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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MARTIN BRIAN JAMES BERNARD MAUGHAN

Before: Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an application by Martin Brian James Bernard Maughan to have his application for leave to appeal against conviction re-opened. This court heard an application for leave to appeal on 30 March 2004 and delivered judgment on 14 May 2004 dismissing his application. Following the delivery of the judgment counsel for the applicant drew to our attention a number of what he said were errors of fact or misapprehensions in the judgment. The court sat again on 10 June to consider whether the appeal should be re-opened, and, if so, what effect this should have on the outcome of the application.

Re-opening an application for leave to appeal

[2] The traditional position was that a judgment of the Court of Appeal could not be altered once it had been pronounced and formally recorded – see *R v Cross* [1973] 2 WLR 1049 per Lord Widgery CJ. In subsequent decisions the Court of Appeal has displayed a more flexible approach to the re-opening of appeals, either on the basis of its 'inherent power' (eg *R v Berry (No. 2)* [1991] 1 WLR 125) or 'within the ambit' of the legislation governing appeals. In *R v Pegg* (1987 unreported) it was stated: -

> 'What the authorities show is a more general inherent power to re-list for rehearing an appeal where (1) the previous hearing is regarded as a nullity, (2) there is a likelihood of injustice having been done because the court failed to follow the rules or well-established practice or was misinformed as to some relevant matter."

[3] In *R v Daniel* [1977] QB 364 Lawton LJ concluded: -

> "The court clearly has jurisdiction within the ambit of the 1968 Act and rules to see that no injustice is done to any applicant or appellant. If in any particular case because of a failure of the court to follow the rules or the well-established practice there is a likelihood that injustice may have been done, then it seems to us right, despite the generality of what was said in R v Cross, that a case should be re-listed for hearing."

[4] In the present case we were persuaded that the court's judgment was in error in that it proceeded on the basis that the statements of a witness, Mrs Rosaleen Faloon, had been read to the jury in the form that they had appeared in the committal papers. In fact an agreed statement was read that combined some aspects of the two statements in the depositions. In order to ensure that no injustice was done to the applicant we have decided that the appeal must be re-opened.

Factual background

[5] In the evening of 17 June 2002 Martin Mongan, a member of the travelling community, and a number of others were drinking at the Colin Mill Lodge public house in Poleglass, County Antrim. Many of the party including Mr Mongan had been drinking all that day and much of the previous day. A number of the group were heavily intoxicated. Mr Mongan left the bar some time after 11 pm and walked along the footpath when he noticed a red Renault estate car pull up alongside him. He claimed that he immediately recognised the driver as the applicant, Brian Maughan, whom he knew well. He stated that the applicant called out, "yellow belly, I got you at last" and discharged a shotgun directly at him. He suffered severe injuries from gunshot wounds.

[6] The applicant was duly arrested and interviewed by police. He denied the offences, claiming that at the material time he was at a guesthouse belonging to Mrs Faloon in Lower Ballinderry. He was charged with the attempted murder of Mr Mongan and returned for trial at the Crown Court

sitting at Craigavon where he was convicted on three counts. On the first count he was charged with the attempted murder of Martin Mongan. On this count he was convicted by majority verdict of 10 to 2. On the second count, which charged him with causing grievous bodily harm, the jury convicted him unanimously. On the third count he was convicted of possession of a firearm with intent to endanger life by a majority verdict of 10 to 2.

The application for leave to appeal

[7] The grounds on which the application for leave to appeal was made and the arguments advanced in support of them have been set out with admirable clarity in the judgment of Nicholson LJ and need not be repeated at any length here. The applicant sought leave to appeal on six grounds. They may be summarised as follows: -

1. The trial judge should have withdrawn the case from the jury at the close of the Crown case;
2. The jury ought to have been directed not to draw any adverse inference against the applicant in respect of his failure to give evidence;
3. The jury's verdict was against the weight of the evidence;
4. The verdict of the jury on Count 2 was inconsistent with the verdict of the jury on Count 3;
5. The manner in which the Crown conducted the swearing of the jury was unfair; and
6. The judge misdirected the jury as to the significance of the evidence and as to the law

The submission that the application for leave be re-opened

[8] Only two of the grounds enumerated above, the first and the third, arise on the present application. Mr Gallagher QC for the applicant has pointed out that in relation to the first ground, Nicholson LJ referred to the evidence of a number of witnesses on the issue of the victim's drunkenness at the time of the shooting. In fact none of the witnesses had given evidence and, Mr Gallagher claimed, the court should not have referred to their committal statements.

