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-V-

RODNEY CLARKE

BEFORE
THE HONOURABLE MR JUSTICE DEENY

AT
BELFAST CROWN COURT

ON
FRIDAY, 2ND DECEMBER 2005

[RULING ON APPLICATION TO ADMIT STATEMENTS
MADE BY MR GALLAGHER QC INTO EVIDENCE]

1. MR JUSTICE DEENY: At Dungannon Crown court yesterday, 1st December 2005, Mr Carl Simpson QC, who appears with Mr David McAughey for the Prosecution in the matter of R-v-Rodney Clarke, made an application to the court to place in evidence certain statements of Mr James Gallagher QC which had been made by him while acting for Rodney Clarke at an earlier hearing of this trial for murder. He wished to put in evidence either the oral recording of what Mr Gallagher said on Thursday, 22nd September 2005 and Tuesday, 27th September or, if there was no dispute, to place a transcript of Mr Gallagher's remarks before the jury in the instant case. The facts of the matter should be briefly set out so that the point can be understood. I say this particularly as it seems a relatively unusual application, although one well founded on authority, yet one for which I do not see a particular precedent in the existing cases.

2. The position is that Rodney Clarke was charged with three other persons with the murder of Mr Adrian Thompson at Banbridge on 1st January 2004. On Wednesday, 21st September, a jury was empanelled before me to try all four accused on the count of murder. By agreement the matter was adjourned until the following day for the commencement of the trial. Counsel for two accused in the case, Joanne McMullan and Tracey Marshall, asked for further time on the morning of Thursday 22nd September and ultimately, late on that morning, they asked for their clients to be rearraigned when they pleaded guilty on

charges of affray and related matters. The Crown then, through Mr Simpson, indicated that they did not wish to proceed with the count of murder against the two women but would ask that it be left on the books not to be proceeded with without the order of this court or the Court of Appeal.

Following bail applications, Mr Gallagher QC briefly addressed the court and he said,

> *"My Lord, it is probably inevitable that the Crown would apply to introduce these convictions in support of the case against the remaining accused. They haven't as yet done so and one does not necessarily know what the implications are."*

There was some discussion then with regard to Press issues and Mr Simpson was asked by me whether he would like me to rise and he indicated he would and Mr Gallagher then said,

> *"Mr Simpson indicated it wouldn't seem to me to be necessary to do that quickly before lunch. I think myself and Mr Fee..."*

(That is Mr Dermot Fee QC who then appeared for Mark Phillips).

> *"... need to consult with our clients in respect of the developments. We may or may not have the same instructions. Again that is something that may be brief but it may not be."*

3. I indicated I was happy to accede to that application and the court rose at 12.46. At 2.05, that is about one hour and 20 minutes later, the court sat again on Thursday 22nd September. Mr Gallagher spoke first to thank the court for the time given and say,

"Myself and Mr Fee have both consulted with our clients in respect of developments this morning. If I can summarise it by saying in respect of Mr Clarke, he has given us new instructions which embrace a considerable number of events commencing early in that night and went late into the night and far beyond. It is a matter in respect of which we would need to get detailed and indeed written instructions from him".

He then went on to indicate they would like to consult with a pathologist and to discuss the time within which that might be done. I asked, as I had a jury sworn at this stage ready to start the case that afternoon,

"Is the outcome of his instructions likely to make a substantial difference to the outcome of the case in considerations?
Mr Gallagher: In terms of the jury, very much so. I can tell your Lordship, there is no need for mystery about it, the defendant's case would be conducted on the basis that he was there and was involved in the incident, but again he would have reasons why that has not been his version until now. In light of that we then have obtained instructions from him in respect of what happened in the park.

Mr Justice Deeny: But he feels there are exculpatory matters nevertheless that he would wish to sound?
Mr Gallagher: That certainly doesn't make him guilty of murder".

4. In the light of that and a not dissimilar application from Mr Fee QC I agreed to Defence counsel's application to adjourn the matter on that Thursday

until the following Tuesday, 27th September. On that occasion - and I don't think I need to read that in extenso - Mr Gallagher, on behalf of Rodney Clarke, then indicated that having obtained the adjournment the previous Thursday so that fuller instructions could be obtained, in the light of those instructions and the instructions which he Mr Gallagher had received with his junior that morning the 27th September, *"It would no longer be possible for us to continue to represent Mr Clarke."* He then asked for leave to withdraw from the case.

