Neutral Citation no. [2002] NICA 50 | *Ref:* **CARC3827**

Judgment: approved by the Court for handing down | *Delivered:* **20/12/2002**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN

S J BROCKBANK

(Complainant) Appellant

and

WILLIAM ANTHONY SHANNON

(Defendant) Respondent

_____

Before: Carswell LCJ, Campbell LJ and Kerr J

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CARSWELL LCJ

[1] In this appeal the appellant, an acting chief inspector of police, appeals by way of case stated against a decision of His Honour Judge McFarland given in the county court for the Division of Belfast on 5 July 2002, when he allowed an appeal by the respondent against his conviction in Belfast Magistrates' Court on 25 February 1999 of an offence against the Proceeds of Crime (Northern Ireland) Order 1996 (the 1996 Order), that he had failed without reasonable excuse to comply with a requirement to answer questions or otherwise furnish information before a financial investigator in compliance with a notice served upon him under the provisions of the Order.

[2] We set out *in extenso* in *Clinton v Bradley* [2000] NI 196 the statutory provisions contained in the 1996 Order whereby a financial investigator in the exercise of his function of tracing the proceeds of crime may require a person appearing to have information relating to a matter relevant to the investigation to attend and answer questions or otherwise furnish information. We refer to our judgment in that case and shall not set out the material provisions again. For present purposes the relevant part is

paragraph 5(1) of Schedule 2 to the Order, which makes it an offence if the person concerned "without reasonable excuse" fails to comply with such a requirement. A significant amendment to this provision was made in April 2000, when section 59 and paragraph 26 of Schedule 3 to the Youth Justice and Criminal Evidence Act 1999 came into effect. By that amendment the exception set out in paragraph 6(b) to schedule 2 to the 1996 Order was considerably restricted in extent by substituting the words:

> "(b) on his prosecution for some other offence where evidence relating to any such answer or information is adduced, or a question relating to it is asked, by or on behalf of that person; or"

[3] The material facts found by the judge were set out in paragraph 2 of the case stated:

> "(a) Mr Shannon was the Chairman of the Irish Republican Felons Club which is a registered club operating out of premises on the Falls Road, Belfast. In May 1997 the premises were the subject of an extensive police search and a substantial number of documents were removed into police custody.
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> (b) Mr Shannon was subsequently required to attend for an interview with a Financial Investigator appointed under the Proceeds of Crime (Northern Ireland) Order 1996. He did so on 27 January 1998 and answered all questions put to him. Mr Shannon was subsequently arrested by police on 16 April 1998 and interviewed under caution during which he made no reply to questioning. Mr Shannon was charged by police at that time with False Accounting and Conspiracy to Defraud.
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> (c) On 1 June 1998 as a result of further enquiries and fresh information a further Notice was served on Mr Shannon under paragraph 2(1) of Schedule 2 of the Proceeds of Crime (Northern Ireland) Order 1996 requiring Mr Shannon's attendance at Woodbourne RUC Station at 10.30am on 11 June 1998. Mr Shannon failed to attend on

11 June 1998 but a letter was received from his solicitor P J McGrory & Co, Solicitors, dated 9 June 1998 seeking a written guarantee that information obtained or any statements or comments made by Mr Shannon during the course of his interview would not be used in any future criminal proceedings.

(d) On 16 June 1998 a further Notice under the said Order was sent to Mr Shannon requiring him to attend Woodbourne RUC Station on 26 June 1998 at 10.30am. Accompanying same was a letter detailing the safeguards incorporated in paragraph 6 of Schedule 2 of the Order.

(e) On 22 June 1998 a letter was received by the Financial Investigators from P J McGrory & Co, Solicitors, indicating that his replies could become admissible at a subsequent trial and suggesting the purpose of the interview was to compel Mr Shannon to disclose his defence. It also indicated Mr Shannon had been advised not to attend unless a satisfactory response was received to that letter.

(f) A reply was hand delivered to P J McGrory & Co, Solicitors on 23 June 1998 rejecting the suggestion that the reason for the interview was to force Mr Shannon to disclose his defence and rejecting the reasons given as amounting to a reasonable excuse. It also indicated that a number of matters arising from the earlier interview required clarification and that there were a number of additional matters to be put to Mr Shannon. A further letter was sent by facsimile on 25 June 1998 seeking confirmation Mr Shannon would be attending the following day.

(g) A telephone call and facsimile from P J McGrory & Co, Solicitors stated that Mr

> Shannon would not be attending the interview."