[9] In relation to the third ground, the court had proceeded on the assumption that the original statements of Mrs Faloon had been read when, as we have said, in fact an agreed statement composed of extracts from her two statements in the committal papers was read to the court. This occurred because, on the day that the trial was due to begin, Mr Creaney QC for the

prosecution informed Mr Gallagher that Mrs Faloon was suffering from a serious illness and that he would be applying to have her statements read to the court under article 3 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988. After discussion between counsel, however, that application was not made and the edited statement was read by agreement instead. This omitted a number of the averments contained in the committal statements. Counsel suggested that this court had drawn heavily on those averments in reaching conclusions on the third ground of appeal.

[10] Mr Gallagher informed the court that, in retrospect, he felt that he should not have agreed that Mrs Faloon's statement be read because it had prejudiced the applicant. Moreover, his solicitors had discovered that in fact she would have been fit to testify. This court did not have any evidence on which to judge this claim, however, and Mr Creaney informed us that he had sufficient material to mount an application under article 3 of the 1988 Order. We are therefore not in a position to make any comment, much less any judgment, on the claim that Mrs Faloon would have been able to give evidence at the trial.

[11] The final claim made by the applicant was that this court failed to properly understand the argument made on his behalf founded on the statement of a witness of whom counsel had been unaware until after the trial. This witness, Mrs Avril Brown, had informed police that the applicant and his party had been in her guesthouse the night after the attack on Mr Mongan and had given the same false names that they had on the night that they had stayed at Mrs Faloon's guesthouse. Mrs Brown had made a statement to police because the applicant had failed to pay her. Mr Gallagher suggested that this witness would have provided vital evidence in relation to the use of false names. It had been claimed by the Crown that the applicant had used a false name in Mrs Faloon's house to conceal his true identity because he intended to carry out the attack on Mr Mongan. In fact, Mr Gallagher said, false names had been given to Mrs Faloon for exactly the same reasons it was provided to Mrs Brown, to exploit the possibility of leaving without paying.

The first ground

[12] It was claimed that the trial judge failed to have sufficient regard to six evidential issues in deciding whether to withdraw the case from the jury. One of these six factors was the extreme drunkenness of the victim at the time that he was shot. It was on Nicholson LJ's treatment of this single aspect that Mr Gallagher claimed that this court had taken evidence into account that it ought to have disregarded.

[13] It is necessary, in order to consider this argument in context, to examine carefully what Nicholson LJ said about it. At paragraph [6] of the judgment he said: -

> "It was contended that the judge failed to take adequate account of the injured party's extreme state of drunkenness at the material time. There was plain evidence that he drank heavily on the Sunday night and drank heavily in the Oak Bar on the Monday morning before moving to the Colin Mill Lodge public house where he drank heavily for the rest of the day, apart from a short respite in the early part of the evening while he had something to eat at a café round the corner from the public house. According to his direct evidence he was away from the public house for 15 to 20 minutes (p 30 of the transcript). In cross-examination he said that he was not drinking constantly through the day. He did have a break, going out of the public house to a chip shop just round the corner for a fish supper which he ate on the street. It took him about 5, 10 minutes (pp 67, 68 of the transcript). He said that he was drinking in the public house on the Sunday evening, possibly from 6.30pm to closing time and was intoxicated when he left (p 65). He said that he had four pints in the Oak Bar on Monday morning "because I needed a cure" or "because I wanted a cure" (p 66) starting at 10.00am, and then went to the Colin Mill Lodge Bar where he remained drinking apart from the period when he had his fish supper, until he left at about 11.45pm (pp 68, 69). He agreed that he could have had 20 pints of beer on the Monday and was intoxicated, but was able to walk and make a telephone call to his son as he was leaving the bar (p 91). He said that he made a call to his son to collect him and then, as he started to walk to the taxi rank, told him "don't collect me, I will get a taxi" (p 92). He said that he then saw a car pull up beside him and that the driver, whom he claimed to identify as the applicant, shot him (pp 92-100).
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> We have read the whole transcript of the injured party's evidence, of the evidence of Michael Mongan, Michael Joseph Mongan and Martin Joseph Mongan Junior and *the preliminary inquiry statements of Colin Dickson, a part-time barman at Colin Mill Lodge, Mark Hughes, the assistant manager of the public house, Patrick*

