

IN THE CROWN COURT IN NORTHERN IRELAND

---

THE QUEEN

-v-

THOMAS NOEL ABERNETHY

---

NICHOLSON LJ

[1] For reasons which I will give later in this judgment. I find the defendant Thomas Noel Abernethy Not Guilty of the offences with which he is charged. These offences involved the attempted murder by shooting of two police officers who were carrying out duties at a polling station at St Mary's Primary School, Draperstown, County Londonderry. The police officers were ensuring that the democratic process of fair elections could take place.

[2] It was a carefully planned and executed attack, involving the use of a Volkswagen Passat car stolen in Belfast four days earlier. Part of the plan was to steal the car and give the impression that it had been stolen by burglars who had broken into the house and taken the keys of the car and the car itself in the course of the burglary. That is to say, it was intended to give the impression that the car was not being taken for a sinister purpose but by teenagers or others involved in a burglary and who would not have been thought to be terrorists. The number plates were then taken off and false number plates were put on.

[3] As the shooting was carried out when a general election was taking place and a lot of policemen were engaged all over Northern Ireland in duties at polling stations, there was less likelihood of detection after the shooting. The shooting itself, although aimed at police officers, was carried out in an area filled with potential voters, whose lives were placed at risk. That they were indeed at risk is shown by the fact that a young girl, Ailish McBride, who was waiting in the hallway of the school in order to vote was shot through the right thigh and a bullet lodged in her thigh. Later the stolen car was burnt out about four and three quarter miles from the school outside

Draperstown. It is obvious that this was also planned in advance and that getaway cars were organised.

[4] A group of people, believed by the police to be members of the Real IRA, carried out this brutal, cold-blooded and ruthless attack. If Mr Abernethy had been convicted, he would have been sentenced by me to a period of at least 30 years' imprisonment for these offences.

[5] The gunman was seen at the school at close range by a number of responsible persons who gave varying descriptions of him and of his clothing. No responsible jury could select from them which one gave an accurate description either of him or of what he wore. None of them gave a description which fitted Mr Abernethy. It would be irresponsible to pick out from their descriptions bits and pieces of evidence which might possibly fit Mr Abernethy and ignore the other parts of their descriptions which definitely did not fit him. Nor would it be proper to pick out bits and pieces of descriptions of clothing which the gunman was described as wearing as possibly fitting the clothing which Mr Abernethy was found wearing or which he may have been wearing that night and ignore the rest of the descriptions which plainly did not fit what he was wearing or may have been wearing.

[6] It is, therefore, unnecessary to set out the descriptions given by the various witnesses who included the Presiding Officer at the election, students at University and others such as Witness A, an obviously respectable member of the community in Draperstown who were within feet of him. What I do say, however, is that Witness A was asked to attend an identity parade. He was the only person asked to do so. I am convinced that, based on his description of the gunman, he would not have picked Mr Abernethy out as the gunman on an identification parade.

[7] I accept the submission on the part of the Crown that it is possible that Mr Abernethy was the gunman. But it would have been the duty of the trial judge to tell the jury that they must act on the basis that he was not the gunman. Experience shows that people can give wholly inaccurate descriptions of persons after a terrifying and horrific incident as this was. But I reject Mr Kerr QC's submission on behalf of the prosecution that, in effect, the jury could say that the accused may have had contact with cartridge residue discharges because he may have been the gunman. In this context the prosecution cannot rely on possibility when on the evidence before the court the accused was not the gunman. It would be mere speculation on the part of the jury. As I am the jury in this case I must not speculate.

[8] Thus the rest of the evidence in the case must be approached on the basis that the gunman was not the accused.

[9] It is also clear from the evidence that there was only one gunman although the interrogation of the accused was based on the assertion that there were two gunmen. Several reliable witnesses established that there was only one gunman. It was plain to me that they were telling the truth.

[10] Indeed I consider that all the civilian witnesses who made police statements were entirely reliable. None backtracked on their police statements.

