between Barry and Lee about alleged shortfalls in the weekly drugs account. A point was reached at which Barry told Lee that the money was £230 short and told him he had two weeks to get it. Lee phoned his sister in England and

borrowed the money from her. When it arrived he met Barry in the Ivy Bar and gave it to him and Barry confirmed they were all square. Lee then asked Barry if he could stop selling drugs and was told that he could once he had sold the Ecstasy tablets that he had left from the week before. Lee agreed to this but in fact did not sell any more tablets. On 14 February 2003 he had a row with his girlfriend, moved out of her house and took the remaining tablets and the "tick list" of those who owed money to Barry at the Ivy Bar.

[11] Over the following week Barry rang him on his mobile but Lee did not answer the calls. On 8 March 2003 while Lee was in the Hartford Bar watching a Rangers v Celtic match Barry entered the bar with a friend called Noel and gestured for Lee to follow him which he did. On going outside he was told to get into the back of a car, Barry got in beside him and Noel drove the car to the Bowtown Estate near Newtownards. When they arrived at a turning circle there Lee was told by Barry to get out of the car, Noel held him by the shoulders while Barry took a baseball bat from the car boot. Lee was told to lie down and put his right arm over the kerb onto the road. When he did this Noel put his foot on Lee's back to stop him from moving and Barry hit him very hard three times on the arm. Barry then threatened Lee that he would break his other arm and his two legs if he "touted" or went to the police, threw down the drugs "tick list" saying it was no good to him and drove off with Noel leaving Lee there. He made his way on foot to Newtownards minor injuries unit where the nurse strapped his arm and advised him to go to the Dundonald Hospital for an x-ray but he didn't do so. His arm became black and swollen and was sore for months.

[12] Lee thought that was the end as between him and Barry but on Thursday 13 March he received a call from a number he knew as Swindle's but, upon answering it, Barry was on the phone. Barry told him that he had until 5.00 p.m. next day to pay him £500 and threatened him with violence. Barry told Lee that he had two options; pay the money or run away and leave Northern Ireland and never come back or he would kill him. He said he was coming to see him but Lee arranged to meet him and later received a text message telling him to meet at 11.00 p.m. The meeting point was the Comber Road at the entrance to the Four Winds Estate. When Lee arrived a car was waiting and he recognised Barry in the back. As Lee got closer Barry got out and motioned to Lee to get into the back. Barry got in beside him and Lee saw that the front seat passenger was wearing a balaclava and the driver was a skinhead. The car was driven to the same turning circle where they all got out, the driver pulling on a balaclava also. While Barry stood in front the two others stood beside him and Barry told him that he had until 5.00 p.m. on the Friday to get him £500 or he would kill him. Lee offered to pay by instalments as he could but Barry refused and repeated the threat before the three drove away leaving Lee there.

[13] Lee then walked back to another sister's house where he was staying and wrote a letter to his parents which he took round and posted through their letterbox. His parents received the note on the Friday and spoke to him. He said "I realised there'd be no end to it unless I went to the police". He telephoned Newtownards Police Station and that afternoon he went there where he was seen by detectives. At 4.39 while he was with them in an interview room he received a text message from Barry's mobile phone saying "Time is running out" and he showed it to the Police. At 8.04 p.m. he received a further text message from 077 3654 7285 saying "Dead man walking. Ha Ha. C U soon". (The phone was produced in evidence and the witness was able to retrieve and display the message)

[14] Mr McMahon Q.C. for the prosecution then asked the witness:

Q. "And when you went to the police on the 14th of March 2003 *then and thereafter* did you tell them what you had been doing in the UDA in Newtownards?" (emphasis supplied)

A. "Yes"

Q. "That you were a member and that you had been supplying drugs?"

A. "Yes"

Lee gave evidence that arising from the activities described in his evidence he had pleaded guilty on 12 March 2004 to being a member of the UDA, supplying and possessing Class A Drugs and possessing Class B drugs and had been sentenced to 30 months imprisonment suspended for three years. He also agreed that he had two prior convictions, one for an offence of criminal damage and one for theft and false accounting

Matters arising from the Cross examination of Lee

[15] Lee was effectively cross-examined by a succession of Defence Counsel. I mean no disrespect to their industry when I do not attempt to set out here all the points that were established but the following seem to me to represent most of those of greatest significance:

1. Towards the end of 2002 when drug dealing was mooted he was tempted by the prospect of easy money.
2. When he first went to the Police he denied that he had joined the UDA. and gave what he agreed was a quite sophisticated concocted account of

