Neutral Citation No. [2012] NIQB 55 | *Ref:* **WEA8536**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **18/6/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Walsh's Application [2012] NIQB 55

AN APPLICATION BY JOHN CHRISTOPHER WALSH

FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is the application for judicial review by John Christopher Walsh in relation to the decisions of the Department of Justice of 5 July 2011 and 10 May 2012 upon his application for compensation for miscarriage of justice. Ms Quinlivan QC and Mr Devine appeared for the applicant, Mr McGleenan for the respondent and Mr Scoffield for the Northern Ireland Human Rights Commission as intervener.

[2] The applicant was convicted on 7 December 1992 of possession of explosives, namely a coffee jar bomb. The conviction was quashed by the Court of Appeal on 16 March 2010 ([2010] NICA 7). The applicant then made an application under section 133 of the Criminal Justice Act 1988 for compensation for miscarriage of justice. The basis of entitlement to compensation for miscarriage of justice was considered by the Supreme Court and the decision was issued on 11 May 2011 in R (on the application of Adams) v. Secretary of State for Justice and MacDermott and McCartneys Application [2011] UKSC 18 and [2011] NI 42.

[3] Further to the decision of the Supreme Court the application for compensation for miscarriage of justice was considered by the Minister of Justice and that led to the decision of 5 July 2011. The Northern Ireland Human Rights Commission made a written submission to the Court on this application for judicial review and in the light of that submission the Department referred the matter back

to the Minister who issued a further decision on 10 May 2012. Thus the initial judicial review challenge to the decision of 5 July 2011 was extended to the decision of 10 May 2012.

[4] The background appears from the judgment of Morgan LCJ in the Court of Appeal quashing the conviction, which judgment I append to this decision. The trial Judge in 1992 was Judge Petrie QC. The matter went on appeal to the Court of Appeal in 1993 when MacDermott LJ delivered the judgment dismissing the appeal. The Criminal Cases Review Commission became involved and the matter returned to the Court of Appeal in 2002 and Carswell LCJ delivered the judgment dismissing the appeal. The matter returned to the Court of Appeal in 2007 when Kerr LCJ delivered the judgment granting leave to reopen the appeal. Finally the conviction was quashed by Morgan LCJ's judgment in the Court of Appeal on 16 March 2010.

Compensation for miscarriage of justice

[5] Section 133 of the Criminal Justice Act 1988 represents the adoption of Article 14(6) of the International Covenant on Civil and Political Rights and provides as follows –

> "(1) Subject to subsection (2) below when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non disclosure of the unknown fact was wholly or partly attributable to the person convicted."

[6] The operative words for present purposes are underlined above. There must be new or newly discovered facts. There must be a 'miscarriage of justice'. The new facts must establish the miscarriage of justice to the criminal standard of beyond reasonable doubt. The boundaries of the concept of 'miscarriage of justice' have been the subject of much judicial debate. The Supreme Court has reformulated the approach to applications for compensation for miscarriage of justice. The Supreme Court began from the framework provided by Dyson LJ in the Court of Appeal in England and Wales where he had identified four categories of cases to be considered in dealing with the concept of miscarriage of justice.

The first category is where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.

The second category is where the fresh evidence is such that had it been available at the time of the trial no reasonable jury could properly have convicted the defendant.

The third category is where the fresh evidence renders the conviction unsafe in that had it been available at the time of the trial a reasonable jury might or might not have convicted the defendant.

The fourth category is where something has gone seriously wrong in the investigation of the offence or the conduct of the trial resulting in the conviction of someone who should not have been convicted.

[7] The Supreme Court confirmed that category four, where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, in effect concerns abuse of process and is not included in the concept of miscarriage of justice.

Category three, where there has been fresh evidence which renders the conviction unsafe, in effect applies the safety test on an appeal against conviction and represents every quashed conviction and is not included in the concept of miscarriage of justice.

Category one, where there is new evidence which shows clearly that the defendant is innocent, is included in the concept of miscarriage of justice.

Category two, defined by the Court of Appeal as fresh evidence upon which no reasonable jury would have convicted and reformulated by the Supreme Court, is also included in the concept of miscarriage of justice.

[8] Thus a borderline has to be drawn between category two cases which are included in the compensation scheme and category three cases which are excluded from the compensation scheme. The debate in the present application for compensation has been whether the case falls into category two or category three.

