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Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:*	**20/08/2021**

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING IN BELFAST

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REGINA

v

DAVID JONATHAN HOLDEN

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Mr F O'Donoghue QC with Mr I Turkington (instructed by MTB Solicitors) for the Defendant
Mr C Murphy QC with Mr S Magee QC (instructed by the Public Prosecution Service) for the Prosecution

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RULING ON APPLICATION FOR A NO BILL

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O'HARA J

Introduction

[1] The defendant is a former soldier charged with manslaughter. This ruling concerns his application for a "no bill" i.e. a finding that the evidence in the papers does not disclose a case sufficient to justify putting him on trial.

[2] On Sunday 21 February 1988 Aiden McAnespie was walking along the Monaghan Road, Aughnacloy, County Tyrone. He was on his way to a GAA match. As he passed near a permanent army vehicle checkpoint three shots were fired. One of them, probably the first one, hit the ground, ricocheted upwards and struck him in the back. Mr McAnespie died at the scene.

[3] The shots were fired by the defendant from a general purpose machine gun (a GPMG). That fact is admitted by the defendant. The shots could not have been fired unless the gun was cocked. That is an agreed fact. The defendant says that his finger slipped off a trigger guard because his hands were wet. Prosecution experts recently engaged by the Public Prosecution Service say that while this explanation is

technically possible it is extremely unlikely because in order for bullets to be fired the trigger would need to have had much more pressure applied to it than would result from a hand slipping.

[4] The defendant is charged with manslaughter, not murder. The Crown case is that the defendant can be convicted on either of two bases. The first is that he caused Mr McAnespie's death by an unlawful act. The second is that he was grossly negligent. It contends that, at least at this stage, the Crown does not have to elect for one option rather than the other nor does it have to specify any particular theory or factual scenario.

[5] The defendant contends that there is insufficient evidence by which the charge against the defendant can be maintained. It is submitted that it is not open to the Crown to advance its case on both grounds, unlawful act manslaughter and gross negligence manslaughter. Instead it has to opt for one. Since it cannot do so because all of the evidence taken together does not establish that either is a route to conviction, the application for a no bill should be granted and the case against the defendant dismissed.

BACKGROUND

[6] The defendant was 18 years old when he killed Mr McAnespie. He is now 51. In the immediate aftermath of the death he was charged with manslaughter but in September 1988 the DPP decided not to prosecute him. It is likely that this came about, at least in part, because a Mr Gary Montgomery, a senior scientific officer, advised that in his opinion the gun had been inadvertently discharged.

[7] That opinion led to a discussion on 6 September 1988 involving representatives of the forensic science laboratory, the RUC and the DPP. A note dated 7 September 1988 written by Mr Morrison of the DPP records that the evidence and circumstances "lend support to the following views":

(i) It is probable that the weapon was inadvertently left cocked by another soldier, not the defendant.

(ii) The defendant would have had no reason to suspect that the gun was cocked and ready to fire.

(iii) The defendant's explanation that his wet finger slipped off the trigger guard onto the trigger, thus discharging it, cannot be ruled out but….

(iv) The more likely explanation for the discharge is that in grasping the weapon in order to move it the defendant's finger pulled the trigger without slipping but without the defendant intending to discharge any rounds.

(v) The pattern of strike marks does not lead to any certain conclusion as to whether the weapon was firmly aimed at the time it began to discharge or whether it was being moved in the manner claimed by the defendant. In either case it cannot be predicted exactly how the direction of the weapon would have been moved by the defendant's reaction to a discharge which he did not expect.

[8] In March 1993 an inquest was held into the death of Mr McAnespie. The jury returned a finding that the soldiers in charge of the machine gun were in contravention of standing orders in relation to the handling of weapons. It appears that one soldier, a Lance Sergeant Peters, who had handed the gun over to the defendant was "almost sure" that he himself had not cocked it before handing it over. However, nothing emerged which prompted the DPP to change its decision not to prosecute the defendant or anyone else for that matter.