> *James Maughan who was in the public house during the course of 17 June, Terence Patrick Maughan who was in the public house that evening, Bernadette Maughan who was also there, Martin Gerard Maughan who left before the shooting incident,* Patrick Joseph Cawley who was with Mr Mongan on Sunday 16 June and Monday 17 June but left the public house before the shooting and Brian Gerard Mongan who was outside the public house at relevant times. We have looked at the preliminary inquiry statements only in so far as they assist the submissions made on behalf of the applicant. We are confident that if the evidence of these witnesses had assisted the applicant's case beyond what is contained in their statements of evidence, transcripts of their evidence would have been sought and obtained and placed before this Court.
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> The judge, in the course of his ruling (p 197) referred to "the high alcohol" but said that this evidence on its own or combined with other points did not seem to him to be sufficiently poor to apply the principles set out in *Turnbull* because, whether right or wrong, Mr Martin Joseph Mongan Senior, the injured party, purported to recognise a man whom he had known, on his estimate, for 20 years. The judge stated that there were alternative estimates, but all of them involved knowing the applicant for a number of years. The two men were also known to each other as part of a group of people generally known as travellers. They were also known to each other from a very close physical proximity because it appeared to be common case that within a year and a half there was a physical confrontation between the two of them as a result of which it seemed likely that the injured party, Mr Mongan, delivered a beating to the accused. So there was, in his view, a strong recognition aspect that removed the case from the category of being a poor identification case (p 197). In our opinion there can be no valid criticism of the judge on these aspects of the case, based on the evidence.

[14] It is to the italicised section of this passage only that Mr Gallagher took exception. He suggested that the court should not have read, much less taken account of, statements that had not been given in evidence. Of the witnesses named in this section, Mark Hughes, Patrick James Maughan, Terence Patrick

Maughan and Bernadette Maughan did not give evidence. Mr Gallagher claimed that the court had drawn an inference adverse to the applicant by wrongly concluding that they had given evidence and that cross-examination did not establish any concession favourable to the defence.

[15] This claim is, in our judgment, without foundation. Examined in its context the court's consideration of these statements did not involve the drawing of an inference unhelpful to the applicant. On the contrary, the purpose of looking at the statements was to ensure that there was nothing contained in them that might have assisted the applicant's contention.

[16] If the court had been aware that these witnesses had not given evidence, it would not, of course, have had regard to the statements. In general an appellate court should only consider material that was either given in evidence before the trial court or that is provided by agreement between the parties. But we are entirely satisfied that no injustice has accrued to the applicant by the court having examined these statements. As I have said, the court's consideration of them was to ensure that there was nothing in them that would have assisted the applicant's contentions on this issue. Besides that, however, and more importantly, the statements were entirely peripheral to the issue under consideration. There was a wealth of material available to justify the judge's conclusion on this aspect of the case. The statements added nothing to the court's consideration of that conclusion.

The third ground

[17] At paragraph 9of the judgment Nicholson LJ dealt with the evidence of Mrs Faloon in the following passage: -

> "Apart from the issue of identification with which we have dealt, this [that is the claim that the verdict was against the weight of the evidence] appears to rest on the evidence of Mrs Faloon which was read to the jury with the consent of the defence and is to be found in the preliminary inquiry papers at pp 28 to 31. She was proprietor of Oakfield Guest House Lower Ballinderry, and stated that there was one main entrance to the guest area at the front of the house although there was a fire exit through the disabled room. She described the arrival between 8.00 pm and 8.30 pm on 17 June of four persons, one of whom was the applicant. About an hour later it is highly likely that one of them left with the applicant and returned about 9.45 pm. About an hour later she heard a male voice in Room 4. Two of the persons were female; one was a male child and the other was

the applicant. About midnight she locked the front doors but she stated, "the door can be easily opened from the inside. It is locked with the turn of a knob". She did not hear any sounds of movement during the night but she indicated that the guesthouse had "my own side and a guest side" and also stated that "the property is double glazed and one would not hear noises from outside". Moreover she said that when the party left the next morning about 10.30 am she discovered a fault in the lock to the door to the disabled room which gives access to the fire-exit. She could not open the door. The lock did not work. She had to get a joiner to open it. Prior to the arrival of the four persons "it worked fine". In a second statement she stated that on arrival "the two girls paid me in cash at the door". The male (ie the applicant) and one of the females went into Room 2, the other female and the male child went into Room 4. At 10.45 pm she heard no sound from Room 2. The male voice was heard in Room 4. In interviews with the police the applicant said that with the door closed it would not be possible to tell whether a male voice was his or the boy's voice.