[9] The reformulation of category two was stated by Lord Phillips at paragraph 55 as being – '*A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.*'

Lord Hope at paragraph 102 stated that he would rephrase category two so that it fitted more narrowly into the language of Article 14(6) and section 133 – '*I would limit it to cases where the new or newly discovered fact shows conclusively that there was a miscarriage of justice because the evidence that was used to obtain the conviction was so undermined by the new or newly discovered fact that no conviction could possibly be based upon it.*'

Lord Kerr at paragraph 178 stated that the test was -'*whether, on the facts as they now stand revealed, it can be concluded beyond reasonable doubt that the applicant should not have been convicted.*'

The other two Supreme Court Justices in the majority, Lady Hale and Lord Clarke, were prepared to subscribe to the test for category two as reformulated by Lord Phillips.

The evidence at the trial

[10] Before HH Judge Petrie there were several aspects to the evidence.

First of all there is evidence of the soldiers in the patrol and in particular of Corporal Blacklock and Private Boyce. The key prosecution witness was Cpl Blacklock who stopped the applicant in an alleyway and on asking him to empty his pockets the evidence was that the applicant produced a coffee jar bomb that was placed on an adjacent wall. Pte Boyce gave supporting but not identical evidence. The trial Judge accepted the soldiers' evidence.

Secondly, there was forensic evidence that included the presence of an explosive trace on the applicant's left hand but generally the absence of explosive traces and fibres and fingerprints to link the applicant or his clothing to the coffee jar. Mr Glass, the fingerprint expert, concluded that it would be highly improbable that there would be prints on the jar. The forensic evidence was described by the trial Judge as 'neutral'.

Thirdly, the defendant's credibility. The trial Judge was not satisfied by the defendant's explanation for his presence at the scene which was not on the route to his stated destination nor was he satisfied that he was going for a night out with so little money.

Fourthly, the trial Judge drew an adverse inference against the defendant because the defendant stated at trial that there was another man present in the alleyway where he had been stopped, a matter he had not mentioned when he was interviewed by police.

The 1993 Court of Appeal

[11] In the first Court of Appeal the focus was on the forensic evidence. No new evidence was introduced. A trace of RDX explosive had been found on the applicant's left hand. The applicant had stated that he touched the wall where the jar had been placed and that may have accounted for the presence of the explosive on his left hand. There had been no other trace of explosives on his hands or in his pockets. There had been no fibres found on the bomb connecting the bomb to his clothing. There had been no fingerprints on the jar connecting him to the jar in which the explosives were contained. The judgment of MacDermott LJ in the Court of Appeal dismissed the appeal.

The 2002 Court of Appeal

[12] The case returned to the Court of Appeal in 2002 where Carswell LCJ gave the judgment. There was new evidence from the two soldiers, forensic evidence from Dr Lloyd and an additional witness named Conor Bradley.

The two soldiers had made new statements but they were not brought before the Court of Appeal which, therefore, did not examine that issue.

Dr Lloyd gave evidence that it could be the position that there would be no residue of explosives on the jar but that he would have expected there to be fibres on the jar from the clothing and he would have expected residues in the applicant's pocket. However the Court of Appeal concluded that these were all issues that had been debated at the trial and on the first appeal and nothing new had been introduced by the evidence of Dr Lloyd.

The additional witness, Conor Bradley, gave evidence that he was present in the entry at the same time as the applicant. His evidence was rejected by the Court of Appeal. Further, the Court of Appeal concluded that Conor Bradley's evidence undermined the applicant's account in that he had called a witness who could not support him and this was an added credibility issue against the applicant.

On the other hand the Court of Appeal rejected the adverse inference that had been drawn by the trial judge in relation to his failure to mention the presence of a man in the alleyway when questioned by police.

The 2007 Court of Appeal

[13] The case returned to the Court of Appeal in 2007 on an application to reopen the appeal. The new statements of the two soldiers were considered. The statements were not the same as their evidence in all respects and in particular Pte Boyce gave a different account of his movements at the time. By the judgment of Kerr LCJ the Court of Appeal gave leave to reopen the appeal.

The 2010 Court of Appeal

[14] The case was reconsidered by the Court of Appeal in 2010. New evidence consisted of the additional statements from the two soldiers, from Mr Bayle in relation to fingerprints and from Mr Logan in relation to fingerprints and further new evidence concerned the non disclosure of information at the trial.

[15] In relation to the statements of the soldiers, Pte Boyce had changed his movements during the patrol in that he had originally stated that he came to the scene from a certain direction and he now agreed that that was not correct and that he had approached the scene from a different direction. This raised the issue of his consistency and also raised an issue about the evidence of Cpl Blacklock who had placed Pte Boyce 20 yards behind him when the incident occurred. The Court of

Appeal noted that Cpl Blacklock had stated that he did not know Pte Boyce's precise position. The Court of Appeal did not regard Pte Boyce's statement as undermining Cpl Blacklock.

