

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

HAZEL STEWART

Applicant.

Before: Morgan LCJ, Gillen LJ and Weatherup LJ

GILLEN LJ (giving the judgment of the court)

Background

[1] The applicant was unanimously convicted by a jury at Coleraine Crown Court on 2 March 2011 of the offences of the murder of Lesley Howell and Trevor Buchanan. The learned trial judge, Hart J, imposed a life sentence with a minimum term of 18 years.

[2] The applicant served Notice of Appeal in relation to both convictions on 22 March 2011. Her application for leave to appeal dated 28 October 2011 contained amended grounds of appeal and related only to the murder of Lesley Howell. No reference was made therein to the murder and conviction in respect of Trevor Buchanan.

[3] In correspondence from the applicant's then solicitors, Hasson and Company, dated 19 December 2012 to the Court Office it was stated –

“We write to advise you that we are instructed to proceed with this appeal in respect of the applicant's conviction for the murder of Lesley Anne Elizabeth Howell only.”

[4] In the skeleton argument lodged on behalf of the applicant dated 28 December 2012 it was indicated at paragraph 2 that the appeal related solely to the applicant's conviction for the murder of Lesley Howell.

[5] At the hearing of the appeal before Higgins LJ, Coghlin LJ and Girvan LJ on 21 January 2013 reference was made to the amended grounds of appeal. Mr Gallagher QC, counsel for the applicant, outlined the conviction for the murder of Trevor Buchanan in May 1991 and stated in open court:

"As regards the murder of Trevor Buchanan it was not alleged that the applicant herself had been physically involved in a direct sense in his death, but it was alleged that she had facilitated, assisted and indeed encouraged that death to occur. That was the prosecution case. My Lords, there is no appeal against that conviction before the court."

[6] Counsel went on to say:

"It must be accepted, My Lords, based upon her interviews on the face of (sic) interviews, however, that in later interviews she did make concessions on the record that she knew that Colin Howell was coming to her house that night, and in broad terms, what his intentions were, that is, broadly in line with his earlier announced plan to her. And she did, in the course of interviews, go on to make admissions which were tantamount to accepting that by allowing him to come to the house, allowing him into the house etc. that she effectively, or certainly the view could be taken that she was facilitating and assisting him. So on that basis alone, apart from anything that might have been said in interviews the view was taken that a sustainable appeal in respect of that murder could not be made."

[7] The Court of Appeal upon hearing the appeal against conviction in relation to the murder of Lesley Howell, upheld the conviction and noted in the judgment that the appeal in relation to the murder of Trevor Buchanan had been abandoned.

[8] On 19 February 2014 the applicant filed further grounds of appeal in relation to that application for leave which had been withdrawn. Correspondence issued from the Appeals Office dated 25 March 2014 indicating that the court had already heard and dismissed an appeal for the conviction to which the additional grounds related.

[9] The additional grounds related to the application for leave to appeal in respect of the applicant's conviction for the murder of Trevor Buchanan only.

[10] The matter now before this court is that the applicant wishes to pursue that application on the basis that the purported abandonment should be declared a nullity in that the applicant did not authorise the abandonment of her appeal. In particular it is her case that she was not advised by her legal representatives that withdrawing the appeal would have the consequences of her appeal being treated as having been dismissed or refused by the court.

[11] If that abandonment is declared a nullity, the applicant seeks an extension of time within which to appeal and leave to appeal that conviction.

[12] The fresh grounds of appeal are essentially three fold. First that the learned trial judge failed to act in accordance with the principles set out in R v Makanjuola [1995] 1 WLR 1348 and should have formally directed the jury to look for other supporting evidence of guilt before acting on the evidence of Colin Howell who was an accomplice to the two murders with which this applicant was charged.

[13] Secondly, that the learned trial judge, in directing the jury as to the applicant's good character, had withheld from the jury entirely the necessary limb of that charge relating to propensity.

[14] Thirdly, that the learned trial judge failed to properly direct the jury - with an appropriate Lucas direction - as to the significance of the lies, maintained for many years, that the applicant had told to the police and others before and during the original investigation and thereafter at the Inquest and in the early stages of her police interviews.

