

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

FRANCIS NEWELL

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Before: Morgan LCJ, Girvan LJ and Coghlin LJ

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MORGAN LCJ

[1] This is an appeal by way of reference by the Criminal Cases Review Commission ("CCRC"), pursuant to the powers contained in Part II of the Criminal Appeal Act 1995, of the conviction of the appellant by His Honour Judge Rowland QC on 22 November 1974 for the offence of armed robbery. He was sentenced to a period of 4 years' imprisonment. He appealed his conviction and sentence and on 13 June 1975 the Court of Appeal dismissed the appeal against conviction and substituted a sentence of 8 years' imprisonment. On 16 September 1976 the Secretary of State referred the case to the Court of Appeal but on 7 October 1976 the court granted leave to the appellant to abandon that appeal in order to pursue an application for the exercise of the Royal Prerogative of Mercy.

[2] The case was referred by the CCRC on 18 July 2013 and the Crown now accept that the conviction was unsafe by reason of certain failures of disclosure in the earlier proceedings. At the end of the oral hearing we allowed the appeal and quashed the conviction. We indicated that we would give our reasons later which we now do. Ms Quinlivan QC and Ms Doherty appeared on behalf of the appellant and Mr Simpson QC for the Crown. We are grateful to all counsel for their helpful written and oral submissions.

**Background**

[3] The CCRC reference and the appellant's skeleton argument set out the background to this appeal. The offence for which the appellant was convicted occurred on 7 August 1973. Two unmasked men, both armed, entered the Grand

Street Post Office in Lisburn at around 10am and shouted "This is an Ulster Volunteer Force hold up, no one move and you will not get hurt" or words to that effect. Mrs Johnston and Mrs McKane were working in the Post Office and a female customer, known as Witness A at the trial, was also present in the Post Office.

[4] One of the men demanded that they open the door into the counter area. He then entered the counter area, pointed his gun into Mrs Johnston's face and asked her where the safe was. When she pointed to it, the man went to the safe, opened it, removed the contents and placed them in a bag. More money was removed from the drawers in the counter. The other man had remained in the main post office throughout with Witness A. When another customer entered the post office he was also threatened with the gun and told to stand with his face against the wall.

[5] The men then ran out of the post office and into a car. Witness A ran to the window and provided a description of the car and its registration number. Mrs Johnston wrote it down and later provided it to the police. After the police arrived Mrs Johnston was taken to Lisburn police station where she was interviewed and as a result of that interview two photo-fit pictures of the robbers were compiled. A description was recorded on the photo-fit that was said to relate to the man who came behind the counter as follows:

"Age:- 20-22 Yrs, 5'8", medium build, long straight shoulder length dark hair, brown eyes, thick lips, squarish badly pock marked face. Wearing blue denim jacket, jeans and open neck short. Very rough appearance."

[6] The appellant was arrested at around 4.30pm on 9 August 1973. He was stopped in his car at Royal Avenue/North Street in Belfast. Police recognised the description and registration number provided by Mrs Johnston. It was pointed out at trial that it was unlikely that one of those responsible for the robbery would have driven around openly in the car involved which was likely to have been seen and reported to police. When he was stopped the appellant was told police had reason to believe his car had been used in a recent robbery. The appellant replied in the negative when he was twice asked if his car had been stolen recently. At Tennant Street police station he was cautioned after confirming that the car had not been out of his possession when given further details about the robbery.

[7] After caution the appellant provided police with a false version of events. He also said:

"If this has anything to do with the UVF I am saying nothing more. You don't know what they are like. I do not want to say anything more about it. I was not there, you charge me if you want."

The appellant maintained his false story that his car had not been out of his sight on the morning of 7 August on further questioning. Police indicated to him that they did not believe his story and thought it possible that he was not involved but that he

did know who was. The appellant repeated that he did not know who was involved and reiterated that, even if he did know, as it involved the UVF, he would be too frightened to tell. He gave examples of what happened to people who “grass up the Shankill Road.”

[8] The post office workers, Mrs Johnston and Mrs McKane, attended the police station on the morning of 10 August 1973 to view an identification parade. Mrs McKane did not identify any individual as being involved in the robbery. However, Mrs Johnston passed the parade from front to back and then put her hand on the appellant indicating that she believed him to have been involved in the robbery. The appellant said “She is wrong”. At trial Mrs Johnston confirmed that the man she had identified was the man who had come behind the counter during the robbery.

