Neutral Citation No. [2014] NICA 1

Ref: **COG9102**

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

Delivered: **08/01/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

PATRICK McDAID

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal by Patrick McDaid ("the appellant") from a conviction of the offence of assisting in, arranging or managing a meeting which he knew was to support a proscribed organisation, namely the Irish Republican Army, contrary to Section 12(2) of the Terrorism Act 2000 ("the 2000 Act"). The appellant pleaded not guilty at his arraignment on 28 January 2013 and his trial commenced before His Honour Judge McFarland, Recorder of Belfast, sitting without a jury, on 29 April 2013. On 9 May 2013 the learned trial judge delivered a written judgment convicting the appellant of the offence and, on the same date, he imposed a sentence of 15 months imprisonment suspended for three years. For the purposes of the appeal Mr Kieran Mallon QC and Mr Heraghty represented the appellant while Mr Terence Mooney QC and Ms Kitson appeared on behalf of the prosecution. The court is indebted to both sets of counsel for the assistance that it derived from their carefully prepared and succinctly delivered written and oral submissions.

The background facts

[2] On 25 April 2011 a meeting took place at the City Cemetery, Derry, which was organised by a body that calls itself the "32 County Sovereignty Committee" for the purpose of commemorating the anniversary of the Easter Rising in Dublin 1916. Prior to the meeting a group of some eight individuals arrived in the rear compartment of a white van. Each person was wearing identical pseudo military style uniform and each wore a balaclava type mask to conceal facial features. These individuals formed up and paraded after the fashion of a military colour party. The

group was led by a person carrying the national flag of Ireland and that person was followed by six others in two columns of three each carrying different flags with an eighth person bringing up the rear. An address was delivered purporting to emanate from the leadership of Oglaigh na hEireann/IRA. The person carrying the Irish flag was referred to by the learned trial judge as "X" and it was the prosecution case that X was the appellant.

The evidence

[3] The evidence against the appellant may be conveniently divided into the following categories:

(*a*) Facial mapping and physical build.

(*b*) Previous association, interest and participation.

(*c*) Presence in Derry shortly before the Commemoration ceremony, association with an individual who admittedly participated in the Commemoration and evidence relating to the Commemoration upon the appellant's computer.

Facial mapping and physical build

[4] Derek Kinnen the Managing Director of a company specialising in electronic evidence presentation, computer based forensic reconstruction and evidence analysis gave evidence that he had received from the police various images including one of the individual referred as X, one of the appellant taken during the 2009 Easter Commemoration and one of the appellant taken at the time of his arrest in May 2011. Mr Kinnen adjusted the images to conform to the same scale and superimposed one on top of the other. Mr Kinnen did not offer any opinion expert or otherwise and the learned trial judge considered that the exercise that he had carried out resulted in what could be described as producing a similar eye shape and mouth shape between the three images. He concluded that, while it would not eliminate the possibility that the appellant was X, this evidence was of limited value.

[5] The principal analyst of Anley Consulting, Mr David Anley, is an expert in forensic imagery analysis and he was provided with the same material as had been supplied to Mr Killen. Mr Anley specifically recorded in his report that it was necessary to acknowledge that it was not possible to identify points of similarity or difference in other areas of the face, which would normally be considered in a facial comparison, by virtue of the fact that X had been wearing a balaclava mask. However, comparing the image of X to the appellant Mr Anley noted the following:

(*i*) Notwithstanding the variation in colour presentation that can occur when images are recorded by different camera systems in different like

conditions, there was a marked consistency in the colour of the two men's eyes.

(*ii*) Allowing for the potential of the close-fitting balaclava to pull the skin around the eyes, there was consistency in the shape of the two men's eyes.

(*iii*) Both Mr X and the appellant displayed long eyelashes at the medial aspect.

