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

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IN THE CROWN COURT OF NORTHERN IRELAND

SITTING AT LAGANSIDE CROWN COURT, BELFAST

THE QUEEN

v

MALACHY GOODMAN

Ruling on Application by the PPS to Adduce Hearsay Evidence

TREACY J

Introduction

[1] The defendant faces a charge of murder and the possession of a firearm with intent relating to the killing of Edward Gibson on 24 October 2014.

[2] At the time of the killing, the deceased had been in the company of Kieran McAuley. Mr McAuley provided statements to police which form part of the depositions. On 28 October 2014 this witness took part in a VIPER identification procedure and failed to identify anyone in the procedure including the defendant Goodman. Notwithstanding this, the prosecution make the highly unusual if not unique application described in the next paragraph.

[3] The prosecution wish to adduce McAuley's identification of the defendant by his name and thereby to establish proof of the identity of the defendant as the man who shot the deceased. The prosecution brings this application to adduce hearsay evidence submitting that his evidence identifying the defendant by name is admissible under the provisions of the Criminal Justice (NI) Order 2004 namely, Article 22(1) Rule 3(c) or, failing that, Article 18(1)(d) in the interests of justice.

Further, the prosecution submits it may also be admissible under Article 20(2)(a) given that two sources of the information are dead.

[4] The defence objects to the giving of this evidence on a number of grounds.

Background

[5] On 24 October 2014, at approximately 5.00pm, Edward Gibson was shot in an alleyway connecting Clonfadden Crescent to Divis Street in the Lower Falls area of Belfast.

[6] The victim and a friend, Kieran McAuley, entered the alley from the Divis Street end. A man came round the bend in the alleyway, walking past them before turning, drawing a small dark gun and shooting the victim. McAuley ran up the alley, onto Clonfadden Crescent. He heard a second shot, 25 to 30 seconds after the first.

[7] McAuley ran on to Lisfadden Place where he hid in a garden. He then raised the alarm and returned to the scene with the victim's uncle, Stephen Gibson. The victim had already called 999 at 5.02pm. He later lost consciousness and was taken by ambulance to hospital. He subsequently died from his wounds.

[8] Earlier in the afternoon, before 4.00pm, Gibson and McAuley had been involved in an altercation at the bottom of Albert Street with three people: Paul Burns, Liam Duffin and Thomasina McDaniels. Gibson had phoned McAuley for assistance (at 3.38pm according to the phone evidence). Burns confronted Gibson with two pizza cutters and called him a rapist. McDaniels had seemingly made an allegation of rape against Gibson. McDaniels carried a sock with a pool ball in it. Burns and Duffin fought with Gibson and McAuley. Following this incident, Gibson and McAuley went into the city centre.

[9] While Gibson was in the resuscitation room at the hospital, Paul Burns burst in shouting "Edward Gibson you bastard". He was forcibly removed but as he went up the corridor, he shouted: "Edward Gibson you fucking rapist I am going to fucking kill you".

Non-Identification

[10] On 25 October, police interviewed McCauley. A statement was prepared and the witness was invited on the next day, 26 October, to sign it. On 28 October the witness attended a VIPER identification procedure and failed to identify anyone from the procedure. After the procedure he went on to tell police that the

person who shot the deceased was Malachy Goodman. He states that he had seen the defendant a few times on the Falls Road but had never spoken to him. The witness made a statement to this effect on 28 October 2014.

[11] Six days later on 30 October Kieran McAuley made a statement to police in which he described a man:

> "… about 5'10" tall aged between 42 and 48, skinny build with a thin face which was pale/yellowish in colour … he was clean shaven … his hair was short…"

[12] Later in the statement he stated:

> "I have made a statement in relation to trying to identify the gunman in which I name him. I attended an identity viper parade. There were photographs shown to me for 15 seconds each. I went through it four or five times, then I asked to see numbers 1 and 3 again and watched them closely. I decided that I wouldn't choose either as I wasn't sure and I didn't want to choose the wrong one and make a mistake. So when it was over I asked to see the serious crime officer and tell him the name of the gunman. I told him everything that I know and how I know the gunman."

[13] The events of the VIPER ID are explained in the statement of Constable Pye at page 62 of the depositions. It appears in fact that the witness asked to see all suspects again, "particularly number 1" (who was not Goodman). He asked to see the first 5 again and then 1 and 3 (Goodman). No identification was made but the witness did say:

> "The person I seen in the entry is <u>not</u> on the DVD unless he looks different but I would recognize this person."

[14] The witness was interviewed again by police in December 2015. The interview was confined by the PSNI to questions they had been asked by the PPS regarding his account that he knew the gunman. He was asked about how he knew the gunman. The witness states, inter alia, that he had seen the defendant "… once or twice on the Falls Road". He stated it would have been over a year before the shooting and was "... merely just a sighting".

He goes on to state:

> "Some people that I'd been walking with said that's Malachy Goodman."

He later says:

> "I have never spoken to Malachy Goodman Snr. I have never called him by his name and I have never heard him being called by his name.
>
> "I have only ever seen Malachy Goodman Snr once or twice prior to the murder."

[15] When asked about when he had last seen him he said that it would have been "about over a year" before the shooting (see page 9 of the interview transcript). He says emphatically that "I cannot remember who told me it was Malachy Goodman". He says that 5 times. Then on 13 April 2016 the witness is interviewed yet again apparently at the request of the PPS. He is asked the same questions and he says:

> "A. It was Tony and Edward, Tony Benson and Edward Gibson".