[11] There was a Volkswagen Golf car parked close to the VW Passat car in which the gunman escaped. A passenger in the Golf car saw a single person jump into that car but could only say that he got into one of the passenger seats, front or back. He got the registration numbers of the car which he thought were HCZ 5415. These were false number plates but his evidence shows that he was alert. The driver heard the shooting and later heard the gunman shouting: "Go, go, go". He saw that he had a gun in his right hand, and, as other witnesses described, appeared to be wearing white gloves. Again, as with other witnesses at the scene of the shooting, his description of the clothes worn by the gunman, if accurate, eliminates the accused. He was further away from the actual shooting than eye-witnesses of the shooting.

[12] The driver drove his Golf car about 100 yards down the road in the direction of Draperstown as he was blocking the VW Passat and was concerned that his car would be shot at. The VW Passat sped past his car. He said that a second vehicle also passed him. I do not discount this evidence but evidence that a second car passed the Volkswagen Golf does not assist the case for the prosecution or defence. Convincing evidence was given by another eyewitness that the gunman got into the front passenger seat of the VW Passat car. He saw only the driver and the gunman. He did not notice anyone in the back seat of the Passat he said.

[13] The VW Passat was found, burnt out, 4.35 miles away from the school off the B162 near Blackwater Bridge (see Sheet A of the maps prepared for this case, Exhibit 8.) Photographs of it can be seen in Exhibit 4. A pair of Wellington boots were found nearby. No evidence was given as to how the car was burnt. But extensive damage was done to it. All the glass was burnt or shattered. A fire brigade officer estimated that 95% of the vehicle was burnt out. No forensic evidence of any significance was found, so far as I am aware. Certainly there was nothing to connect the accused with the car. No evidence was given as to whether clothing was burnt in the car. A witness who was travelling home to Draperstown saw a large plume of smoke and the car on fire at the point marked on the map about 10 pm or shortly afterwards. It had been abandoned and all four doors were open at that time. There is no evidence that the accused drove the VW Passat from the school to the place where it was abandoned and no evidence that he took part in the

burning of the car. It would be mere speculation to say that he might have driven the VX Passat or been at the scene of the burning of the vehicle.

[14] The evidence of the mapper was that the distance between the burnt-out car and the Birren Road/Killew Road junction where the car driven by the accused was stopped by police was 15.35 miles according to my note. There may be some confusion as this note may not be accurate. The 15.35 miles may include the 4.35 miles from the school to the burnt-out car. In my view the precise distance does not assist the prosecution or the defence.

[15] Constable Johnston was the front seat passenger in a mobile patrol car which travelled towards Draperstown from the Dungiven direction arriving at the junction of the Killen Road and Birren Road about 10.15 pm. He and his fellow police officers observed a Toyota Corolla car travelling in a direction which could have been away from Black Water Bridge near the place where the VX Passat was burnt out. It could have been coming from the direction of Cookstown and going towards Dungiven and on to Derry.

[16] Constable Johnston got out of his vehicle. Although there was no evidence to this effect, it is likely that he had drawn his revolver. He indicated that the vehicle should stop. It did slow down and stop. The front seat passenger was using his mobile phone which he dropped into his lap as the police approached. Constable Johnston approached the driver's side. He said that the driver appeared nervous but in the circumstances I attach no significance to that observation. The driver got out of the car. The police officer must have obtained his name and address and date of birth. The accused lives at 8 Glebe Mews, Dungannon. The registration number of the car was LJ1 6275 and it later transpired in evidence that he had borrowed the car from his next door neighbour although he did not say so to Constable Johnston at the time. He was asked where he was going and where he was coming from. Constable Johnston did not indicate what the answers were, if any,. But he did not say that he refused to answer. He said that if any significant question had been asked and not answered, he would have noted it down in his notebook. He found some gloves in a bag under the front passenger seat and asked the driver and his passenger who owned them but got no reply. There were a number of things found in the car which were later examined forensically. I am satisfied from the forensic evidence in this case that nothing found in the car was in any way sinister and although there was no evidence to this effect, I suspect that they belonged to the owner of the car and his family. The owner's driving licence was in the car. The accused was arrested by Constable Johnston at the scene about 11.37 pm. He was arrested for the attempted murder of two police officers and another under the Terrorism Act 2000. A SOCO suit was placed over his head and body; he was placed in a car separated from his passenger and taken to Gough Barracks. He was seen there by Sergeant McMahon, the custody police officer who asked him some questions and noted his replies.