Factual background

[15] The gruesome factual background to this case was well set out by Girvan LJ who delivered the judgment of the Court of Appeal in the hearing into the murder of Lesley Howell (unreported GIR8718).

[16] I have leant heavily on the contents of paragraphs [4]-[16] of that judgment in setting out the background facts for this appeal as follows:

[17] On 19 May 1991, the bodies of Lesley Howell and Trevor Buchanan were discovered a car in the garage of Mrs Howell's father who had died a few weeks earlier. Mr Buchanan's body was slumped in the front driver's seat, while Lesley Howell's body was found lying in the boot of the car. Lesley Howell's body was found with headphones on and family photographs were positioned beside her body. Fitted to the end of the exhaust pipe of the car was one end of a vacuum cleaner hose pipe. The other end of the hose was located in the boot beside the head of Lesley Howell. There was a strong smell of car exhaust fumes in the garage and

while the car engine was not running the ignition was in the 'switched on' position. Autopsy reports on both bodies determined that death had occurred by reason of carbon monoxide poisoning consistent with car exhaust fumes. A small trace of drugs found in each body was within therapeutic limits and a drugs overdose was ruled out. Mrs Howell was found to have consumed some alcohol. A purported suicide note had been left by Lesley Howell, which was supposedly found by her husband Colin Howell at their home.

[18] Inquests into the circumstances surrounding the deaths took place on 14 May 1992. The verdict in each case was death resulting from carbon monoxide poisoning.

[19] Many years after the deaths, Howell confessed on 29 January 2009 to his new wife, Kyle Howell, and then to certain members of Coleraine Baptist Church ("the Church") that he was responsible for the deaths of Lesley Howell and Trevor Buchanan. He told them about his sexual relationship with the applicant and of his involvement and that of the applicant in the murders of the two deceased providing details of how he had carried out the murders. He was arrested on 29 January 2009 on suspicion of the murders of Lesley Howell and Trevor Buchanan on 19 May 1991.

[20] Subsequently Howell pleaded guilty to the murders of the deceased. He was called by the Crown as a witness at the trial of the applicant and he gave evidence. He claimed that after she became aware of his affair with the applicant, Lesley Howell suggested that it would be better if she and Trevor Buchanan were both killed in a road traffic accident. This led him to hatch a plot to arrange their deaths and make it look like suicide. He stated that he discussed his plans with the applicant. He planned to pipe car fumes from the garage into the house, first at his house and then at Trevor Buchanan's house. The plan was that both Lesley Howell and Trevor Buchanan would fall asleep, that he would put the gas pipe from the car beside them and they would fall asleep quietly.

[21] Mr Howell executed the plan by firstly killing his wife by carbon monoxide poisoning and placing her body in the boot of the car with a blanket and his bicycle placed over it. He then claimed that he contacted the applicant as previously agreed and drove over to her house and reversed the car into her garage with access being afforded to him by the applicant to the garage and then to the house in accordance with their prior arrangement. He then connected a garden hose to the car and brought the pipe into the bedroom where Trevor Buchanan was asleep and placed the pipe beside him. Mr Buchanan was sedated. Mr Howell, who made clear to the applicant the need to ensure that Trevor Buchanan was sedated, claimed that he had previously given the applicant sleeping tablets and asked her to mash them up and put them into her husband's food. While Howell was in the bedroom Trevor Buchanan, although sedated, stirred and Howell had to hold the pipe to his mouth while he died. The applicant had left out some of her husband's clothes as previously she agreed she would do. Howell subsequently dressed the deceased,

who was only in boxer shorts, in these clothes. Howell then put the body in the car beside his wife Lesley's body.

[22] Howell stated that the applicant's role was to clear up. The applicant cut the hose pipe into sections and burned it in the fireplace. Howell stated that while this was all his idea the applicant co-operated. He then drove the two bodies to his deceased father-in-law's house and reversed the car into the garage. He removed Mr Buchanan's body from the boot and placed it in the driver's seat. He put a set of Walkman earphones on Lesley Howell and switched the Walkman on to make it appear that she had died listening to music. There was a broken vacuum cleaner in the car the hose of which he connected up to look as if fumes had been piped in. He started the engine, left the garage, ran along the beach, got his bicycle which he had earlier deposited and cycled home. He thinks that he reached home at about 4.30am. He telephoned the police and said that his wife was missing. He then phoned Jim Flanagan, an elder in Coleraine Baptist Church.