[9] In 2014, apparently at the instigation of solicitors representing the family of Mr McAnespie, the Public Prosecution Service looked again at the file. A letter dated 17 September 2014 from the then deputy director, Ms Atchison, sets out her analysis of why there was no prosecution. It was stated that:

> "There was no evidence capable of showing either (a) that Holden knew the weapon was cocked or (b) that he was aiming the weapon at the time he fired or (c) that he pulled the trigger deliberately in any circumstances."
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> Accordingly:
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> "There was no evidence capable of proving to the required standard that Mr McAnespie's death was caused deliberately or by gross negligence on the part of Guardsman Holden."

FURTHER REVIEW

[10] In September 2017 the PPS received a report from a Mr Mastaglio and a Ms Shaw, forensic firearms consultants. This was part of a review instigated by the PPS after the Attorney General had referred the matter back to the PPS. What had prompted the Attorney General to take that step was a report on Mr McAnespie's death by the Historical Enquiries Team ("HET") of the PSNI. In its report the HET concluded that the chances of the fatal shot "being un-aimed or random seem to be so remote in the circumstances that they can be virtually disregarded."

[11] The remit of Mr Mastaglio and Ms Shaw was to review the forensic firearms evidence. In effect they were reviewing the work done almost 30 years earlier by Mr Montgomery. The report includes the following expressions of opinion:

> "8. The magnitude of the trigger pull and trigger travel, coupled with the gun being mounted so that most of its mass was supported would reduce the risk of a finger slipping off the trigger guard and discharging the GPMG MG1 in the manner described by Guardsman Holden. Although the possibility of this happening cannot be totally excluded.
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> 9. Alternatively the GPMG MG1 could have been discharged with a deliberate pull of the trigger, either with the knowledge that the gun was cocked and ready to fire, or in the belief that the gun was in a safe condition. It is not possible to scientifically quantify the likelihood of these two possibilities.
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> 10. With the cocking lever pushed forward and the top cover closed it is not apparent that a cocked GPMG is in the "ready to fire" state. Additionally the presence of the muzzle cap could give the impression that the gun was not in a "ready to fire" state."

[12] A decision was then taken by the PPS that the defendant should be prosecuted, again, for the manslaughter of Mr McAnespie.

COMMITTAL PROCEEDINGS

[13] Mr Magee QC represented the PPS at the hearing which resulted in the defendant being returned for trial. He provided the District Judge with a speaking note from which the following excerpts are taken:

> "5. The Prosecution case is that this defendant discharged three bullets from the GPMG as Aiden McAnespie was walking along the Monaghan Road. One of those bullets ricocheted off the road and struck Mr McAnespie when he was approximately 300 metres from the sangar. It is the Prosecution case that this was not an entirely chance or accidental event as was ultimately claimed by the accused. The court will receive evidence of the explanation for the shooting given by the defendant at the time. On account of the available evidence the prosecution will say that a reasonable jury properly directed could reject that account as being true (sic). The prosecution say that it could be inferred from the available evidence, including the dishonest account of the accused, that the gun was trained and the trigger deliberately engaged by the defendant whilst pointed in

the general direction of Mr McAnespie resulting in shots being fired in his direction. While it will ultimately be for the tribunal of fact to determine the defendant's state of mind in respect of the firing condition of the GPMG at the very least the defendant failed to give adequate regard to whether the gun was in a non-firing state when he did so. Given the level of duty of care on the defendant as a soldier in possession of a deadly and lethal weapon, in those circumstances the court could conclude that the killing of Mr McAnespie was unlawful even if not persuaded that the act was unlawful per se.