[17] The front seat passenger was Anthony Murphy of 78 Knockaleary Road, Cookstown who was also arrested at the road junction and taken to Gough Barracks. I asked one of the police officers to describe Mr Murphy and was satisfied that he did not fit any description of the gunman who did the shooting at the school.

[18] A Scenes of Crime Officer, David Maitland, went to Gough Barracks at 1.25 am and took swabs from the accused which included swabs from his face and hand, and took head-hair combing. He also took his clothing which included a beige shirt (exhibit 20) and trousers. It was at this stage that a serious mishap occurred. The clothing was put in paper bags instead of nylon bags. As a result the clothing could not be examined for cartridge discharge residues. Two things follow from this mishap. If there were cartridge discharge residues on the clothing there could be no evidence of this given on behalf of the prosecution to the court. If there were no cartridge discharge residues (CDR), the accused was deprived of the opportunity to establish this. Forensic evidence established that there was no CDR on any swabs which were taken from the accused. The Forensic Science Agency might consider examining clothes placed in paper bags to see whether they could be eliminated. But I understand that adverse findings would not be of evidential weight against an accused.

[19] SOCO Cairns who carried out the same procedure on Mr Rooney put his clothing in nylon bags. As a result his clothing could be examined forensically and no CDR was present on his clothing or when he was swabbed. He was ultimately released and no charges have been preferred against him.

[20] The only item of evidence which could connect the accused with the shooting was a coat or jacket which was found on 8 June (exhibit 21).

[21] A search of the road between the burnt out VX Passat and the junction of the Birren/Killew Roads and of the surrounding area was carried out by a police unit, commencing at 5.20 pm on Friday 8 June. Various objects were found, which I am satisfied, had nothing to do with the shooting at the school. This road, as it goes northwards on map A, is given different names - the Disert Road, the Doon Road, the Derrynoyd Road, the Moneyneary Road, the Moydamlaght Road and so forth.

[22] A blue coat or jacket was found at 5.32 pm. This was labelled JLC 13, was exhibit 21 and is seen in photograph 9 of the series of photographs taken by Scenes of Crime Officer Cairns. If one is travelling towards the Birren Road, Killew Road junction it was on the grass verge on the passenger side of the vehicle. Constable Williams was the finder; he pointed it out to Sergeant Barr. It was a number of miles away from the junction. Sergeant Barr gave

evidence that no member of the search unit touched the coat. Two persons arrived in a car later in the evening. One was a Scenes of Crime Officer. Constable Cairns, now Mr Cairns as he has retired. The other was Mr Edgar, the mapper. Both were in civilian clothes.

[23] Mr Cairns who had earlier taken the clothing of the passenger in the car driven by the accused and gave it in for forensic examination was a very experienced Scenes of Crime Officer. On Friday evening, 8 June he went with Mr Edgar to the scene of the various finds made by the police search unit and recovered all the items found including the coat. The coat was not the first object which he bagged. He wore a SOCO protective suit and put on disposable gloves to bag each item. Mr Edgar travelled as the front seat passenger throughout the period when he was bagging the items. An issue will arise as to whether Mr Edgar may have contaminated him with CDR and, in turn, whether he contaminated the coat. I will return to it.

[24] Mr Speers, a principal scientific officer in the forensic science agency, specialises in biological matters, notably fibres. He examined the coat which was in reasonable condition, slightly soiled. There was nothing to indicate that it would be discarded through wear and tear. It was dry. He also examined the beige shirt worn by the accused. Twenty two blue fibres found on the shirt were compared with fibres from the coat. All were examined by comparison microscopy. Eleven were examined by infra red spectroscopy and microspectrophotometry. They were not analysed by thin layer chromatography because of their small size. They were indistinguishable from the corresponding constituent fibres of the blue jacket. One brown hair approximately 30 cms in length was found on the jacket.