[23] Mr Howell stated that, while the applicant would not have understood the plan to the level that he understood it, she was willing to co-operate with him in its execution. He said that she had not asked him not to execute the plan, although she initially was concerned that they would be caught. The purpose of the plan was the removal of the two spouses to leave the applicant and Howell free to pursue their relationship. Afterwards Howell noted that there was a change in her and that in the early days he knew she wished that the murders had not happened.

[24] Howell described his relationship with the applicant as intense and sexual. He gave evidence of how the relationship with the applicant developed after the deaths of their spouses. Initially the relationship was secret but progressed to the point where they would take their children on outings to remote beaches. They went on hotel breaks and he went to the applicant's home regularly on Friday nights. The relationship ended after 5 years in the summer of 1996 because the applicant had met someone else.

[25] The applicant did not give evidence at the trial. Evidence was adduced by the Crown of what she told the police during a number of police interviews under caution.

[26] Those interviews proceeded over a protracted period and in the course of the interviews the applicant's version of events changed considerably. She described how she met Howell through the Church. They were both professing Christians. She took Sunday School for the small children. She and Howell's wife took their children to a swimming club. On occasions, Howell went instead. She was aware that he found her attractive and one night he phoned her and called at her house when her husband was working. They developed a relationship. She said she went to the pastor of the church and told him about the relationship and that the relationship then finished. She thinks that was why Lesley Howell took an overdose. Then Howell contacted her and the relationship began again. She became

pregnant and was not sure whether the baby's father was her husband or Howell. As a result with Howell's help she had a secret abortion. She and her husband never separated during her relationship with Howell. She described how people had tried to warn her off Howell and had told her that he was a compulsive liar but she saw a charming side to him. She stated that Howell told her that he would never divorce his wife. When he broached the idea of killing his wife and her husband, she was scared. She claimed that she thought he might kill her if she did not co-operate. At the start of their relationship, she loved him but after the abortion, the relationship deteriorated. She stated that Howell loved taking risks and got a buzz from them. She stated that Howell was annoyed that he was put out of the Church after his wife's death and that she was allowed to stay. She said that Howell told the pastor that he had slept with her, so she was expelled from the Church along with her children. She described that when the relationship ended, Howell prowled around the back of her house, drove up and down, was very angry and telephoned her. She described him as controlling and that she was "easy prey". They finally separated in 1996 and she told him that she did not want to see him anymore.

[27] Initially in her interviews she claimed that Howell came to her house on a Saturday night and reversed his car into the garage. He told her that Lesley Howell was in the boot. Her husband Trevor was in bed asleep. She felt scared and did not know what to do. Howell told her to go into the bedroom and close the door. She looked out of the bedroom and saw her husband's body on the hall floor. She described how there was a pipe running from Howell's car to the bedroom. She assumed that her husband died by fumes from the car. She stated that Howell never told her how he was going to kill her husband and his wife. She described how Howell had given her the hose pipe and told her to cut it up and burn it, which she did. She stated that she had no idea where he went when he drove off and did not want to know. She said she found out from the Church where the bodies were found.

[28] In the course of interview the applicant told the police that she had fallen asleep the night of her husband's death, but sometime later heard voices in the house, one of which she recognised as that of Lesley Howell. She subsequently accepted in interview that this was a lie. She also said that that night Howell phoned her and told her he was coming to her house. She said that she was not suspicious. She denied giving her husband any medication, drug or tablet that evening and said that he had taken something himself. She stated that after Howell had taken her husband's body from the house, she washed the covers on the bed and opened the window to get rid of the fumes.