27. It is the Crown's case that the defendant deliberately engaged the trigger of the gun when it was pointing in the general direction of the deceased. In doing so at a time when the gun was in a ready to fire state, the defendant committed manslaughter, at the very least, by way of gross negligence; the ultimate tribunal of fact will be entitled to determine whether the act of itself was unlawful bearing in mind the defendant's state of mind as to the firing status of the weapon at the time he pulled the trigger. For the purposes of these proceedings the court can at the very least be satisfied that there was a clear duty of care towards the victim in this case which the defendant breached …

28. Whether the court is of the opinion that the defendant himself cocked the gun or indeed was aware that the gun was cocked or not is immaterial at this juncture. Provided the court is of the opinion that a jury properly directed could be sure that the defendant unlawfully killed Aiden McAnespie then the defendant should be committed for trial."

SUBMISSIONS

[14] For the defendant Mr O'Donoghue QC contended that it is not open to the prosecution to present the case on alternate grounds of unlawful act manslaughter or gross negligence manslaughter. He relied on Blackstone's Criminal Practice 2021 at B1.35. In the course of this paragraph which discusses voluntary and involuntary manslaughter the authors discuss issues which can arise if it is uncertain why a jury in a murder case has convicted a defendant of manslaughter instead. Their view is that provided the jury agree that the defendant is guilty of manslaughter it is unnecessary for them to agree on the route to that verdict e.g. loss of control as against diminished responsibility. They then continue:

> "It is submitted however that it would be different if manslaughter is alleged on two fundamentally separate grounds: unlawful act and gross negligence. It arguably should not be sufficient that six jurors thought that D's act causing death was unlawful but not grossly negligent and the other six thought it was grossly negligent but not unlawful. Here the prosecution have not proved either of the two forms of manslaughter beyond reasonable doubt; it is quite different from a case where what would otherwise be murder has been proved and the jurors merely differ as to the reason for *reducing* the offence to manslaughter …"

[15] Mr O'Donoghue further contended that despite significant gaps in the evidence of Mr Montgomery as a result of the circumstances in which he performed his work in 1988, his opinion had to be given singular weight at any trial. If that is done, the prosecution cannot succeed even on gross negligence never mind voluntary manslaughter. Considerable weight was attached in this context by Mr O'Donoghue to the reasoning given in 1988 and again in 2014 to the decision not to prosecute.

[16] The prosecution approach at the committal stage was then attacked on the basis that the Crown cannot possibly prove that the defendant "deliberately engaged the trigger" when it was accepted in 1988 and 2014 that this possibility cannot be ruled out.

[17] It was further submitted that the Crown's approach to voluntary manslaughter cannot be right because if the defendant had mens rea for anything it must be murder. Accordingly, the only possibility is a case of gross negligence manslaughter which would involve a complete turnaround from the rationale of 1988 and 2014 despite the absence of any new evidence.

[18] For the prosecution Mr Murphy QC contended that the Mastaglio/Shaw report does not in fact change the case in any fundamental way. He accepted that the prosecution can properly be asked at the end of the Crown case whether it is still advancing the case on both grounds or if it accepts that one is no longer open. He emphasised however that such a decision would be based on the evidence after it had been tested in court whereas what the defendant was seeking to do in the current application was to argue the case in advance. Given that the question at this stage is whether a reasonable jury could convict, the answer is clearly "yes."

[19] Mr Murphy contended that the "wet finger slipping" excuse, even if it is plausible, could on its own amount to gross negligence manslaughter. More fundamentally he submitted that the explanation is not consistent with other evidence and could be entirely rejected as implausible since a wet finger which slipped would not apply sufficient pressure to pull a trigger.

[20] Turning to the 1988 and 2014 decisions, Mr Murphy submitted that they are irrelevant because they only amount to opinions formed at the time rather than evidence. The fact that those views were once expressed is not relevant to the legal test which must be applied and certainly doesn't determine it. Instead of picking through them to decide whether they are right or wrong, the court should simply ignore them.