[9] It was only after this identification that the appellant indicated that his car had been hijacked and his previous account had been false. He said “I didn’t do that job. Three fellows came to the Shankill on the Saturday morning. If I said I know I would get one in the head.” The appellant admitted that he knew the identity of the men who took his car and that they were involved in the UVF. He refused to provide those names stating that his wife and family would be put at risk as the men were known to use violence. When shown the photo fit pictures the appellant admitted that one looked like him but he said it looked more like “the fellow who did the job.”

[10] The prosecution case had two main strands. The first was the identification of the appellant’s car and the second the identification of the appellant by Mrs Johnston. The judge relied very heavily on Mrs Johnston’s evidence to convict the appellant. He found her to be a reliable witness. The judge rejected the appellant’s explanation for the differing accounts he gave to the police. He also rejected the alibi evidence put forward for the defence.

### **CCRC Investigation**

#### *Alibi*

[11] The appellant had provided the names of three alibi witnesses a matter of hours after the identification parade, Robert McKee, George Grey and John Armstrong. The appellant said that these men were with him at the taxi office where he was based on the morning of the robbery. He said he was at the taxi office until 11am when he went to visit two shirt factories with Mr McKee and Mr Grey. He had previously told police that he had waited at the taxi office between 9.30 and 2pm for Mr Grey to come to fix his car and then worked from 2pm until 6pm. All three men gave statements and two, Armstrong and McKee, gave evidence at the trial.

[12] The trial judge accepted that if the appellant’s evidence that he had been in the premises of Alpha Taxi Company off the Crumlin Road in Belfast was true then it followed that the accused could not possibly have taken part in a robbery in

Lisburn some 12 miles away and it also followed that the evidence of Mrs Johnston was wrong. The judge rejected the alibi evidence. The formal alibi evidence had not been revealed by McKee until September and by Armstrong until October, well after 7 August, despite the fact that both were aware for some time that the appellant had been charged with a very serious crime.

[13] However, material provided to the CCRC showed clearly that Mr McKee had told police at an early stage that the appellant was with him at the time of the robbery. In an undated signed statement made by DS Speers he stated that on the evening of 13 August, 1973, John Newell called at Lisburn RUC station to collect his brother's car. He was accompanied by Robert McKee and George Grey. Robert McKee told DS Speers that he was surprised to hear that the appellant had been arrested because he had been with him and George Grey in the Alpha Taxi Office when the incident occurred. DS Speers invited Robert McKee and George Grey to make written statements but they refused to make statements. Robert McKee said that they had an appointment with Newell's Solicitor the following morning and they would not do anything until they had seen him. That information was also contained in DS Speer's report of 16 October 1973.

[14] At trial Mr McKee was specifically cross-examined by Crown counsel about his failure to provide alibi evidence to police when he went to tow the appellant's car. According to DS Speer's statement and report he had in fact done so, but not in writing. When questioned, Mr McKee appeared to agree that he had not provided such evidence at that time. He was not questioned on this issue at all by defence counsel. The trial judge then questioned him seeking to establish precisely when Mr McKee had first offered the alibi evidence. His apparent failure to offer that evidence at an earlier stage was clearly significant in the judge's decision to reject the evidence of the alibi witnesses.

[15] Both the report and the undated statement prepared by DS Speers were disclosed to the DPP, according to the index of papers within the file forwarded to the DPP in December 1973. There is no material dealing with its provision to prosecuting counsel. However, given the line of cross-examination pursued by Crown counsel with Mr McKee it seems improbable that he had access to this information. There is no evidence that it was provided to the defence. Had it been deployed by the defence there is a real possibility that the judge's concerns about the timing of the provision of the alibi evidence would have been assuaged and that the alibi evidence would have provided a complete answer to the charge faced by the appellant.

#### *Identification*

[16] It further appears that the initial descriptions of the offender taken by police from Mrs Johnston and Mrs McKane were not disclosed to the defence. There were material discrepancies in the description which Mrs Johnston gave when preparing a photo fit picture and at the trial and the appearance of the appellant. In particular

she described the offender as 20-22, 5'8" to 5'10" tall with pock marked skin. The appellant was 32 years old, 6'1" tall and did not have acne.

[17] It further appears that Mrs McKane had given a description of the offender in a statement prepared on 18 October 1973:

"early twenties, 5'10", broad shouldered and well built, he had black shoulder length hair, unkempt, dark complexion, he had pimples round his chin, he had good features with wide moustache. His hands were large and wide and strong looking. He was wearing blue jeans and a short blue jacket which was open."