[29] Over the course of the interviews under police questioning the applicant radically altered her initial account and conceded that Howell had arranged to come round that Saturday night to kill her husband. She stated that she knew it was going to be by carbon monoxide poisoning. She claimed not to know the precise details. She said that she knew something was going to happen that day and was

not in good form. She said that her husband took the Temazepam himself because he couldn't sleep and she had suggested: 'why don't you take something?' She stated that Howell had wanted her to give her husband a tablet. She stated that when Howell arrived at the house, she went into the living room and then into another bedroom beside her own. She agreed that she had left her own car out of the garage that night on Howell's instructions. She described how on the night in question, Howell came to her house and reversed his car into the garage. He told her that Lesley Howell was in the boot. She described how he had given her the hose pipe and told her to cut it up and burn it, which she did. She stated that she had no idea where he went when he drove off and did not want to know. She said she found out from the Church where the bodies were found. She described how Howell had told her what to say about her husband's disappearance.

[30] In her fourteenth interview the police put to her that when she got the phone call from Howell in the early hours of the morning she knew that Lesley Howell had been murdered and that the plan was going ahead. It was put to her "*You fully accept that?*" She said "*Yes, I do.*" This was entirely at odds with her assertions in earlier interviews that she did not know why he was coming. The police put to her the following question: "*You were allowing somebody with your consent (and you had been in it from the start) to come and murder your husband, that he had murdered his own partner which was all part of the plan? Do you accept that?*" Her answer was "*Yes*".

Abandonment

[31] Mr Kelly QC appeared on behalf of the applicant with Mr McKenna. Mr Murphy QC appeared on behalf of the prosecution with Mr Connor. Both counsel conducted this matter with characteristic attentiveness and precision.

[32] Rule 16 of the Criminal Appeal (NI) Rules 1968 provides, where relevant, as follows:

"Abandonment of proceedings

16.-(1) An appeal or an application for leave to appeal..... may be abandoned before the hearing of the appeal or application by serving on the proper officer notice thereof in Form 15.

(2) The notice shall be signed by the appellant, his counsel or solicitor or any other person authorised by the appellant.

(3) Where a notice is signed otherwise than by the appellant, his counsel or solicitor, the court may treat the notice as not constituting a notice for the purposes of this rule unless it is supported by a

statement signed by the appellant that he has authorised the person in question to sign the notice on his behalf.

.....

(5) Where an appeal or an application for leave to appeal is abandoned, the appeal or application shall be treated as having been dismissed or refused by the court.”

[33] Counsel were ad idem on the legal principles that govern the concept of abandonment. They cited well known authorities which included: R v Medway [1976] QB 779, R v Grey [2004] 2 Cr. App. R. 30, R v Grace [1995] NIJB 113, R v Shawn Edward Offield [2002] EWCA Crim 1630, R v Lambert [2004] EWCA Crim 154, R v Elrayess [2007] EWCA Crim 2252, R v Nelson Richards [2010] EWCA Crim 3330, R v RL [2013] EWCA Crim 1913 and R v Paul James Smith [2014] Crim App R 1.

[34] From these authorities the following undisputed principles can be distilled;

- (i) A Notice of Abandonment of Appeal is irrevocable unless the Court of Appeal treats that Notice as a nullity.
- (ii) The “nullity test” is that the court is satisfied that the abandonment was not the result of a deliberate and informed decision but that the mind of the applicant did not go with his/her act of abandonment.
- (iii) It is impossible to foresee when and how such a state of affairs might come about and it is wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and such like, which would purport to be exhaustive of the types of case where this jurisdiction can operate.
- (iv) Bad advice given by some legal advisor, which has resulted in an unintended or ill-considered decision to abandon the appeal, may constitute grounds for nullity of abandonment. This would constitute one of the clear cases of a fundamental misconception, the basis of a decision that was plainly and clearly wrong and that led the applicant to apply his/her mind in ignorance of a very material consideration.

[35] We pause at this stage to address the circumstances in which the Court of Appeal has power to re-open an appeal. The matter has been extensively dealt with in this jurisdiction in R v Rafferty, unreported, Nicholson LJ 26 May 1999, R v Walsh [2007] NICA 4 and R v Walsh [2010] NICA 7. More recently it has been revisited in England in R v Yasain [2015] EWCA Crim 277.

[36] From these authorities can be derived the core principle that it is in the interests of the public in general that there should be a limit or finality to legal proceedings. Consequently, where a person convicted of an offence on indictment appeals against that conviction, and that appeal has been determined on its merits, the court has no jurisdiction to re-open it on fresh evidence coming to light save in two circumstances.