[25] The jacket was submitted to the specialist DNA Unit in Birmingham for DNA analysis. Mixed DNA profiles were obtained. The analysis carried out at Birmingham, according to Mr Parry, an expert in DNA, is a sensitive DNA analysis technique. The DNA profile from the inside collar of the coat, from the inside of the right pocket and from the neck zip pullover disclosed that a clear major contribution could be attributable to a single individual who might have been female or male. Another user of the coat was a male and three people may have put a hand in the right pocket of the coat. There was no scientific evidence to indicate that the accused or his passenger could have contributed to the mixtures of DNA detected in these samples. DNA samples had been taken from the accused and his passenger so that they could be compared with the samples taken from the jacket. Nonetheless, so far as the fibres on the beige shirt were concerned, the findings would strongly support the proposition that the coat had been in recent contact with the shirt, according to Mr Speers' expert evidence.

[26] Two blue fibres on the passenger seat and one on the driver's seat of the car driven by the accused were indistinguishable from the constituent

fibres of the blue coat. This could be explained by a fleeting contact, a contact some time ago or contact via a third intermediate item. As it is clear that two or three person other than the accused or Mr Murphy had used the jacket, I attach no evidential weight to these findings.

[27] There were no matching fibres found on the accused's trousers. One interpretation of the findings was that the accused had recently worn the coat, that he possibly wore the coat as there may be re-distribution of fibres caused by packaging. By recent contact Mr Speers meant a period of 5-6 hours. After that fibres would be lost.

[28] In cross-examination he said that there were no fibres found in head hair combings from the accused. The coat was such that one would put it on and take it off over the head. The hood of the coat could transfer fibres to hair. The accused was linked with this coat or a coat of equivalent composition in terms of blue fibres. It was a mass-produced coat, sold in considerable quantities. The coat was made by a manufacturer who made clothes for teenagers and young adults. It was not possible to identify who was the manufacturer of the coat or its country of origin. He did not know how many garments of this kind had been made. The human head hair was 12 inches long. On observation and by reference to a police photograph taken shortly after his arrest the accused had black short hair and I am satisfied that the hair found was not his. The lack of testing by TLC did not in Mr Speers' opinion weaken his evidence.

[29] Mrs Ann Irwin, an expert in firearms discharge residues or as was referred to in this case, cartridge discharge residues (CDR) examined the coat, found two unique particles and one characteristic particle of CDR on the coat but because of the method of sampling was unable to say where on the coat these particles were found. Items which use cartridges produce CDR and it is impossible to tell what item or kind of item had produced these particles. Evidence from Mr Leo Rossi showed that the gunman had used a 9 mm P firearm. The particles were tiny. Two were 4 microns and 8 mikrons in size. I assume that she was referring to the unique particles. A million is 1/1000 of a millimetre. Most modern ammunition contains that kind of particle. It was impossible to say whether they had come from a handgun, shotgun, starting pistol, rifle or cartridge tool such as a hilti type steel gun. On garments CDR could persist for weeks.

[30] She dealt with the issue of contamination because at this stage of the case there was a live issue as to whether Mr Edgar, the mapper, may have contaminated the Scenes of Crime Officer, Mr Cairns, and as a result the particles may have been transferred onto the coat. Mr Edgar on the morning of 8 June had been in the small office of the school where one of the police officers who was shot had discharged his revolver, firing through a window at the escaping gunman. It was accepted that if Mr Edgar was not wearing a

SOCO suit, then there was a strong likelihood that his clothing would be contaminated with CDR and as he travelled as a front seat passenger with the SOCO, Mr Cairns, he may well have contaminated Mr Cairns' SOCO suit, risking transfer of particles such as were found on the coat.