Independent evidence established that it would take ten to fifteen minutes to drive from Mrs Faloon's guesthouse to the scene of the crime. Undoubtedly, if the applicant was the gunman, he changed cars because the four persons arrived and left in a red Audi whereas the evidence was that Mr Mongan was shot by the driver of a red Renault.

All of this evidence was dealt with fairly and properly by the judge. We can find nothing in it which provides the applicant with an alibi. On the contrary it places him ten to fifteen minutes from the scene of the crime on the evening of 17 June.

In the course of interviews with the police the applicant referred to the fact that he stayed in a guesthouse on 17 June and, undoubtedly, this was Mrs Faloon's guesthouse. He was able to name it and he had given his solicitor a card from it, it would appear (interviews, p 7). He said that he paid in cash for staying in the guesthouse but he was not too sure how much he paid. The unchallenged evidence of

> Mrs Faloon was that the girls paid when they arrived. He told the police that he left the guesthouse that evening twice or maybe three times, but that he went to bed not later than 11.15 pm. At another stage of the interviews he said that he had owned a red Renault 19 but got the red Audi in its place.

[18] Before dealing with the specific features of Mrs Faloon's case that were highlighted by Mr Gallagher, it is helpful to recall the general nature of the evidence provided by the agreed statement that was read to the jury. Mrs Faloon described the arrival of the party and the fact that one of the females signed the guesthouse register using what proved to be false names. During the course of the evening she heard a male voice in one of the rooms that they occupied but could not be sure at what time she heard this. On her estimate it was approximately one hour after the group had returned and her son had told her that they had come back to the house at about 9.45 pm. She locked the main door to the guesthouse after hearing the male voice. This door can easily be opened from the inside, however. Mrs Faloon heard no sound of movement during the night.

[19] The significance of the evidence provided by this statement, or of any evidence that Mrs Faloon might have given if called to testify, is, in our judgment, slight. It is clear that the applicant could have travelled from the guesthouse to the scene of the shooting within the time available on the most generous interpretation (in the applicant's favour) of Mrs Faloon's evidence. Her evidence had at best an extremely oblique relevance to the issue of the applicant's claimed alibi, therefore, and it was presumably fully canvassed before the jury. We do not consider that her evidence helped, or, if she had given oral testimony, that it could have helped the applicant's case. He could have left by the front door and returned by the same route provided he had either left the door open or arranged for one of the others in his party to admit him.

[20] Mr Gallagher stated that it was not accepted by the applicant that there had been any fault in the lock of the disabled room door that gives access to the fire-exit. He suggested that if this evidence had been given, it would have been challenged and that it would have been possible to adduce evidence that this was more likely to have been caused by the young boy who was with the party. He suggested that the judgment of this court implied that the evidence of the broken lock was significant. This is not correct. The broken lock proved nothing and the reference to it in the judgment was given solely as part of the summary of Mrs Faloon's evidence. This court reached no conclusion on whether the applicant had used the fire exit door. It did not need to since the critical evidence on this subject was that the applicant could leave the house by the front door and return by the same route.

[21] The second matter arising from Mrs Faloon's committal statements that did not appear in the agreed statement was the reference to the rooms occupied by the various members of the party. As recorded in Nicholson LJ's judgment, Mrs Faloon had said in her original statement that the applicant had gone into Room 2. This evidence was not contained in the agreed statement. Mr Gallagher suggested that this court was misled into attaching undue significance to this when taken in conjunction with the evidence relating to Mrs Faloon having heard a male voice in another room. But the jury would have been aware that Mrs Faloon had heard a male voice in one of the rooms and no doubt the possibility that this was the applicant's and that it might serve to reinforce his claims to an alibi could have been canvassed with the jury. In the event that it was, it is clear that the jury did not attach importance to the point. Neither do we. From the evidence of the agreed statement the time at which the voice was heard is at best uncertain. The possibility that it was the applicant's raises no doubt in our minds as to the safety of the conviction.