[4] The respondent was charged by summons dated 14 September 1998 with an offence of failing to comply with the financial investigator's requirement to answer questions or otherwise furnish information, contrary to paragraph 5(1) of Schedule 1 to the 1996 Order. He was convicted of this offence at Belfast Magistrates' Court on 25 February 1999 and fined the sum of £200. He appealed to the county court against conviction and sentence. The appeal was adjourned on a large number of occasions and eventually came on for hearing on 27 June 2002. The judge held, in a written judgment given on 5 July 2002, that the prosecution had not proved the absence of a reasonable excuse and allowed the appeal. He expressed his conclusion on page 3 of his judgment that the respondent, having been charged, had a right not to answer questions that would have tended to incriminate him. Since there was a real and not a fanciful risk that he would be forced to answer questions about the proceeds of a crime, he had a reasonable excuse for failing to attend to answer questions put to him by the financial investigator.

[5] The appellant by a requisition dated 17 July 2002 requested the judge to state a case, which he stated and signed on 26 September 2002. The questions posed for the opinion of this court were:

> "1. Was the court correct in law in holding that a refusal by the Defendant to comply with a requirement of a Financial Investigator in pursuance of the powers under paragraph 2(1) of Schedule 2 of the Proceeds of Crime (Northern Ireland) Order 1996 on the grounds that it could incriminate the Defendant in pending criminal proceedings could constitute a `reasonable excuse' within the meaning of paragraph 5 of Schedule 2 of the Order?
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> 2. If the answer to 1 is `Yes', was the court correct in law in holding that the prosecution had failed to discharge the burden of proving the absence of reasonable excuse?"

[6] It was accepted on behalf of the respondent that when he failed or refused to attend the financial investigators in June 1998 he did not have a reasonable excuse for doing so. His counsel did not dispute the correctness of our decision in *Clinton v Bradley* [2000] NI 196, where we held that a person who was required to answer questions or give information to financial investigators appointed under the 1996 Order could not claim that he had a reasonable excuse for failing or refusing to comply on the ground that he

might incriminate himself. The failure to comply in that case pre-dated the amendment to paragraph 6 of Schedule 2, and since that amendment the possibility of self-incrimination has further receded. Accordingly, such a person could not now claim that as a reasonable excuse, even though the Human Rights Act 1998 has come into operation and courts may not act in a way which is incompatible with a Convention right. It was submitted on behalf of the appellant that the judge's conclusion in the present case was incorrect and that the respondent did not have a reasonable excuse for failing to comply with the financial investigators' requirement.

[7] Mr Larkin QC on behalf of the respondent advanced an ingenious counter-argument. He accepted that the respondent had been correctly convicted in the magistrates' court, but submitted that by the time the case came on appeal to the county court the changes in the law gave the respondent *ex post facto* a reasonable excuse. His submissions may be summarised in the following propositions:

1. The appeal to the county court was by way of a complete rehearing, and therefore it constituted fresh proceedings brought by a public authority. In consequence section 7(1)(b) of the Human Rights Act 1998 applied (by the operation of section 22(4)) and the respondent was entitled to rely on his Convention right under Article 6(1).

2. Since the respondent had been charged in April 1998 with false accounting and conspiracy to defraud, his trial on those charges must in accordance with the jurisprudence of the European Court of Human Rights be regarded for the purposes of Article 6(1) as having commenced.

3. The financial investigators' requirement in June 1998, being part of the trial, had to accord with the obligations of fairness contained in Article 6(1).

4. In June 1998 the respondent could not have known whether his answers would be excluded from evidence at the hearing of those charges, as the original version of paragraph 6(1) of Schedule 2 to the 1996 Order was still extant.

5. It therefore followed that in the absence of an assurance that the answers would not be given in evidence it would have been unfair to require the respondent to furnish answers or information and he had a reasonable excuse to fail or refuse to do so.

[8] Mr McCloskey QC on behalf of the appellant submitted by way of riposte that it is not to be regarded as unfair to require a person in the respondent's position to answer questions or furnish information to the

financial investigators. It cannot be known at the time when answers or information are sought whether the material sought will be used at the hearing of the charges, and therefore the issue of fairness of the trial because of possible self-incrimination can only be judged at the time of that hearing.

[9] We accepted similar propositions in *Clinton v Bradley* at pages 203-4, but as counsel in the present appeal carried out a careful review of the authorities we shall re-examine them. In *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 and *R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd* [2000] 2 AC 412, both decided before the Human Rights Act 1998 came into force, the House of Lords expressed the clear opinion on domestic law that challenges on preliminary matters should not in general be entertained, but the propriety of prosecution decisions (*Kebilene*) or the extent of prejudice in having to answer potentially incriminating questions in pre-trial procedures (*Green Environmental Industries*) should be left to the decision of the judge at trial of the offence.