(*iv*) The vermilion of X's upper and lower lips presented as very thin with the upper lip featuring a small, wide and shallow Cupid's bow. He considered that the lips of the appellant were wholly consistent with those of man X. Taking into account the limitations imposed on the comparison by the wearing of the balaclava mask Mr Anley expressed the opinion that his analysis leant "moderate support" to the contention that X and the appellant was the same person. The term "moderate support" reflected the terminology employed in the scale of assessment endorsed by the Forensic Imagery Analysis Group as suitable to apply to this form of comparison. The relevant terminology listed in ascending order of significance is as follows:

> "**Description**:
>
> Lends no support
> Lends limited support
> Lends moderate support
> Lends support
> Lends strong support
> Lends powerful support."

The appellant's standing, interest and participation in the relevant form of Easter Commemoration

[6] It was accepted that the appellant had attended the corresponding Easter Commemoration events in both 2007 and 2009. On both occasions he had been unmasked as a member of the colour party carrying a flag. When his house was searched in May 2011 the police found a movie clip of the 2011 Commemoration on his computer. The 2011 Commemoration took place in the afternoon of 15 April 2011. At 11.25 am on the morning of 15 April 2011 the appellant was stopped in Great James Street in Derry travelling as a rear seat passenger in a motor vehicle driven by Aiden O'Driscoll. During the stop Mr O'Driscoll was arrested and several men including Frank Quigley and Tony Lancaster ran towards the police car. Mr Quigley was subsequently convicted of assisting with the management of the 2011 Commemoration after entering a plea of guilty. Constable Archbold gave

evidence in this case, which was unchallenged, that Mr Quigley and Mr Lancaster were "known associates" of the appellant and Mr O'Driscoll.

The Lancaster document

[7] On 28 July 2011, during the course of a police search, a notebook was seized from an alleyway at the rear of the home of Tony Lancaster. It was accepted that the alleyway was used as an area of storage by Mr Lancaster. One page of that notebook appeared to be a record or minute of a pre-Commemoration meeting attended by a number of individuals on 19 April 2011. The record of those in attendance included a person referred to as "Paddy". The document referred to Commemorations in Bellaghy and Dublin and recorded a number of functions to be carried out on Easter Monday by named participants. The document included the following:

> "*Colour party ≥ McDaid to get people sorted."

The appellant's case

[8] In his skeleton argument Mr Mallon QC identified two core grounds in support of the appeal, namely, that the learned trial judge should not have concluded that the evidence of Mr Anley established an identification in respect of which he could thereafter seek to find support from the circumstantial evidence adduced by the prosecution and, secondly, notwithstanding that primary submission, the said circumstantial evidence was not sufficient to convince of guilt to the requisite standard either when considered individually or together. During the course of hearing Mr Mallon also sought to rely on a submission that, at the conclusion of the prosecution case, the learned trial judge could not have concluded that the evidence was such that a reasonable jury, properly directed, could have found the appellant guilty beyond a reasonable doubt. Mr Mallon had advanced a submission of "no case" at the conclusion of the prosecution evidence at first instance but that had been refused by the learned trial judge who subsequently proceeded to draw an adverse inference from the failure of the appellant to give evidence in accordance with Article 4 of the Criminal Evidence (Northern Ireland) Order 1998 ("the 1998 Order").

Discussion

[9] In our view, rather than dividing the evidence in the case and dealing separately with the "identification evidence" and "other circumstantial evidence" a more realistic approach would be to approach the case as one based on circumstantial evidence.