[22] The final issue arising from Mrs Faloon's evidence relates to the timing of the payment for the accommodation by one of the females in the party. In her second statement she said that the two girls paid her in cash at the door. Mr Gallagher suggested that the judgment of this court, recording that they had paid on arrival, undermines the theory that the party had given false names (as they did the following evening to Mrs Avril Brown) in order to exploit the possibility of leaving without paying for the accommodation. That theory was in turn relevant to defeat the Crown proposition that they had used false names because they did not want to be identified. The Crown submission on this point was never, in our opinion, viable. In the first place, it was in direct conflict with the suggestion that the applicant wished to set up a false alibi. More importantly, however, it was the applicant himself who gave the police the information that he had stayed at Mrs Faloon's guesthouse. This flatly contradicts the notion that the applicant and the others gave false names because the applicant was planning to attack Mr Mongan that evening.

[23] In dealing with the evidence of Mrs Brown (to which we shall shortly turn) Nicholson LJ suggested that if she had been called as a witness her evidence would have been unhelpful to the defence because it might have invited the comment that the prompt payment to Mrs Faloon was for the purpose of setting up an alibi. On further reflection we are satisfied that such a suggestion could not have been plausibly made. It would be wholly inconsistent with the fact that false names were given. We are now satisfied that the issue of whether the females paid Mrs Faloon, or the time at which payment was made, is entirely irrelevant to the guilt or innocence of the applicant.

The evidence of Mrs Brown

[24] Nicholson LJ dealt with this issue as follows: -

> "[10] By agreement a statement of evidence of a lady who was the proprietor of a bed and breakfast establishment was put in as "fresh evidence". This had been in the possession of the applicant's solicitor and was known to the applicant but had not been disclosed to counsel for the applicant in this case and counsel indicated that, if he had been aware of it, the lady would have been called as a witness for the defence. On the night of 18 June it would appear that the applicant and the other three persons stayed at her establishment and left the next day without paying.
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> One of the females had signed the applicant in at Mrs Faloon's guesthouse under a false name for which he gave an explanation to the police. counsel indicated that the lady at whose establishment the group had stayed on 18 June would have been called by the defence because the same false name was given there and the jury might not have attached any significance to the giving of a false name on 17 June since the group might have hoped to leave without paying after staying at Mrs Faloon's guesthouse, if given the chance. But, as has been pointed out, Mrs Faloon's unchallenged evidence was that the girls paid in cash when they arrived on the evening of 17 June.
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> We are satisfied that if such evidence had been called, it would certainly not have assisted the applicant and could have harmed him, as inviting the comment that the prompt payment on 17 June was to set up an alibi, as contrasted with the behaviour at the next establishment where they stayed."

[25] For the reasons given in paragraph [23] above we do not now consider that it was correct to state that the evidence could have harmed the applicant by inviting the comment that the prompt payment was made in order to set up a false alibi. We have therefore carefully re-examined the statement made by Mrs Brown to see whether her evidence casts doubt on the safety of the applicant's conviction. Mr Gallagher suggested that it would have shown that there was nothing unusual in the applicant and the others giving false names. But this could not have assisted the applicant's case in any material

way, in our view. The giving of false names could only be relevant to the issue of whether the applicant wished to conceal his identity and that suggestion was readily scotched by the fact that the applicant gave the police the information that led to Mrs Faloon. Indeed during the interview the applicant's solicitor, Mr Leonard, was able to provide the interviewing officers with the name, address and telephone number of Mrs Faloon from a card that the applicant had earlier provided. We have concluded that the evidence of Mrs Brown could not have assisted the applicant's case, therefore.

[26] The most recent authoritative statement of the law on the correct approach to the effect of fresh evidence on the safety of a conviction is to be found in *R v Pendleton* [2002] 1 WLR 72. In that case the House of Lords held that where fresh evidence had been received on an appeal against conviction, the correct test to be applied by the Court of Appeal in determining whether to allow the appeal was the effect of the fresh evidence on the minds of the members of the court, not the effect that it would have had on the minds of the jury, so long as the court bore very clearly in mind that the question for its consideration was whether the conviction was safe and not whether the accused was guilty. It is clear from that decision, however, that although speculation as to what effect the evidence might have had on the jury was to be avoided, the jury-impact test did have a virtue in reminding the Court of Appeal that it was not and should never become the primary decision-maker, and that it had an imperfect and incomplete understanding of the full processes which had led the jury to convict.

[27] Applying that approach to the present case we are satisfied that the conviction of the applicant is safe. The principal – and overwhelming – evidence against the applicant was his identification by the victim, a man who knew him well and who, although intoxicated, was within feet of his assailant when he was shot. When, in the face of such evidence, the applicant elected not to give evidence, his conviction was virtually inevitable. Having carefully reviewed all the submissions made on the applicant's behalf we are satisfied that the application must fail.