5. Mr Simpson's submission is that he should be entitled to put those matters before the jury at the trial of Mr Clarke.

6. The trial obviously had to be adjourned. It will be known also that Mark Phillips did plead guilty on Tuesday, 27th September. It will further be known that a subsequent application by him to vacate his plea was rejected by me so that he will be sentenced for the murder in due course and the two partners of the men, McMullan and Marshall, will be sentenced for their offences. So Mr Clarke remains to be tried for the count of murder.

7. Mr Simpson QC referred to relevant passages in Blackstone at F16 para 33 and, in particular, to the leading authority on this point which is a decision of the Court of Appeal in England in R-v-Turner & others [1975] 61 Crim App R p67. I propose to quote from that case. The appellant, Shervill, was a co-accused of Turner and was being tried in regard to a

number of robberies with a number of other men. I quote from the judgment of Lawton LJ at page 81:

"The way in which this cross-examination was conducted led both the judge and Mr Matthew (prosecuting counsel) *to think that the officers'* (the police officers') *credibility was being attacked. Before this court Mr Waley QC, who appeared for Shervill, accepted they were right in so thinking. This was the fifth attack which had been made on the credibility of the police officers in the case. Grave allegations had been made against them in the earlier cross-examinations. We infer that Mr Matthew became somewhat exasperated by Mr Waley's attack. We can understand why he did. He* (which I think must be Mr Matthew) *knew that at Shervill's trial on September 26, 1973, for other offences, counsel then acting for Shervill (who was not Mr Waley) in mitigation had given as an explanation for his client's criminal activities the very explanation which Detective Inspector Fraser said Shervill had given to him and which Mr Waley, on instructions, had suggested he (that's the Detective Inspector) had put into Shervill's mouth".*

The Lord Justice continues:

"In addition to putting forward this explanation, Shervill's counsel had gone on to tell the judge then trying him that in the summer he agreed "to become part of a team which was indulging in this offence." The judge intervened to ask whether Shervill

was involved in the indictment with which this appeal is concerned. Counsel answered "yes" and then went on to describe further matters."

8. Now, most unusually, the Defence, having lost the argument before the trial judge who admitted the evidence of what counsel had said in the other case, then called the counsel from the other case who admitted that he had not acted on instructions. It seems he was an inexperienced counsel and *"the judge seems to have been impressed with his frankness"* and told the jury when summing up that it would not be safe to use counsel's speech in mitigation, that is in the other trial, as evidence against Shervill before this court.

9. Mr Waley said he was not satisfied with this direction, palliative though it was. He submitted that inadmissible evidence had been put before the jury which was prejudicial to Shervill's case. The Court of Appeal then went on to consider the matter and to refer to an older case of Downer [1880] 43 LT 445.

10. At page 82 on behalf of the court the Lord Justice made the following statement:

"The problem before us must be considered in the light of a few elementary principles, which are as follows. First, a duly authorised agent can make admissions on behalf of his principal. Mr Waley did not dispute that proposition. Secondly, the party seeking to rely upon the admission must prove that the agent was duly

authorised. Mr Matthew agreed that this was so. Thirdly, whenever a fact has to be proved, any evidence having probative effect and not excluded by a rule of law is admissible to prove that fact: circumstantial evidence is just as admissible as direct evidence. Whenever a barrister comes into court in robes and in the presence of his client tells the judge that he appears for that client, the court is entitled to assume, and always does assume, that he has his client's authority to conduct the case and to say on the client's behalf whatever in his professional discretion he thinks is in his client's interests to say. If the court could not make this assumption, the administration of justice would become very difficult indeed.

The very circumstances provide evidence first, that the barrister has his client's authority to speak for him and secondly, that what the barrister says his client wants him to say. Counsel should never act without instructions, and they seldom do."

11. In those circumstances the Court of Appeal stood over the actions of the learned judge at first instance i.e. admitting the evidence of what counsel had said at the other trial but acknowledging that he was right to warn the jury not to hold it against the accused once the inexperienced counsel had said that he had acted without instructions.

12. Mr FG McCrory QC, who appears with Mr SJ McNeill for Mr Rodney Clarke, drew to the Court's attention and Mr Simpson commented on the only reference he could find in this jurisdiction which was to be found at [1994] 4 BNIL and was a short note of a decision in R-v-Fox at first instance made by Sheil J as he then

was. Overnight I have obtained a transcript of that judgment of Sheil J and I propose to refer to it. As this is a relatively novel matter I think it appropriate to do so reasonably extensively so that the profession will have available a judgment which might be of assistance if the matter arises in the future. Sheil J said:

"This application by the Crown arises towards the end of the evidence called by the Crown in a case where the main issue is one of identification. During the course of the trial counsel for the defendant Mr James Lavery QC and Mr Treacy, have been testing, by way of cross-examination, the strength of the Crown case, particularly in relation to identification of a male said to be the defendant, Cahill Fox, who was stopped by a soldier close to and a short time after an explosion on the Falls Road in the city of Belfast.