[10] Adopting such an approach, the first aspect of the evidence that falls to be considered is the expert evidence provided by Mr Anley and Mr Kinnen. As noted earlier, Mr Kinnen simply carried out the exercise of superimposing the images, an exercise which was then left for the learned trial judge to consider without any further expert opinion. The learned trial judge gave careful consideration to that exercise and to the evidence provided by Mr Anley. He accepted Mr Anley's assessment that there were striking similarities in relation to the features of the masked individual that were visible namely, the eyes and mouth but carefully reminded himself that, in the absence of any other features, the evidence could only be regarded as being of "moderate support" for the prosecution case. Mr Anley's report was read by agreement and he was clearly a suitably qualified expert with facial mapping skills (Attorney General's Reference (No. 2 of 2002) [2003] 1 Cr. App. R 21). Such a witness may give evidence of facial similarities without being able to make a positive identification and, provided that the factual tribunal is aware that his views are not based upon a statistical database recording the incidence of the features compared as they appear in the population at large, such a witness is entitled to make use of the assessment framework employed in this case (Atkins v The Queen [2009] EWCA Crim. 1876).

[11] While the learned trial judge properly concluded that the absence of the appellant from the 2008 and 2010 Commemorations prevented the prosecution from establishing a degree of continuity and consistency, he was entitled to draw the inference from his presence at and role in the 2007 and 2009 events as indicating that the appellant not only had an interest in such affairs, an interest that was not merely historic, but that he also enjoyed a degree of standing within the group organising the events. Such an inference was supported by the movie clip of the 2011 Commemoration found by the police on his computer.

[12] The learned trial judge also gave very careful consideration to the "Lancaster document" and, having done so, was entitled to conclude that it had "... all the hallmarks of an authentic document recording a meeting that had occurred on 19 April 2011." He noted that the images exhibited by the prosecution in evidence indicated that the 2011 Commemoration had passed off in accordance with the items noted in that document. Notwithstanding the concession made by Detective Constable Caroline Williamson that the name McDaid was "not uncommon" in Derry, the learned trial judge was entitled to draw the inference that the McDaid referred to in the Lancaster document was the appellant in the context of the appellant's established interest and prominent role in earlier Commemorations together with his accepted association with Lancaster, upon whose property the document had been found, and Quigley, who, as noted earlier, was subsequently convicted, on a plea of guilty, of the offence of assisting with the management of the 2011 Commemoration.

[13] Mr Mallon QC submitted that some elements of the circumstantial evidence were very weak and an inadequate basis upon which to found a conviction.

However, it is important to bear in mind with regard to circumstantial evidence that, while the individual pieces of evidence making up the case may each be of greater or lesser weight what matters ultimately is the conclusion to which the combination of circumstances leads – see the judgments of this court delivered by Carswell LCJ in R v McClean and McCready [2001] NICA 32 and Girvan LJ in R v Kincaid [2009] NICA 67. Mr Mallon accepted that he was unable to identify any specific piece of circumstantial evidence that was inconsistent with the appellant's guilt.

[14] Mr Mallon further submitted that even if the cumulative effect of the circumstantial evidence, taken as a whole, was to be considered the prosecution case could not amount to more than a suspicion or, at its height, a strong suspicion. This was a "Diplock" case in which the learned Recorder sat without a jury and we remind ourselves that in such circumstances, the assessment to be carried out by the judge at the conclusion of the Crown case is, at that stage, whether an essential proof is lacking or that the evidence is so discredited or unreliable that no reasonable court could ever safely convict (R v Hassan [1981] 9 NIJB, R v Armstrong and Another [1991] 8 NIJB 70). In our view at the conclusion of the Crown case the evidence comfortably passed that threshold and the learned trial judge was right to refuse the application for a direction.

[15] The appellant did not give evidence and, consequently, the learned trial judge was entitled to draw an adverse inference in accordance with Article 4 of the 1988 Order. The question as to whether or not he had taken part in the 2011 Commemoration and, if so, was the individual identified as X was a matter clearly within the knowledge of the appellant and no credible explanation for his silence was forthcoming. The inference that was open to the learned trial judge to draw was that the appellant either did not have an answer to the evidence identifying him as X or did not have an answer that would stand up to cross-examination.

[16] We have considered this carefully prepared and well-reasoned judgment in the context of counsel's written and oral submissions and, having done so, we are not persuaded that there is any respect in which this conviction is unsafe. Accordingly, the appeal will be dismissed.