The police say:

> "Q. Why didn't you tell us that before, that those were the two people who pointed him out?"
>
> "A. Because I just didn't want to mention their names basically, I didn't want to bring their names into it".
>
> "A. I just didn't feel it was necessary to mention the names, basically no reason really."

So two dead people pointed him out. On page six when the police say:

> "Well we would like to speak to Tony Benson." He says: "He is deceased."

Legislative Framework

[16] The relevant Articles of The Criminal Justice (Evidence) (NI) Order 2004 provide as follows in relation to Hearsay:

> **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,
>
> (b) any rule of law preserved by Article 22 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (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 paragraph (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 sub-paragraph (a);
>
> (c) how important the matter or evidence mentioned in sub-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 appears 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 that difficulty would be likely to prejudice the party facing it.

Statements and matters stated

19.—(1) In this Part references to a statement or to a matter stated are to be read as follows.

(2) A statement is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.

(3) A matter stated is one to which this Part applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—

(a) to cause another person to believe the matter, or

(b) to cause another person to act or a machine to operate on the basis that the matter is as stated.

Cases where a witness is unavailable

20.—(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

...

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

(2) The conditions are—

(a) that the relevant person is dead;

...

Preservation of certain common law rules in relation to hearsay

22.—(1) The following rules of law are preserved.

...

Reputation or family tradition

(3) Any rule of law under which in criminal proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving—

...

(c) the identity of any person or thing.

Note

The rule is preserved only so far as it allows the court to treat such evidence as proving or disproving the matter concerned.

Discussion

[17] In support of their application to adduce McAuley's identification of the defendant by his name the court was referred to a number of English Court of Appeal decisions – R v Clarke & Baker [2003] EWCA Crim 718; R v Williams [2004] EWCA Crim 2570 and R v Phillips [2010] EWCA Crim 378. I have considered these authorities in detail but they are, to borrow a phrase used in one of the cases, "many leagues distant from the present case". The cases were all very clear recognition cases in which there had been no formal identification procedure.

[18] The case of R v Fergus [1992] Crim LR 363 is referred to in a number of the above authorities but distinguished. Unlike the prosecution I find this case of considerable assistance. In Fergus the witness had seen the suspect once and was told his name by a third party. The conviction was quashed by the Court of Appeal because the trial judge had erroneously permitted a dock identification. The CA said the trial judge "was wrong to conclude ….that in any real sense [the witness] was recognising rather than identifying Fergus as the man who stabbed him. In our view one previous sight of Fergus did not make this a case of recognition; it remained a case of identification. It follows that the Recorder was wrong to allow the question 'Do you see in court the person whom you have referred to as Joseph Fergus?' to be asked". I note that the court had earlier observed that this question was nearly equivalent to asking him "Do you see the man who stabbed you in court?"

[19] The primary purpose in wanting to adduce McAuley's hearsay evidence of the identification of the defendant by name is an attempt to establish him as the gunman who murdered Edward Gibson. But the alleged gunman (Goodman) was in position 3 in the VIPER procedure and McAuley not only failed to pick him out but positively asserted that the gunman was not on the DVD. The VIPER identification procedure is the process utilised to test the ability of the witness to identify the gunman. The prosecution cannot subvert that vitally important safeguard by seeking to adduce the McAuley hearsay evidence of the defendant by his name. In his oral submissions, but not in his written argument, Mr McDowell QC tried to downplay the VIPER parade. He submitted that one has to see the VIPER in its context "because it is not like an old identification parade. These were a series of floating heads, without hair, and in Goodman's case there was a scar blocked out. So it was pixilated and therefore in relation to all the subjects, the same area of pixilation was created. But it is different identifying someone as a floating head as it is when it would have been an old-style identification parade, because it is facial identification only and confirmation cannot be gleaned by any other feature, such as height or build, or a particular body shape, which one might do if one saw someone in the street and said 'do I think that is such and such? Oh, it looks like him from behind. Oh yes, I recognise the shape of his shoulders'. But in VIPER there is no opportunity for that". This was an unusual submission and was unsupported by any authority. I say unusual because the procedure that counsel downplayed is the independent procedural safeguard, utilised in countless cases, to test the ability of a witness to identify a suspect and to minimise the risk of a wrongful identification.

[20] Further, if as in Fergus, there had been no identification procedure in this case it would be impermissible to allow the prosecution to adduce McAuley's

hearsay evidence of identification for similar reasons to those identified in Fergus. Like Fergus this is a case of identification not recognition and allowing the evidence would necessarily be the precursor to a dock identification which, in the circumstances of this case, must meet the same fate as in Fergus.

[21] Moreover, even if McAuley was being truthful in belatedly telling the police in April 2016 the identities of Benson and Gibson as being those who told him that the person he had seen (over a year before the murder) was Goodman there is a further difficulty. Neither Benson nor Gibson (both being dead) can assist the court as to whether the gunman in the alleyway was the person known to them as Mr Goodman the defendant in this case.

[22] The prosecution must establish a statutory gateway or common law exception before the court could properly admit the evidence it is sought to adduce. The prosecution have failed to establish any such gateway or exception. The admission of such hearsay would be grossly and irredeemably prejudicial. Accordingly, the application is refused.