[10] In *Ex parte Green Environmental Industries Ltd* the House of Lords also examined the jurisprudence of the European Court of Human Rights in order to ascertain whether it was in accord with its conclusion on domestic law, since the Environmental Protection Act 1990, having been enacted in order to give effect to an EEC directive, had to be interpreted according to principles of Community law, which had regard to the decisions of the ECtHR. Lord Hoffmann in his opinion, with which the other members of the House concurred, examined first *Saunders v UK* (1997) 23 EHRR 313, the leading case on the privilege against self-incrimination, quoting from paragraph 67 of the judgment of the ECtHR:

> "The court first observes that the applicant's complaint is confined to the use of statements obtained by the DTI inspectors during the criminal proceedings against him. While an administrative investigation is capable of involving the determination of a `criminal charge' in the light of the court's case law concerning the autonomous meaning of this concept, it has not been suggested in the pleadings before the court that article 6(1) was applicable to the proceedings conducted by the inspectors or that these proceedings themselves involved the determination of a criminal charge within the meaning of that provision. In this respect the court recalls its judgment in *Fayed v United Kingdom* where it held that the functions performed by the inspectors under section 432(2) of the Companies Act 1985 were essentially investigative in nature and that

> they did not adjudicate either in form or in substance. Their purpose was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities – prosecuting, regulatory, disciplinary or even legislative. As stated in that case, a requirement that such a preparatory investigation should be subject to the guarantees of a judicial procedure as set forth in article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities."

Lord Hoffmann concluded (page 423F) that --

> "The European jurisprudence is firmly anchored to the fairness of the trial and is not concerned with extra-judicial inquiries. Such impact as art 6(1) may have is upon the use of such evidence at a criminal trial."

He went on to examine three other European cases on which the appellant had relied, *Serves v France* (1999) 28 EHRR 265, *Funke v France* (1993) 16 EHRR 297 and *Orkem v EC Commission* [1989] ECR 3283. He distinguished *Serves* and *Orkem* and expressed reservations about the reasoning in *Funke*, pointing out that the court in *Saunders* –

> "did not regard that case as casting doubt upon the clear distinction which it drew between extrajudicial inquiries and the use of the material thereby obtained in a subsequent criminal prosecution".

[11] It accordingly appears clear that further examination of the authorities does not lead one to a different conclusion from that which we reached in *Clinton v Bradley*, that Article 6(1) of the Convention is directed towards the fairness of the trial itself and is not concerned with extra-judicial inquiries, with the consequence that a person to whom those inquiries are directed does not have a reasonable excuse for failing or refusing to comply with a financial investigator's requirements merely because the information sought may be potentially incriminating.

[12] Mr Larkin submitted that the fact that the respondent had been charged with a substantive offence before the investigators required him to attend in June 1998 made a critical difference, since the trial must be regarded as having commenced when he was charged and the protection of Article 6(1)

thenceforth applied. One may note that in *Saunders v UK* the defendants were not charged until after the interviews by the DTI inspectors and that several of the judges of the ECtHR dissented or expressed reservations about the Court's conclusion that Article 6(1) does not apply to the use of statements obtained in pre-trial investigations. Nevertheless, the majority of the Court, aware of the dissent and reservations, expressed themselves in the terms of paragraph 67 of the judgment and that must be taken to represent their considered view. We respectfully agree that it is a correct view of the law as it applies in our system of criminal justice. The trial judge has full power to admit or exclude any evidence, applying recognised standards of fairness to the accused, and if excluded that evidence cannot be put before the tribunal of fact which will decide his guilt or innocence. The fact that the accused was charged with the substantive offence on which he is to be tried before the investigation took place does not affect the validity of this proposition, which would in our opinion hold good even if the answers to the questions posed will involve direct admissions of guilt. In *Orkem v EC Commission* the investigating body and the deciding body were one and the same, whereas in a case such as the present they are separate and if the evidence is ruled inadmissible at trial the tribunal of fact will never get to hear of it.

[13] We accordingly conclude that the respondent did not have a reasonable excuse for failing and refusing to comply with the requirements of the financial investigators and that he should have been found guilty of an offence under paragraph 5(1) of Schedule 2 to the 1996 Order. We answer question 1 in the negative. Question 2 does not arise. The respondent's conviction is therefore affirmed.