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Judgment: approved by the Court for handing down | *Delivered:* **10/10/2014**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF REFERENCES BY THE CRIMINAL CASES REVIEW COMMISSION

VERONICA RYAN AND JAMES MARTIN

Appellants;

-v-

REGINA

Respondent.

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] These references by the Criminal Cases Review Commission ("the Commission") relate to the convictions by the learned trial judge sitting alone without a jury on 8 May 1991 of the appellants, Veronica Ryan and James Martin, for offences arising out of the false imprisonment of Joseph Fenton at the appellants' house at 124 Carrigart Avenue, Belfast, on 25 and 26 February 1989.

[2] The appellants and others were also convicted on 8 May by the same judge arising out of the false imprisonment of Alexander Lynch at the same address between 5 and 7 January 1990. Those convictions were the subject of an earlier reference by the Commission to this court. In a judgment delivered on 9 January 2009 those convictions were quashed (R v Daniel Morrison and others) [2009] NICA 1).

[3] Mr Simpson QC appeared on behalf of the Crown. Mr Macdonald QC appeared with Mr Devine for the appellant James Martin. Mr Greene and Mr Flanagan appeared for the appellant Veronica Ryan. The court is grateful to counsel for their helpful and succinct submissions.

The grounds for the references

[4] The appellant Veronica Ryan pleaded guilty to the false imprisonment of Fenton. She was sentenced to 6 months' imprisonment. The appellant, James Martin, was convicted of false imprisonment of Fenton and also convicted of making property available for terrorism. He was sentenced to 3 and 4 years concurrently on those counts.

[5] During its investigation the Commission had access to relevant sensitive material which had not been before the judge and which had not been made available to the Public Prosecution Service. That material led the Commission to conclude that there were grounds for referring to this court the convictions of Martin and Ryan in relation to the Fenton incident as it had done in the case in relation to the convictions in respect of Lynch.

[6] Neither appellant previously appealed their convictions. However, the Commission took the view that the applications for leave to appeal out of time would be frustrated by the appellants' lack of knowledge of or access to the sensitive material. The Commission concluded that this and the decision in R v Morrison gave rise to exceptional circumstances which made it appropriate to refer each of the appellants' convictions to this court notwithstanding the absence of any previous appeals.

[7] In R v Morrison [2009] NICA 1 after hearing submissions the court concluded that in light of the contents of the undisclosed confidential material the convictions could not be regarded as safe. In those proceedings the court conducted two private hearings to consider the material. As a consequence of the material and information received by the court in the course of those *ex parte* hearings the court concluded that it was not possible to disclose all the reasons leading to its decision to quash the convictions.

[8] In that case the court concluded that:

(a) directly relevant material on the question whether a trial should take place had not been made available to the DPP who accordingly was not in a position to give proper consideration to the question whether the appellants should stand trial;

(b) the disclosure to the appellants had in consequence been inadequate and the prosecution could not perfect its duty of disclosure before and during the trial since the material had been withheld from the prosecution;

(c) in consequence of the breach of the duty to make proper disclosure the appellants lost the opportunity to apply for a stay of the proceedings as

an abuse of process the court's view being that a stay was likely to have been granted; and

(d) had the matter proceeded to trial the non-disclosure of relevant material would have resulted in the exclusion of evidence which would have had a significant effect on the outcome. The court concluded that that evidence would almost certainly have resulted in the acquittal of the defendants.

[9] In this reference as in the case of R v Morrison there was a confidential annex of documentation. Since the case raised issues directly comparable to those in R v Morrison it is unsurprising that the prosecution indicated, as it had in R v Morrison, that it could not resist the appeals on the grounds that not all of the relevant material had been made available to the prosecution prior to the trial and the prosecution was thereby prevented from discharging its on-going duty of disclosure.

[10] The appellants invited the court to disclose the contents of the confidential annex and hear the appeal in open court subject only to any application on the grounds of public interest immunity. The Secretary of State for Northern Ireland issued a PII certificate certifying that disclosure of the documents and information in the documentation referred to in the confidential annex would be contrary to the public interest. The court in an *ex parte* hearing considered the material and concluded that the material could not be disclosed.

[11] In the case of Ryan she pleaded guilty to count 3 on an aiding and abetting basis. She pleaded not guilty to counts 2, 4 and 5 but changed her plea to guilty on count 5 in the course of the trial, pleading guilty on the basis of aiding and abetting. She was acquitted on counts 2 and 4 which are thus not relevant. Mr Greene argued on her behalf that her plea of guilty was not a bar to a finding that her convictions were unsafe. A conviction on a plea of guilty can be found to be an unsafe conviction (see Re DPP v Shannon [1975] AC 717). While the circumstances in which it may be appropriate and proper to allow an appeal are necessarily very limited the appellant may be able to establish that as a result of trial processes prior to plea the basis of the plea is undermined (R v Kelly [2003] EWCA Crim 2957, R v Schlesinger [1995] Criminal Law Reports 137). In R v Blackledge [1996] 1 Criminal Appeal Reports 326 the convictions were found to be unsafe there having been material irregularity created by the non-disclosure of material. In R v Montague Darlington [2003] EWCA Crim 1542 the court concluded that the question was whether the appellant had had a fair trial and it considered it difficult to see how an appellant could be said to have had a fair trial when she should not have been tried at all. Mr Simpson on behalf of the Crown did not seek to resist these arguments.