[21] On the critical issue as to how the jury could possibly convict on the evidence taken at its height Mr Murphy advanced three possibilities:

(i) The defendant cocked a weapon and then intentionally pulled the trigger although not intending to kill or cause serious bodily harm. In those circumstances he is guilty of unlawful act manslaughter.

(ii) The defendant did not know that the weapon was cocked, he trained the weapon in the direction of Mr McAnespie and he pulled the trigger not intending that it should fire but it did fire. This was submitted to amount to gross negligence manslaughter.

(iii) The defendant did not know that the weapon was cocked and handled it in a way suggested by him or otherwise that caused his finger to slip from the trigger guard or otherwise to be placed onto the trigger causing the weapon to discharge while it was pointed in the direction of Mr McAnespie. This amounts, it is suggested, to gross negligence manslaughter. As Mr Murphy pointed out, the prosecution does not accept that this is a tenable version of the facts but it is ultimately a matter for the court to conclude if that is how the discharge of the weapon occurred.

DISCUSSION

[22] The parties accept the legal principles as set out in *R v McCartan & Skinner* [2005] NICC 20. They are:

(i) The trial ought to proceed unless the judge is satisfied that the evidence does not disclose a case sufficient to justify putting the accused on trial.

(ii) The evidence for the Crown must be taken at its best at this stage.

(iii) The court has to decide whether on the evidence adduced a reasonable jury properly directed could find the defendant guilty and in doing so should apply the test formulated by Lord Parker CJ when considering applications for direction set out in Practice Note [1962] 1 All ER 448.

[23] The history of the case shows that when the available evidence was considered in 1988 and 2014 the decision taken was not to prosecute but that when essentially the same evidence was reconsidered in 2017 it was decided to prosecute.

The question for me is not to pick between these opinions but to decide whether on the available evidence, taken at its height, the defendant could be found guilty by a reasonable jury properly directed on the law. In saying that I acknowledge Mr O'Donoghue's submission that the relevance of the previous decisions not to prosecute is that they add weight to this application for no bill.

[24] Manslaughter can be proved in a multiplicity of ways, at least some of which are apparently contradictory. At this stage I am sympathetic to the proposition set out in Blackstone, cited above, that it is at least questionable whether a jury or a judge sitting alone should be left to consider two fundamentally separate and distinct grounds for convicting the defendant. It seems to me however that this is a matter to be considered at the end of the Crown case when the available evidence has been given and tested.

[25] At this stage it is important to remember what was said by Kerr LCJ in *R v Courtney* [2007] NICA 6:

> "In a case depending on circumstantial evidence it is essential that the evidence be dealt with as a whole because it is the overall strength or weakness of the complete case rather than the frailties or potency of individual evidence by which it must be judged. A localised approach is required not only to test the overall strength of the case but also to obtain an appropriate insight into the interdependence of the various elements of the prosecution case."

[26] At the heart of this trial is a young man who was shot dead as he walked along a country road to a GAA match. He posed no threat to anyone that Sunday afternoon but was killed by a bullet fired from a gun which was under the control of the defendant. The case is not fresh and the evidence may be imperfect but significantly less so than in many other historic cases.

[27] In all the circumstances my judgment is that for the reasons set out by Mr Murphy, cited at paragraph [21] above, there is sufficient evidence to justify putting the defendant on trial for manslaughter. Different views have been taken in the past as to whether this evidence is sufficient to warrant the charge of manslaughter being brought but in my judgment it is. It seems to me that the 1988 and 2014 decisions focused on the likelihood of conviction but that the issue at this stage on an application for no bill is different. It is whether a jury or judge sitting alone *could* convict rather than whether there *will be* a conviction. The latter issue can only be decided after the evidence has been heard and tested. By that point it will be apparent how well, if at all, it stands up to scrutiny. At this stage however I am satisfied that a reasonable jury properly directed *could* find the defendant guilty of manslaughter. Accordingly, the application for a no bill is dismissed.