Counsel for the defendant have not positively put to the main Crown witness, Lance Corporal Wignall, that he was wrong in his identification of the defendant as being that male but have merely suggested to him that he may have been mistaken. Arising out of this line of cross-examination the Crown seeks to adduce evidence at this stage as to what was said by counsel for the defendant in the course of a bail application to the High Court on the 11th February 1994, in respect of charges which charges are the Same as those now before this Court."

13. The judge observes that another junior, though a very experienced counsel, acted for Cahill Fox at that bail application.

"The Crown proposes to adduce this evidence as to what was said at the bail application by calling Detective Chief Inspector Greene who was present at the

bail court on 11th February 1994, and who made a contemporaneous note as to what was said by Mr Macdonald on behalf of the defendant at that time. So far I have not seen a statement of the evidence to be given by Detective Chief Inspector Greene but I am informed by Mr Gary McCrudden, counsel for the Crown, that it is highly relevant to the issue of identification.

Mr McCrudden states that what was said by Mr Barry Macdonald to the Lord Chief Justice in the course of the said application, was a positive assertion of what the defendant had instructed his counsel to say in relation to the charges and that it was not merely a matter of counsel himself commenting thereon.

Counsel for the defendant objects to the admissability of the evidence of Detective Chief Inspector Greene in relation to what was said in the bail application".

14. Then the learned judge refers to the then edition of Blackstone, to Turner and to Downer, and then sets out matters which otherwise don't seem to be reported which it seems therefore appropriate that I should now quote.

"I am informed by Mr McCrudden that there are two unreported cases in this jurisdiction which bear upon the point, one a decision by Lord Justice Kelly about which little or nothing is known beyond it is said that he refused a similar application to that in the present case. The other case is that of R-v-McGuigan and Others, unreported, a decision of McGonigal LJ in or about 1977 or 1978 in which it is said such evidence was admitted.

The facts of that case, according to counsel, appear to have been as follows: There were two defendants. They were both charged with making up a bomb in a bedroom

which they occupied in the Bohill Hotel which bomb subsequently exploded in the hotel.

At a bail application for the first defendant her counsel stated that she had been at the hotel with the second defendant on the night in question but that she knew nothing about the bomb.

At the trial of the defendants a case was put on behalf of the first defendant, that is the woman, that the witnesses who had identified the first defendant as having been in the hotel in the night in question were mistaken.

McGonigal LJ permitted a clerk from the office of the DPP to be called to give evidence aided by a contemporaneous note made by him as to what was said by counsel for the first defendant at the bail application. I do not know at what stage of the trial McGonigal LJ allowed this to be done.

One other case in this jurisdiction bears upon the point, although it is not known if the admissability point was raised or argued before the Court in R-v-Dowds, unreported, 1987. The defendant was charged with murder at a bail application. Counsel for the defendant stated that the defendant was not disputing the killing but was disputing the charge of murder. At the trial the defendant said that he had not been at the scene of the murder at all and that it was somebody else who had been involved.

In the course of his charge to the jury, a copy of which charge is available, Mr Justice MacDermott said to the jury: "The Crown say that this version of the affairs was told for the first time by Dowds when the case started on Monday of last week. It is accepted that at the Magistrates Court and a week later at a bail application, Mr Blackburn on behalf of Dowds told the

Court that he was not disputing the killing but he was disputing the murder charge. Now what Dowds says is quite simply that he had been out at the shops in East Belfast, he came back and he found a man he knew in the bathroom of his house obviously washing. This man told him how he had been in next door and how he had killed this lady and that he, Dowds, was not to say anything about it, that he was threatened that harm would come to himself and some members of his family".

15. I pause there to say that one can see some analogy in that case with the present case, i.e Dowds on the earlier occasion had admitted he was there while continuing to dispute the charge of murder. That clearly is analogous with Clarke here. It appears that either the defence conceded that this evidence should be admitted or that Mr Justice MacDermott, as he then was, did admit it. Lord Justice McGonigal's admission of the evidence is also supportive of it being admitted although in that instance the defence did appear to be putting a directly contrary case. To return to the quotation:

"Mr McCrudden for the Crown submits in the light of R.v. Turner and R.v. McGuigan and Others, that the evidence of DCI Greene is admissible evidence. As to what weight should be given to that evidence when admitted, he accepts that is a matter for the Court to decide in due course.