- his swearing-in ceremony having been disrupted before the crucial swearing-in point had been reached.
3. He claimed that he denied membership because he was “embarrassed” and could not remember the point at which he decided to tell the truth. Later he said that he initially wanted the police to believe that he was not a paramilitary.
 4. He agreed that his conviction for dishonesty related to stealing money from the till in a bar where he had been employed in a position of trust.
 5. He did not know why he had ultimately decided to join the UDA having declined several times.
 6. Although he knew that it was his UDA headquarters he was never in the North Down Advice Centre and did not know who staffed it.
 7. He couldn’t remember how he came to tell the Police that he was a member. He could not exclude the possibility that the police had told him it would sound a whole lot better if he were actually “one of them”. He accepted that he had completely misled the police about his involvement to begin with and that that was dishonest and a lie.
 8. He had told the police that he “believed” his arm had been beaten with a baseball bat, not that he saw it happen.
 9. It was from the police that he had found out that the man “Paul” who had taken him to the swearing in and performed the ceremony was called Brown.
 10. He had continued to say that he was not a member of the UDA in a statement to the police on 15 March 2003 and not until making a statement on 18 September 2003 had he admitted to the police that he had been sworn in to the UDA.
 11. He couldn’t remember whether he or the police had first mentioned the issue of UDA membership.
 12. He could not say that all the people (whom he numbered in thousands) who attended Mr Gregg’s funeral would have been members of the UDA.
 13. In his dealings with police he had not told lies “the whole way through”.

14. His patrolling at Mr Swindle's house had been before his swearing-in.

15. He had not incriminated Mr Barry as a member of the UDA for about 18 months after he had first gone to the police.

Evaluation of the Evidence of Lee

[16] Mr Lee gave his evidence in an assured manner, he did not "fence" with counsel and made apparent concessions when it was obviously appropriate for him to do so. By comparison with Mr Hamilton and Mr Patterson he was both polished and plausible. At the conclusion of the prosecution case I refused applications to reject his evidence by an application of the *Galbraith/Hassan* tests as I was not then of the view that, as the judge of fact, there was no circumstance in which I could entertain the possibility of my being convinced beyond reasonable doubt or to any accepted standard by the evidence for the prosecution.

[17] At the conclusion of the trial there were closing submissions on behalf of the accused. It fell to Mr Terence McDonald Q.C. to commence those on behalf of the Defence and he did so with characteristic force and cogency. His submissions were adopted by the Counsel who followed him. He politely submitted that while in this trial I was obviously sitting without a jury I ought to view the evidence and background of Lee through the hypothetical prism of twelve jurors considering those matters together with the circumstances in which he claimed to have gone to the police and while there incriminated others in these criminal offences. Founding himself upon the seminal authority of Lord Lowry LCJ's judgment in *R v Steenson and others* [1986] 17 NIJB 36, he submitted that a judge sitting alone must carefully guard himself against seeking to "cherry pick" evidence because of a feeling that as a judge alone he is especially able to carry out a forensic exercise of that type and should bear in mind that the negative aspects of a witness's evidence are much more important than the positive aspects. In this connection he relied upon the following passage from *R. v Donnelly* quoted with approval in *Steenson* at page 52:

"The essential thing to remember is that evidence (including the witness's own evidence) which detracts from the credibility of a prosecution witness is much more important than evidence which enhances it. It is necessary to recognise the difference in value between something which contradicts and something which confirms. The former reveals a flaw in the structure and destroys credibility, comprehensively or to a

lesser degree according to circumstances, unless a satisfactory explanation is provided. But the latter is of little weight on the question of veracity (unless it is also corroboration or unless it resolves in favour of the witness an issue involving his honesty and not merely his accuracy)."

[18] I have carefully considered Mr McDonald's submissions and of those Counsel who followed him although they for the most part directed themselves to the details of the charges faced by their clients rather than repeat the general attack of Mr McDonald upon the nature and quality of Lee and his evidence. I have concluded that Mr McDonald is right to strongly caution against any misplaced judicial conceit that judges sitting alone are somehow qualified in a way that twelve jurors are not to reliably extract the plums and at the same time unerringly reject the duff. While Mr Lee was plausible in the manner of giving his evidence there are so many unsatisfactory aspects both to him and to his evidence, as instanced in paragraph [15] above, that it would involve an unwarranted exercise in selectivity if not frank guesswork to decide which if any of his allegations are true. There is some support for some of them such as his attendance at the minor injuries department on the day that he says he was assaulted by Barry and, perhaps most strikingly, the mobile telephone messages from Barry's phone when he was with the police and it may well be that some or all of them are correct. However, when I stand back and look at Lee and his evidence I recall this further observation of Lord Lowry in *Stenson* at p. 103:

"an accomplice witness could possibly be found who would be really impressive But, if such a witness were forthcoming, the acceptance of his testimony would not need to depend on an overgenerous assessment or (as in the present case) on a theory (for that is all that we can fairly call it) that the witness, having lied about almost everything else, had decided to be as accurate and truthful as possible about the incidents themselves."

