Neutral Citation no. [2003] NICA 43 | *Ref:* **CARF4040**

Judgment: approved by the Court for handing down | *Delivered:* **31/10/03**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

DARREN EDWARD CLARKE

Before: Carswell LCJ, Campbell LJ and McLaughlin J

CARSWELL LCJ

[1] The appellant Darren Edward Clarke was charged jointly with John Thomas Hazlett and Thomas George Dunbar with attempted murder, wounding with intent and possession of a firearm and ammunition with intent to endanger life. They were tried at Belfast Crown Court by Nicholson LJ, sitting without a jury, who gave his decision in a written judgment on 28 June 2002. He acquitted Dunbar on all charges and found Haslett and the appellant guilty on the third count, that of possession of a firearm and ammunition. On 16 September 2002 the judge made a custody probation order in respect of the appellant, consisting of five years' custody and two years' supervision by a probation officer. The appellant appealed against his conviction, on the grounds which we shall discuss, and the Attorney General also sought leave to bring a reference to the court on the ground that the sentence was unduly lenient. We deferred the matter of the reference until determination of the appeal, which we heard on 27 October 2003.

[2] On 28 August 2000 at about 10.55 pm Mr Frank Simpson Daly, his partner Yvonne Gray and their two children were in the living room on the ground floor of the house which they occupied at 48 Jefferson Park, in the Ballysally estate in Coleraine. Mr Daly was an active member of the Ulster Democratic Party, which has affiliations with the Ulster Defence Association. The UDP and UDA had at the time a feud running with the Progressive

Unionist Party and its affiliated organisation the Ulster Volunteer Force, in the course of which many acts of violence were committed.

[3] The evidence established that a red Vauxhall Astra car pulled up outside the house and a gunman discharged some 30 shots at the house, 20 of which were aimed at the living room window and 10 at an upstairs bedroom window. The forensic evidence was that the weapon which fired the shots was a 9 mm submachine gun. Mr Daly's daughter Charlene, aged 11 years, was struck by one of the bullets and sustained a serious injury to her left upper back. The Crown case was that the Astra was driven by the appellant, that Dunbar was the gunman and that Hazlett instructed them to carry out the attack.

[4] A red Vauxhall Astra, registration number SIL 5956, was found abandoned about 2 am on the same night in a laneway not far from the scene of the shooting. There was a smell of petrol from the car; a three-litre plastic bottle was found on the front seat and a petrol can was also found inside the car. On forensic examination petrol vapour was detected in the can and a vapour containing a mixture of partly evaporated petrol and diesel oil in the bottle. Shortly after 11 pm on 28 August police found a fire in bushes at Ballygallin Park, also in the Ballysally estate. A partly burnt purple fleece jacket was found in the fire. Nitroglycerine was detected on the fleece and fibres on the front passenger seat of the red Astra matched those of the fleece. The judge concluded from this evidence, in a finding which was not challenged on appeal, that the red Astra SIL 5956 was the car used by the gunman and that an attempt had been made to burn it out subsequent to the attack by using the petrol in the can and the accelerant mixture in the bottle.

[5] The plastic bottle in the car was found to bear three fingerprints. One was made by the right little finger of the appellant. A print from his right palm was found on the metal strip bordering the off side of the windscreen of the Astra, adjacent to the driver's door. Four cigarette butts were found in the footwell of the car, one of which yielded a DNA profile which matched that of the appellant. The judge held that the fingerprint and palm print were made by the appellant and that he had smoked one of the cigarettes the butts of which were found in the car.

[6] A considerable part of the evidence against the appellant adduced by the Crown consisted of testimony by witnesses who identified him as the front seat passenger in the car when it was driven about 10 pm on 28 August along Washington Drive. The reliability of the identification evidence was challenged at trial and on appeal. It was carefully considered in the trial judge's judgment, but for reasons which will appear we do not propose in this judgment to analyse it or assess its reliability.

[7] Michelle Crawford gave evidence that the appellant and a number of other men were in the house in which she lived at 7 Hazledene Drive, also in the Ballysally estate, in the evening of 28 August 2000. At some stage the accused Dunbar arrived at the house; it was put to her that this was between 9 and 10 pm, but she said that she could not remember the time, having earlier stated that she only arrived at the house at 10.30 or 10.40. Dunbar later left the house along with the appellant and a man referred to as "Jimmy Jap", who appears to have been one Jimmy Kennedy. Dunbar was carrying a plastic shopping bag containing an object which she estimated was a foot to eighteen inches long. Her evidence was somewhat discredited in cross-examination, but the judge was prepared to accept the substance of her account as we have summarised it.

[8] Counsel for the appellant applied at the close of the prosecution case for a direction that there was no case to answer, but the judge ruled against his submission. The appellant did not give evidence, although called upon to do so, and the judge drew an inference, pursuant to Article 4 of the Criminal Evidence (Northern Ireland) Order 1988, that the appellant could not think of any explanation of the finding of his fingerprint and palm print and the cigarette butt which was consistent with the possibility of innocence.