[37] First, where the decision on the original appeal can be regarded as a nullity. This is more commonly applied where there has been an application to treat a Notice of Abandonment as a nullity.

[38] The second circumstance, which may be simply an example of the first, is where, owing to some defect in the procedure, the appellant has, on the first appeal being dismissed, suffered an injustice as where, for example, he has not been notified of the hearing of the appeal or counsel has been unable to attend. Consequently, whilst the power of the Court of Appeal in England to relist a case has not been removed by the passing of the Criminal Appeal Act 1995, which established the Criminal Conviction Review Commission (“CCRC”), the occasion for the exercise of such a power will arise only in the most exceptional circumstances. As Kerr LJ said in R v Walsh [2007] NICA 4 at [31]:

“In virtually every conceivable case it is to be expected that where the possibility of an injustice is reasonably apprehended, the CCRC will refer the case. If it decides not to refer, however, the circumstances in which a challenge to that decision can be made are necessarily limited ... Where the CCRC has been invited to refer a conviction to the Court of Appeal for a second time and has declined, if this court considers that because the rules or well-established practice have not been followed or the earlier court was misinformed about some relevant matter and, in consequence, if the appeal is not re-listed, an injustice is likely to occur, it may have recourse to its inherent power to re-list (or, effectively, re-open) the appeal.”

[39] In Yasain’s case at paragraph [40] Lord Thomas of Cwmgiedd CJ said:

“... In a criminal case there will often be three interests that have to be considered – that of the state, that of the defendant and that of the victim or alleged victim of the crime even though the victim is not a party to the proceedings under the common law approach ... There is the strongest public interest in the finality. The jurisdiction (*to re-open an appeal*) is

probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission.”

The evidence of abandonment

[40] This court had the benefit of affidavits from the applicant, her husband David Stewart, Lorna Mills the sister of the applicant, Pauline Ellis the sister of the applicant, notes of the applicant’s solicitor attending upon a Bar Library consultation with senior counsel in Belfast on 7 November 2012, solicitor’s notes of a consultation at HMP Hydebank with the applicant, her husband and senior counsel on 7 November 2012, a consultation between David Stewart, the applicant’s two sisters and senior counsel on 23 November 2012 and notes of a solicitor’s meeting with the applicant at HMP Hydebank 29 November 2012. In essence the applicant contended the consequences of abandonment had never been properly explained to her.

The applicant’s submissions

[41] Mr Kelly submitted the applicant’s mind had not gone with the abandonment since she was unaware of the consequences of so doing and she had not been apprised of the grounds of appeal now formulated. Once again, there was no real dispute between counsel as to what emerged from these meetings between senior counsel, the applicant and her husband. Mr Kelly at the outset of the submissions set out certain propositions which, in the main, did not find serious objection from Mr Murphy, namely that:

- (i) the applicant had authorised the abandonment of her appeal by her counsel;
- (ii) David Stewart had been told of the effect of abandonment and that it would amount to a dismissal;
- (iii) there may have been an element of confusion in the mind of Mr Stewart as to the difference between a new appeal and the matter being referred to the CCRC in the event of new evidence coming to light (albeit Mr Murphy did not expressly accept this proposition);
- (iv) there was no positive evidence that the applicant had been told of the effect of abandonment. Whilst her husband may well have been told in the course of the meeting at the Bar Library on 7 November 2012, the note of the attendance on the applicant at Hydebank made by her legal representatives was of importance. It was the applicant’s case that this was never discussed with her legal representatives. A statement for the court headed “Statement of Applicant’s previous legal representatives in the appeal” signed by senior and junior counsel and the solicitor for the applicant dated 19 January 2015 was, according to Mr Kelly, silent on the question of the applicant being told

the effect of abandonment. It was his assertion, therefore, that there was no evidence that the applicant knew the effect of abandonment;

- (v) both the applicant and her husband were informed by her legal advisers that there was no arguable appeal on the Trevor Buchanan murder;
- (vi) the grounds now advanced – namely failure on the part of the learned trial judge to provide an adequate good character direction, to comply with the principles in Makanjuola and to give an appropriate Lucas direction – cannot have been considered with the applicant. Mr Kelly asserted that the former counsel had been given an opportunity to comment on this but had not done so;