This differed considerably from the first description given to DS Speers and in some significant respects from Mrs Johnston's descriptions. In particular the description of the man having a "wide moustache" did not appear anywhere else and did not accord with the appellant's appearance. The statement certainly would have been used in cross-examination of Mrs Johnston, if it had been available.

[18] The particular reference in Mrs McKane's statement to the hands of the man who came behind the counter would have been important for the defence. The appellant was missing a thumb. She was asked about his hands under cross-examination, presumably with a view to establishing that, although she saw his hands, she could not say that the man was missing a thumb. Her statement which makes particular reference to his hands and, unusually, describes them in some detail was not put to her during cross-examination. It was submitted that if it had been disclosed it would have been, particularly when her answer to one of the questions was "I cannot say I really noticed his hands because he was stooping with his back to me."

#### *Intelligence*

[19] The CCRC investigation has established that three intelligence reports in relation to the robbery were received by police prior to the appellant's trial in November 1974. The first report identified some of those responsible for the robbery and indicated that it had been carried out by hijacking the car used in the robbery. The appellant, the owner of the car, was known not to have been involved in the robbery. The appellant was afraid to expose the UVF because of threats. This intelligence report also contained further material about UVF activities. A further intelligence report apparently from the same source was received later that year. It provided further information in relation to the identity of those involved in the robbery.

[20] A third intelligence report in 1974 repeated the suggestion that a particular individual was involved in the robbery and suggested that the photo fit picture made by police with the assistance of Mrs Johnston was a great likeness of this individual.

[21] The CCRC has been able to carry out investigations in relation to the backgrounds of those identified in the report as having been involved. All of those alleged to have been involved had a significant number of previous convictions for serious offences. Some had been convicted of terrorism offences, some had convictions relating to firearms and at least one had a conviction for robbery. The appellant had previous convictions but all were for relatively minor offences.

[22] It seems likely that the first report at least was hearsay and it is also possible that the information in the second and third intelligence reports were also hearsay. The Commission concluded, however, that police would have been aware of the persons from whom the information was obtained. It was significant that in a letter dated 21 July 1976 the Law Officers Department indicated to the DPP that the Assistant Chief Constable of the RUC believed that the appellant was innocent. There was no indication that these sources of information excluding the appellant as the offender were in any way generated by him or those close to him. The police assessment was that the information was reliable.

[23] These reports were not disclosed to the DPP or to the defence. They were not made available to those dealing with the Secretary of State's Reference in 1976 although prior to that hearing a letter had been written to the appellant's advisors indicating that police believed that he was not involved in the robbery. That may have encouraged the appellant's advisers to pursue a remedy by way of the Royal Prerogative of Mercy. It also appears unlikely that even if they had been disclosed to the DPP disclosure would have been made to the defence in 1974 or 1975 having regard to the prevailing view that only matters capable of being given in evidence should be disclosed.

#### *Disclosure*

[24] At the time of the trial and appeal in this case the common law regulated the disclosure of unused material in criminal cases. Since the 1970s there have been major developments in the nature of the disclosure obligation at common law. In R v Keane [1995] 2 All ER 478 the Court Of Appeal held that material must be disclosed if, on a sensible appraisal, it was judged: -

- (1) to be relevant or possibly relevant to an issue in the case;
- (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence which the prosecution proposes to use; or
- (3) to hold out a real as opposed to a fanciful prospect of providing a lead on evidence which goes to (1) or (2).

In R v H and C [2004] UKHL 3 the House of Lords reviewed the current state of the law of disclosure and held that fairness ordinarily required that any material held by the prosecution which weakened its case or strengthened that of the defendant should be disclosed to the defence. In R v McCrory and others [2005] NICC 37 the court specifically considered that disclosure should be made of the identification of

any other persons suspected of involvement in the offending and any interviews carried out by the police with them.

[25] Mr Simpson accepted that applying modern standards of fairness disclosure of the gist of the intelligence reports was required. He accepted that if these reports had been disclosed to the DPP it would have required re-examination of the public interest in pursuing the prosecution particularly since disclosure of the gist of the intelligence information may have given rise to issues concerning the safety of the source. If the disclosure obligation had been recognised it seems unlikely that the prosecution would have been continued.

### **Conclusion**

[26] We considered that in each respect there had been a failure of disclosure in this case as a result of which the conviction was unsafe. We accordingly allowed the appeal.