[12] In light of the approach adopted by this court in R v Morrison and having regard to the frank acceptance by and on behalf of the Crown that the convictions could not be considered safe these appeals must be allowed and the convictions

quashed. The real issue between the parties is whether it is in the interests of fairness and justice that the court should provide a fully reasoned judgment on what material was withheld, by whom it was withheld and why it was withheld.

[13] The appellants contend that:

(a) Article 6 of the Convention calls for a public judgment and the common law requires open justice conducted in public (R v Sussex Justices [1924] 1 KB 256, Scott v Scott [1913] AC 417, Attorney General v Leveller Magazine [1979] AC 440, R(Binyam Mohammad) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65);

(b) in Al Rawi v Secretary of State [2011] UKSC 34, in the context of civil claims, the Supreme Court made clear that a litigant should be able to see and hear all the evidence which is seen and heard by the court;

(c) a party has the right to know the case against him and to know the reasons why he has lost or won; and

(d) a decision to deliver judgment in a criminal case in such a way that the basis of the court's reasoning is withheld from the defendant cannot be reconciled with the obligation to ensure openness and transparency.

[14] The Crown in response to those submissions contends that the court could not give an open judgment revealing the information covered by the PII certificate having regard to that certificate and the court's decision not to order disclosure of the documents after consideration of the material. A closed judgment would still be a public judicial assertion for the purposes of Article 6. As stated by the European Court of Human Rights in Sutter v Switzerland [1984] 6 EHRR 272:

> "In each case the form of publicity given to the judgment under the domestic law of the state must be assessed in the light of the special features of the procedures in question and by reference to the object and purpose of Article 6.1."

In Campbell and Fell v UK [1985] 7 EHRR 165 the court stated that the form of presentation given to the judgment and to the domestic law of the respondent's state must be assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6.1 in this context, namely to ensure public scrutiny of the judiciary with a view to safeguarding the rights to a fair trial. In R v Doubtfire [2001] Criminal Appeal Reports 13 and in R v Haskayne [2007] EWCA Crim 2797 the Court of Appeal refrained from giving an open judgment. Mr Simpson argued that in the present case the prosecution had no means of protecting the public interest if the court gave an open judgment.

[15] In the case of R v Doubtfire [2001] 2 Criminal Appeal Reports 209 the Court of Appeal had sight of confidential information which it was ruled could not be disclosed in the public interest. May LJ giving judgment of the court said:

> "In the unusual circumstances of this case the prosecution through Mr Barnard do not seek to uphold this conviction. This court has seen and considered the details which led the Commission to reach the conclusion which we have quoted. Those details persuade us that the appellant's trial was materially unfair in the way in which the Commission describes. That is sufficient for our conclusion that this appeal should be allowed and the conviction quashed.
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> We have considered whether it is right that this court should elaborate on that conclusion by giving detailed reasons by reference to the confidential material which has been put before the court, to explain why we have reached that conclusion. We are persuaded that the balance of competing public interest in this case falls on the side of not making the material public, and not making public the detailed reasons for the Commission's conclusion.
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> We have found that particular point a difficult one and we have sought by consideration both amongst ourselves and with counsel whether there is any way a half-way house in this case. We have, with some regret, reached the conclusion that there is not, and in reaching that conclusion we are acutely aware of the clear fact that justice is required to be conducted openly and in public and that exceptions to this should only occur in cases where there is indeed and overriding public interest which so requires it."

[16] Regrettably we must reach the same conclusion as that reached in R v Doubtfire and R v Morrison. A PII certificate has been issued. The court examined the documentation and it decided that the PII certificate should not be called into question and concluded that the material cannot be disclosed in the public interest. If the court were to divulge the information to which the PII certificate relates it would be undermining and setting at nought the effect of the PII certificate and its own ruling on the *ex parte* hearing. At the trial stage if disclosure of sensitive material is ordered by the court the prosecution has the option of protecting national interests by abandoning the criminal case against the defendant. The balancing of interests at the appeal stage will necessarily be different since no question of abandoning the criminal case arises since the defendant has been convicted. If, as in

this case and in R v Doubtfire and R v Morrison, it is clear that there has been a serious irregularity in the trial process rendering the trial unfair and the resultant conviction is unsafe, the public interest is secured by this court setting aside the conviction and making clear that the ground for setting it aside is because of that irregularity. The public interest would be undermined not advanced by the disclosure of material covered by the PII certificate which the court has found to be properly issued. The right to a fair trial has been secured in these circumstances. The object pursued by Article 6, namely to ensure a scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial (see Campbell and Fell v UK [1985] 7 EHRR 165) is being properly achieved.

[17] Counsel for the appellants contended that in order to advance the appellants' claim for compensation for miscarriages of justice they are entitled to know the reasons why the convictions have been set aside and the underlying information to be found in the confidential annexure. This point was raised and covered by the decision in Doubtfire where May LJ said that while the court was satisfied that the appellant's trial was materially unfair because there was a failure by the prosecution in respect of the disclosure obligation the question of compensation is not a matter for the court determining the reference.