Mr Lavery for the defendant submits that such evidence is not admissible. He states that there is a difference between a situation where the defendant, having decided to give evidence at the trial, is cross-examined by the Crown to the effect that the case which he is making in

the witness box is inconsistent with the case which he made at an earlier bail application.

As distinct from this situation the Crown seeks in the present circumstances of this case to lead such evidence as to what was said at the bail application. He also seeks to distinguish the present case from R.v. Turner in that there is no transcript available in the present case but only a contemporaneous note made by DCI Greene, the accuracy of which maybe open to question".

16. Stopping there, clearly that is not the case here as we do have a transcript of Mr Gallagher's remarks. The learned judge, after discussing pre-trial reviews in England, which seem to me of lesser relevance to this particular case, concluded:

"Mr Lavery QC accepts that in the event of the accused giving evidence at this trial to the effect that he was not at or near the scene of the explosion, the Crown would be in a stronger position to call such evidence by way of rebuttal. The issue to be decided is not an easy one to resolve. Having considered the matter carefully I rule in the exercise of my discretion that in the instant case where the defendant, through his counsel has merely been testing the strength of the Crown case on identification, the Crown should not be permitted at this stage to lead as part of the Crown case evidence of what was said by counsel for the defendant on the previous bail application".

17. That concludes the judgment of Sheil J. He made it clear that it was an exercise of his discretion and it resulted in part from the fact that the matter arose from a bail application.

18. I note the decision of the House of Lords, R-v-Webber 2004, 1 Cr App R 513. In that case the Court was concerned about whether an inference should be drawn from non-disclosure at an interview by an accused of a matter which was then put by his counsel to a prosecution witness. In that case the prosecution witness had not accepted what was put and their Lordships ruled that nevertheless that constituted a fact which would allow the jury to infer that the accused ought to have disclosed that at the earlier stage to the police. However, the Webber case is also interesting because as Lord Bingham said in paragraph 15, *"Counsel acting (as must be assumed) on the instructions of the client..."* proceeded to say something and he repeats that formulation later on. It must be an undisputed point that the court must act on the basis that counsel have instructions when they say something to the Court.

19. I observe that I am conscious of my overall duty to ensure fairness to the accused both at Common Law and under PACE and I bear that in mind. I note that Mr McCrory QC, very properly, made it clear that there was no criticism of Mr Gallagher QC with regard to anything that he said on this earlier occasion. Mr McCrory accepts on the authorities, as I think he was obliged to do, that if his client went into the witness box and denied that he had been there, that Mr Simpson would be entitled to contradict him. He came close to conceding that if he put on behalf of his client to the identification witnesses that his client was not there, that Mr Simpson would be entitled to put it in, but he reserved his position

as to how the cross-examination would be conducted and his case was that as it may be that all he would do would be to test the evidence of the identification witnesses by suggesting their recollection was infirm or by pointing out any discrepancies in it, that it was not right for the Prosecution to be permitted to put in Mr Gallagher's earlier statement in evidence.

20. I accept there is a valid distinction in law between the two types of cross-examination. The issue for me is whether the Crown's application should be confined to a situation where a positive case is put to the witnesses or whether it should extend to the situation which seems likely to occur here, that their evidence will only be tested. In addressing that issue I take into account what was actually said. I also draw attention to the fact that the trial had been commenced on Wednesday, 21st September. It seems to me almost inevitable that Mr Gallagher would have been aware on Wednesday 21st or, at the very latest, on the morning of Thursday 22nd, that there were discussions between Crown counsel and counsel for the two women, one of whom, of course, was the partner in the personal sense of the word, of Rodney Clarke.

21. It seems to me reasonable to infer that experienced counsel such as Mr Gallagher, with over 30 years experience in criminal cases, would have adverted to this potential development at some stage on the 21st or 22nd to his client. Indeed, I think his remark to me at 12.40pm on that day would be consistent with that i.e. *"we may or may not have the same*

instructions". So this was not something said off the cuff. Mr Clarke must have been aware that this was a significant development. Furthermore, I have to take into account that this was not being said at a bail application where quite often counsel appear for an accused person who do not subsequently appear in the trial and whose opportunity for taking instructions may well be limited.