[9] The judge's conclusions set out in his judgment may be summarised as follows:

(a) The forensic evidence was so strong that in the absence of any explanation he was prepared to find that the appellant drove the car to the laneway and tried to set fire to it.

(b) The driver of the car must have known that there was a submachine gun in the car and that shots were to be fired from it at 48 Jefferson Park, and intended life to be endangered.

(c) The judge would therefore have convicted the appellant on the forensic evidence alone, taken together with the inference which he drew from his refusal to give evidence.

(d) He would not have convicted him on the identification evidence alone, because it only related to a sighting of the appellant at 10 pm and also because of "the danger of acting upon evidence of recognition in the circumstances in which the witnesses made their identifications". He would if necessary have relied on it as supporting evidence if he was wrong in convicting the appellant solely on the forensic evidence.

(e) The judge therefore held that the appellant was at the material time the driver of the red Astra car from which the shots were fired at Mr

Daly's house and that he was in joint possession of the submachine gun and ammunition.

[10] The appellant's notice of appeal raised several grounds, most of which were argued on his behalf by Mr Carl Simpson QC at the hearing of the appeal. He focused mainly on attacking the reliability of the identification evidence, but as we have stated we do not propose to deal with this part of his argument. We shall concentrate our attention on his other major submission, that the judge should have held that there was no case to answer at the close of the prosecution evidence. For the purpose of considering this submission we shall assume that the identification evidence was correct and that the appellant was driving the red Astra in Washington Drive at or about 10 pm on the night of the shooting incident.

[11] The burden of the case made by Mr Simpson was that even if this is accepted, the most that the evidence established was that the appellant drove the car used in the attack at an earlier stage of the evening and that he had been in contact at some stage with the plastic bottle in which the accelerant was contained. He submitted that this fell short of prima facie proof that the appellant was the driver of the car at the time of the shooting incident, and that the judge was not justified in his conclusion that he left the fingerprint on the bottle at the time when it was used in the attempt to burn out the car. He accordingly was in error in holding that there was a case to answer.

[12] The test to be applied in deciding whether there is a case to answer is extremely well known, but it is nevertheless worth repeating it to remind ourselves of the criteria to be applied to consideration of the evidence. As formulated by Lord Lane CJ in *R v Galbraith* [1981] 2 All ER 1060 and applied on many occasions in our courts (see, in particular, *R v Hassan* [1981] 9 NIJB, per Lord Lowry LCJ), it is that if there is no or no sufficient evidence on which a reasonable jury properly directed could return a verdict of guilty, then the case must be withdrawn from the jury. *Mutatis mutandis,* the same principle is applied in a trial by a judge sitting without a jury. We must also bear in mind that the court cannot draw an inference under Article 4 of the Criminal Evidence (Northern Ireland) Order 1988 if the prosecution has not established sufficient evidence to constitute a case to answer: see *Murray v Director of Public Prosecutions* [1994] 1 WLR 1, at 11, per Lord Slynn of Hadley.

[13] In the present case we have assumed that it was sufficiently proved that the appellant was the driver of the car when it was seen being driven along Washington Drive at or about 10 pm. He is also connected with the car by his fingerprint on the plastic bottle and palm print on the bodywork and by the butt of the cigarette smoked by him. The gap which the court is asked to jump is that constituted by the lapse of time between that sighting at 10 pm and the shooting incident at 11 pm. Mr Weir QC for the Crown urged us to infer that the appellant must have continued to drive the car, which was

apparently being used for purposes of reconnaissance at 10 pm, prior to the shooting sortie at 10.55. He submitted that there was a strong inference that the same driver would drive the car on the reconnaissance and on the sortie. We agree that that is rather likely, but it is not a necessary or compelling inference, and we are unable to agree with the judge's conclusion at page 27 of his judgment that –

> "It is plain in my view that the same driver and gunman made the run into Jefferson Park at 10.00 pm and at 10.55 pm. It would be pointless to do otherwise."

[14] Nor do we find ourselves able to accept the inference drawn by the judge that the finding of the appellant's fingerprint on the bottle which had contained accelerant shows that he took part in the attempt to burn out the car. It appears to us quite possible that the bottle had been prepared at some earlier time, either that evening or before, and that the appellant handled it in the course of preparation or when it was in the car at the time of the reconnaissance. Similarly, the fingerprint could relate to his driving the car at that earlier time, as could the cigarette butt. Michelle Crawford's evidence is consistent with the appellant having gone out to drive Dunbar in the car shortly before 10.55, but not probative of it; that is to say, it proves that he could have been the driver, but does not tend to prove that he was.

[15] That is the sum of the evidence against the appellant at the close of the prosecution case, for it goes without saying that the very damaging content of the admissions made by Hazlett is not admissible against the appellant. In these circumstances we are, not without reluctance, compelled to conclude that that evidence was not sufficient for a reasonable tribunal of fact to find it proved beyond reasonable doubt that he was the driver of the car at the time of the shooting incident.

[16] We accordingly must hold that the judge ought to have acceded to the application for a direction made on behalf of the appellant at the close of the prosecution case. We therefore allow the appeal and quash his conviction.