The prosecution submissions

[42] In essence the response to this submission by Mr Murphy advanced the following points:

- (i) The applicant had unequivocally abandoned her appeal in the matter of Trevor Buchanan as evidenced by the letter from her then solicitors, Hasson & Company, dated 19 December 2012 referred to in paragraph [3] above, the skeleton argument lodged on behalf of the applicant dated 8 December 2012 referred to in paragraph [4] above and the concession of counsel adumbrated at paragraphs [5] and [6] above.
- (ii) An attempt to establish grounds to re-open this matter through the CCRC had already been made by virtue of investigations – which were acknowledged by the applicant’s legal representatives and in the affidavit, for example, of David Stewart - carried out on behalf of the applicant by her legal representatives to obtain medical evidence to challenge the admissibility of the applicant’s admissions at interview. That search had been in vain and that consequently no further basis existed for an appeal against the conviction in the case of Mr Buchanan. The applicant’s mind had clearly gone with the decision to abandon the appeal.

Conclusion on the question of abandonment

[43] We have come to the conclusion that there are no plausible grounds for holding that the abandonment of the applicant’s appeal against her conviction for the murder of Trevor Buchanan was a nullity or that it should be set aside.

[44] Our reasons are as follows. At the outset we observe that whilst the note made by the applicant’s lawyers of the meeting at Hydebank with the applicant is silent on the question of explaining to the applicant that abandonment constituted dismissal, it is clear that this matter had been earlier fully explained to her husband at the Bar Library. He was present at the consultation with the applicant at

Hydebank. However, we are prepared to proceed on the assumption that she had not been expressly told that abandonment constituted dismissal. Nonetheless, we do not accept that it can be rationally argued that her mind did not go with the stated abandonment. The fact of the matter is that she fully accepted the advice of counsel that the appeal in the case of the murder of Trevor Buchanan was groundless. In truth she could scarcely have come to any other conclusion. She heard her counsel state in open court, presumably on instructions, in the extract mentioned above at paragraphs [5] and [6] of this judgment that the appeal was without foundation.

[45] Self-evidently all avenues of investigation had been exhausted with reports from medical and psychiatric sources in an attempt to challenge the admissions she had made. She knew that that quest was finished. What other course was then open to her but to abandon the appeal? Had it proceeded without realistic arguable grounds it would have been dismissed in any event?

[46] If, of course, new evidence was to arise after her appeal, she would be in exactly the same position i.e. she would be able to revert to the CCRC to review the matter afresh. This was always the position once she accepted, as we believe she did, that there was at that time no basis for an appeal in the murder of Trevor Buchanan.

[47] We are satisfied that there is no foundation for the fresh grounds now before the court. We consider that it was well within the discretion and judgement of counsel to have made a judgement that no grounds other than those explored realistically existed and not to have raised such matters with her. There is no obligation on counsel to be endlessly inventive and creative unless he or she considers there is some basis to be so.

[48] In any event, even if counsel had discussed the current grounds and the applicant had wished the arguments to be put forward, the outcome would inevitably have been the same, namely that the appeal would have been dismissed.

[49] Consequently, we consider that even had she been informed that the abandonment constituted dismissal, she would have followed precisely the same path that she did in the knowledge that once the appeal was dismissed her course of action then was to revert to the CCRC in the event of fresh evidence emerging.

[50] This conclusion, that the applicant had abandoned her appeal, effectively terminates the issues now before this court. We consider, however, it is in the public interest that we should make clear that even had we concluded that the purported abandonment was a nullity, this appeal would still have failed on the basis that the fresh grounds now put before this court are without foundation. We shall deal with these grounds in turn.

[The Court then dealt for completeness at paragraphs [51] to [89] with the three fresh grounds of appeal which are detailed at paragraphs [12] to [14] above. It rejected all three grounds. This part of the judgment is available on the internet.]

Conclusion

[90] We have determined that the appeal by this applicant against her conviction for the murder of Trevor Buchanan was abandoned in 2013 and therefore dismissed. We find no grounds for declaring that abandonment a nullity. Even had we been persuaded to do so, the fresh grounds now brought are without foundation. The application is therefore refused.