22. I believe that Mr Simpson is perfectly entitled to say a distinction is to be drawn between that situation, the situation Sheil J was dealing with, and the situation before me. This was not an off the cuff remark, it was not a slip of the tongue. Most of those involved in legal proceedings may at times inadvertently say something that is not phrased as happily as they would wish or even, perhaps, that is completely wrong. The court will no doubt be careful not to penalise a defendant where that happens, but that is not the situation here. Mr Gallagher QC was seeking to justify his application for an adjournment. The court was rightly concerned about leaving the jury hanging and so he had to, in effect, put a good reason before the court for this adjournment. I observe from further reading the remarks by Mr Gallagher again overnight and to some degree I have indicated in my partial quotations from him, that it may well be the case that the accused Rodney Clarke has some explanation for this and if and when he gives evidence, which is a matter for him, he may wish to proffer that explanation. Nor do I preclude counsel on his own behalf, even if he doesn't give evidence, suggesting a possible explanation, though obviously he would have to be

sure that he can properly do so. It is not a case where the remark is so prejudicial that it exceeds its probative value partly because, as I quoted from the remarks from Mr Gallagher, he expressly says that it didn't amount to an admission to the crime of murder.

23. Mr McCrory says that it is unfair to the defendant to put this statement if the defendant, through Mr McCrory, is only cross-examined to test the reliability of identification witnesses. But Mr Simpson says it would be unfair to the Prosecution if the reverse situation were to occur. I observe that it would certainly be unfair to the witnesses. They are only doing their public duty. We know that it is a stressful experience for witnesses to do so. It must be particularly stressful in a murder case. In this particular case, for other reasons I needn't refer to, the witnesses here have been granted a measure of anonymity because of their justifiable apprehensions about possible threats to them. That seems to me a relevant factor in the exercise of my discretion.

24. Is it fair to them or to the prosecution and therefore to the public that they are cross-examined on the basis that this man might not have been at the scene of the fatal assault upon Mr Adrian Thompson when many in court will know that through his counsel he had admitted to being there? It is not a crucial point but I also observe that the stress to the witnesses has been increased by Mr Clarke himself whose change of instructions led to the adjournment of the earlier trial. That is obviously not in any

way a determining reason, but I do mention it. If, as is the case, a jury is entitled to draw inferences from the silence of the accused to the police or to the court when he might give evidence in certain circumstances, is it not logical that they should hear a positive statement made on behalf of an accused by his own counsel and on his instructions as *"must be assumed"* per Lord Bingham in R-v-Webber? Is it not logical that they should hear that? They would hear if the accused had said something of a confessional kind to the police. Indeed, though it is less common in this jurisdiction, it seems quite common in England and Wales, they would hear if the accused had made some kind of confession or partial confession to a fellow prisoner while awaiting trial. The House of Lords, having held in Webber that questions put by counsel can lead to an inference against the accused, it seems to be logical that a positive statement of instructions by counsel be admitted in evidence.

25. I take into account, very carefully the decision of Sheil J. in R-v-Fox but it seems to me that it clearly can be distinguished. In that case there was no transcript of what the other counsel had said. Here, there is an exact transcript or a tape if the Defence would prefer that to be played. I give them the choice of which form the matter should be put before the jury. That was a bail application, this is the trial. That was a junior who was not instructed in the case, this was the senior who was about to start a murder trial and who clearly was instructed. In this case the defendant wishes, through senior counsel, to cross-examine four identification

witnesses and it does seem to me that it would be unfair on them for that to be done on the basis he wasn't there when the court has earlier been told he admits that he was there.

26. Furthermore, I note that it would appear that MacDermott J and McGonagle LJ, two extremely experienced criminal judges, have permitted similar evidence in the past. I also take into account the fact adverted to, that this does not preclude in any way senior counsel for the defendant from cross-examining the accused or the accused from seeking to explain why his instructions to counsel now differ from those he gave to Mr Gallagher on an earlier occasion. It seems to me that the prejudicial effect of the statements does not exceed their probative value.

27. Therefore, in the exercise of my discretion I will admit the statements of Mr Gallagher in evidence. I rule on that now, regardless of whether the cross-examination to follow is only a *"testing cross-examination"* or one in which a positive case is put. For the reasons given I feel that the Crown are entitled to put the matter in evidence in either regard.

28. I would add, that, in so ruling, I am following two general principles. Firstly, that justice is the daughter of truth. So far as is fair and practicable, a jury should be asked to decide on these weighty issues on what is known of the truth. A witness swears or affirms to tell the truth, the whole truth

and nothing but the truth. That is consonant with the more general principle.

29. Secondly, the basic principle of the law of evidence is that what is relevant is admissible. It is right to apply that principle here.