[31] She said that CDR readily transferred from skin to clothing and from clothing to clothing. The mapper at the place of contamination (the office) would have considerable initial contamination, then might transfer CDR to another person such as a SOCO and the SOCO suit might be contaminated and contaminate a garment. It was unlikely that material would come in contact with the suit as the SOCO would use gloves. But as described by Mr Cairns SOCO suits have cuffs which could come in contact with gloves. It would be desirable to change suits from scene to scene. But the evidence of Mr Cairns indicated that he wore the same suit throughout his journey with Mr Edgar, finding different objects on the way. He used disposable gloves for each item but he wore the same suit and, therefore, the same cuffs. She said that it was possible that the mapper, if he was not wearing protective clothing at the scene of the shooting, could contaminate anyone in the car – Mr Cairns was the only other person in the car – because it was possible that he would have CDR on his hands and on his clothes. However the control bag was uncontaminated. The gloves were disposed of. It may be that clothing could be retained until a case was completed.

[32] It became important to establish whether Mr Edgar wore protective clothing at the scene of the shooting. As all the witnesses for the prosecution were sitting in court, it became plain to them how important this issue was. When he first gave evidence, he was not asked what he wore at the scene of the shooting. Nor was Mrs Smyth, the photographer in the case.

[33] The Scenes of Crime Officer, Mr Cooke, who was at the scene of the shooting at the same time as Mrs Smyth and Mr Edgar was cross-examined by Mr Magee SC and stated, when he first gave evidence and before the issue had become significant, that he could not recall if he (Cooke) was wearing a SOCO coat. It was possible that he did not have it on. He had no note that he was wearing such a suit.

[34] Mr Stringer, a SOCO, who attended with Mr Cooke said in cross-examination that he believed he (Stringer) was suited up and that Cooke was suited up because he would have told Cooke to put on a suit as it was important not to spread contamination.

[35] It was apparent from the log that the two SOCOs, photographer and mapper arrived together. When pressed, Stringer said that all should be suited up, that he had no recollection of suiting-up, that they would not be allowed into the scene of the shooting if not suited up. It should not happen because of the risk of contamination. SOCO suits were worn as a matter of



course. One takes one's suit off when one leaves a scene. Before entering the cordon one puts a suit on as a matter of course.

[36] Mr Cooke was re-called. He had been a SOCO for 7 months at the time and was supervised by Mr Stringer. At a shooting incident it was automatic to wear a SOCO suit, he said. He was trained to do so for contamination and health and safety reasons. He believed he had been nervous, giving evidence originally. In cross-examination he admitted that he had been listening to Mr Stringer giving evidence. Mr Smyth and Mr Edgar, as the log indicated, arrived with them. All were suited up, he said. All had gloves. Two hours earlier, when he was giving evidence, he could not remember whether he was wearing a suit. He did not think it had suddenly dawned on him that he was wearing a suit. He was shown one of Mrs Smyth's photographs. The person holding the photographer's slide rule is ungloved in the photograph.

[37] Mr Cairns when he was giving his evidence indicated that he was unaware that Mr Edgar, the mapper with him, had been at the scene of the shooting. Had he been aware, I have little doubt that he would have arranged for another mapper to accompany him. It is also apparent that there was a shortage of photographers or that it did not occur to anyone that a photographer should video any find or the manner in which the SOCO collected it. Mrs Smyth took video film later of the areas where the items had been found. By this stage they had been removed. No video appears to have been taken of the scene at the school.

[38] Mr Cairns could not recall whether Mr Edgar wore a SOCO suit at the scene of the finds. It would have been a wise thing to do. Edgar was in close proximity to him.