[19] The intrinsic frailty of accomplice evidence has not been dissipated by the stroke of the legislator's pen. A warning that support is desirable may no longer be obligatory in law but in a case such as this, where, whether for the reasons he gave or for others, a man with Lee's background and acknowledged willingness to behave dishonestly and illegally and to tell lies when he chose and who had in his own interest sought out the protection of the police (and therefore had every interest in maintaining their interest in him and their goodwill), it would be perverse not to recognise the real possibility that some or all of his evidence

may have been tainted. Accordingly I hold that I am unable to be satisfied to the requisite standard in relation to any of the counts in the indictment that depend upon the evidence of Lee including those, such as the alleged assault at the turning circle or the text messages while he was with the police, where some support may be said to exist.

Evidence in relation to the finding of illegal drugs in Mr Montgomery's Motor Car

[20] On 24 June 2003 the police carried out a planned search of Mr Montgomery's home at Scrabo Road, Newtownards. Mr Montgomery was present at the time and the search included a Rover 820 motor car NDZ 1628 that was parked in the driveway of the house. A Reserve Constable Patterson gave evidence that the vehicle was locked when he went to search it and that the keys to open it were then obtained from Mr Montgomery. When the boot was opened it was found to contain a black bin bag inside which were other plastic bags which in turn contained other plastic bags, some of which were small individual bags like the type used by banks for coins, containing quantities of white powder. Mr Montgomery was brought to the car and shown what had been found in the boot. It was later established that the powder was the illegal class B drug, amphetamine, and that its quantity was 928 grammes with a value of £10,000 or more, depending upon how it was prepared for sale.

[21] The witness was cross-examined to the effect that the car had been unlocked when the discovery was made and that the keys were only subsequently obtained from Mr Montgomery when it was decided to remove the vehicle to the police station. The witness denied this and insisted that they had to obtain the keys to give access to the vehicle to carry out the search.

[22] The matter was taken up with Mr Montgomery during his police interviews. He agreed that the car was his, that he had owned it for three or four months and that he had been driving it two days prior to the search. He claimed at interview that the car was unlocked at the time of the search and did not have to be opened with the keys. He said that he knew nothing of what had been found in the boot and that while no-one else had access to the car it was unlocked before it came to be searched. He was asked by police whether he was suggesting that some person had come up to his car and put this material in his boot and that he didn't know anything about it. Mr Montgomery's only comment in reply was: "Knew nothing about it."

[23] I entirely accept the evidence of the Reserve Constable that the car was found locked and that the keys had to be obtained from Mr Montgomery before it could be searched. The idea implicit in Mr Montgomery's claim, false as I find that to be, that the car had been unlocked before being searched is that someone

had, unknown to him, found his car unlocked and placed drugs of this quantity and value in the boot without any means of controlling what became of them is too absurd and fanciful to deserve serious consideration. I am satisfied beyond reasonable doubt that Mr Montgomery was in possession of these drugs and from their quantity and the nature of their division and packaging I am similarly satisfied to the same standard that he intended to supply them to others.

[24] At the conclusion of the evidence for the prosecution Mr Montgomery, in common with the other accused who then remained on trial, was given the statutory warning as to the Court's entitlement to draw proper inferences from a failure to give evidence. Mr Montgomery declined to give evidence. Had he wished to challenge by evidence the prosecution case that the car was locked until Mr Montgomery provided the keys he could readily have done so as the matter was within his knowledge. In addition therefore I also infer from his failure to give evidence about this matter when he was in a position to do so (as evidenced by his answers during police interview) that the accused is guilty.

Verdicts

[25] Applying the foregoing conclusions to the outstanding counts on the indictment, my verdicts are as follows:

Barry

Count 1: Not Guilty
Count 2: Not Guilty
Count 3: Not Guilty
Count 4: Not Guilty
Count 6: Not Guilty
Count 7: Not Guilty
Count 8: Not Guilty

Montgomery

Count 12: Not Guilty
Count 17: Guilty
Count 18: Guilty

Swindle

Count 20: Not Guilty

Dalzell

Count 38: Not Guilty

Count 42: Not Guilty

Count 43: Not Guilty

[26] The effect of the various verdicts and pleas of guilty is as follows:

Barry

Guilty on Counts 5, 9 and 10.

Montgomery

Guilty on Counts 17 and 18

Swindle

Not guilty on all counts.

Dalzell

Guilty on Counts 44 and 45.

Miskimmin

Guilty on Count 50.