[39] Mr Edgar was re-called. He could not remember if he wore a 'scene' suit at the school. He probably was wearing one as it was common practice. In the photographs (P7 and P18) taken by Mrs Smyth his hand did not appear. It was someone else's hand, holding the photographic slide rule or scale. He did not have protective clothing when he travelled with Constable Cairns. In cross-examination, as in examination in chief, he referred to the elasticated cuffs of a SOCO suit. He accepted that the clothing shown in P18 was not a SOCO suit. He admitted that he went into the office at the school (see P6), that the police officer had discharged a gun in a confined space in the office at 9.45pm on the evening before. He would have been within inches of Constable Cairns and possibly touched him when he was wearing his SOCO suit. A second mapper may have been a better option, he said.

[40] It then emerged that Mrs Smyth had taken more photographs than she had printed on Exhibit 1 and the defence called for disclosure of these. Mrs Smyth was re-called and produced the 7 additional photographs. She said she could not recall what clothes she was wearing. She did not know whose

hand was shown in photographs P7 and 18 of Exhibit 1. She said in cross-exhibition that she would have taken her direction from Mr Stringer and Mr Cooke. She did not remember being asked to put on a 'scene' suit. If SOCOs were wearing 'scene' suits, it would 'trigger' her. She selected the photographs for Exhibit 1. She did not recall anyone helping her [with her photographic scale] other than Mr Edgar and the SOCOs. She agreed that if Mr Edgar went into the scene without a suit it was likely that she also went in without such a suit. One of the 7 additional photographs showed Mr Edgar at the scene at the school wearing ordinary clothes. This became Exhibit D1.

[41] This résumé of the evidence concerning possible contamination by Mr Edgar of Mr Cairns and resulting contamination of the coat shows a number of prosecution witnesses in a poor light. I exonerate Mrs Smyth completely from any attempt to deceive the court by not printing the additional photographs. Mr Edgar did not attempt to deceive the court but others [not Mr Cairns] did. I consider it possible that, none of those at the scene of the shooting were wearing 'scene' suits.

[42] Thus I am left with the possibility which cannot be treated as fanciful that Mr Cairns accidentally contaminated the coat. In addition I am forced to recognise that two or three persons (other than the accused) wore the coat and that CDR can remain on such coats upwards of three weeks. But there had been no discharge of firearms in the Maghera, Magherafelt, Draperstown area from 1 June.

[43] As the accused has given no explanation as to how 22 fibres from a coat such as this found their way onto his beige shirt, I infer that he cannot do so. That is to say, he cannot produce a garment worn by him which has similar fibres to the coat. I am virtually certain, therefore, that he was wearing the coat in the care on the road where he was eventually stopped. I am virtually certain that he caused the coat to be thrown out of the car.

[44] It is much more likely that he did so because he feared that there were CD residues on the coat and that they were connected with the shooting at the school, than that there was contamination of the coat by Mr Cairns.

[45] This is not a civil case. It is a criminal case and, sitting as the jury, I must feel sure, be satisfied beyond reasonable doubt of the accused's guilt. I cannot be so satisfied.

[46] Therefore I cannot convict you, Thomas Noel Abernethy, and accordingly as I have indicated I find you Not Guilty.

[47] I must commend the way in which police officers investigated this case and the way in which most of the witnesses gave their evidence. As can be seen by the interviews with the accused, detectives are severely handicapped

by the absolute right to silence on the part of a suspect. But the criticisms of Mrs Irwin about the planning of the examination of the finds must be taken to heart.

[48] I am disturbed by evidence given by Mrs Irwin whom I commend for her integrity and I intend to take it up with the Lord Chief Justice because of its implications. I do not propose to say anything more about it in this court. But I do not intend to let it rest.

[49] The use of video recordings is commonplace but there is no point in using them at the wrong time. Terrorists are now so cunning and potential witnesses are now so fearful that the public are dependent on forensic science procedures to a great extent.

[50] The integrity of this process and adequate financial support for the Forensic Science Agency is essential. Police officers in charge of case of this kind must be able to plan what is required of the Agency and explain what is needed and be aware of what order examinations can be conducted.

[51] I congratulate counsel on the manner in which they conducted the case. Mr Abernethy is fortunate in having had the services of Mr Gallagher and Mr Magee. Mr Kerr conducted the case for the prosecution with his usual skill and professional integrity.