[16] The new forensic evidence from Mr Bayle and Mr Logan concerned fingerprints and the glass jar, the smooth cellotape around the jar, the sticky cellotape around the jar and the top of the jar. Mr Bayle had expected fingerprints to be found and his evidence indicated that the evidence of Mr Glass, the fingerprint expert at the original trial, had been unsatisfactory evidence in a number of respects and that some of his evidence was mistaken. Mr Logan gave evidence about the effect of bagging samples, as was the case, as opposed to boxing samples and where bagging may have created a risk of loss of fingerprints.

[17] There was new evidence concerning the non disclosure of the presence near the scene of a person described as 'a known top IRA man', which it was being suggested might have been connected with the incident in that this person might have brought the carrier of the jar to the scene. The Court of Appeal stated that at best this provided a partial theory on the presence of the bomb.

[18] In relation to the inference drawn by the previous Court of Appeal from the rejection of the Bradley evidence the Court of Appeal stated that, while the rejection of that evidence might not undermine the applicant's case, it left his credibility damaged as had been found by the trial judge.

[19] The Court of Appeal expressed unease about the applicant's conviction and noted in particular the fingerprint evidence, which raised a query about whether the forensic evidence could be described as neutral, and, secondly, the reliability of Boyce as a supporting witness. For those reasons Morgan LCJ delivered the judgment of the Court of Appeal quashing the conviction.

The 2011 review by the Department

[20] A letter of 16 June 2011 from the Department of Justice to the applicant referred to new or newly discovered facts as being threefold. First of all the fingerprint evidence, secondly the evidence concerning the bagging rather than the boxing of material for fingerprints and, thirdly, Private Boyce's further statement. The conclusion to the letter stated that there were substantive elements of the evidence on which the applicant was convicted which remained intact and that the purpose of the letter was to invite comment on behalf of the applicant. The applicant submitted comments. The result was the decision of the Department of 5 July 2011 refusing compensation.

[21] The decision of 5 July 2011 set out the substantive elements of the evidence on which the applicant was convicted which the Department stated remained intact. There were stated to be at least three elements of the evidence that remained intact, namely Corporal Blacklock's evidence, the traces of RDX on the applicant's left hand

and the applicant's explanation for his presence at the scene which the trial judge had not believed. The conclusion of the Department was that the new evidence had not undermined the basis of the conviction and the applicant was not entitled to compensation.

The Human Rights Commission comments on the 2011 review

[22] The Human Rights Commission made its written submission to the Court and this in turn was submitted to the Minister for reconsideration of the decision. The submission referred to there being additional items of new evidence which it was suggested the Department had not taken into account. The further matters were the non disclosure of the presence of the top IRA man, the evidence of Dr Lloyd in relation to explosive residue transfers that it would have been difficult to remove from the outside of the jar, and the fibre residue transfers from the applicant's jacket that would have been expected to be on the bomb.

[23] Further the HRC commented on the three substantive matters relied on by the Department as remaining intact.

In relation to the RDX detected on the applicant's left hand the HRC stated that the significance of this evidence and the manner by which the substance might have come to be there were so unclear that the trial judge had determined that it had to be left out of account. Accordingly it was stated that there was a strong argument that the Department acted wrongly in considering the issue to be a strand of evidence supporting the applicant's guilt.

In relation to the applicant's rejected explanation for his presence at the scene the HRC stated that there was a strong argument that the Department's reliance on the rejected explanation was not properly to be regarded as evidence against the applicant. Rather this was said to be evidence only that the applicant was being untruthful and not probative of his possession of explosives.

In relation to the evidence of Cpl Blacklock the HRC stated that the evidence may have been undermined by forensic evidence which related to the absence of explosives on fibres and the absence of fingerprints.

The nature of the task to be undertaken by the Department in the present case

[24] The exercise that the Minister is undertaking is to look at all the facts as they now stand revealed. The current known facts include the further facts that are available from the decision of the Court of Appeal quashing the conviction and any other new facts that have emerged from the earlier appeals. Overall it is necessary to take account of all the remaining evidence so that a comprehensive assessment of all current facts is completed.

[25] The object in the present case is to determine if the evidence against the applicant has been so undermined that no conviction could possibly be based upon

that evidence, that is, to determine if the case falls into category two as reformulated by the Supreme Court.

[26] However, the task is to decide the issue by taking into account what the Court of Appeal quashing the conviction has stated but without being governed by what has been stated or not stated. The Court of Appeal in hearing the appeal is performing a different task and applying a different test to the task being undertaken and the test being applied by the Minister. The Court of Appeal is determining the safety of the conviction. The Minister is determining whether the applicant could possibly have been convicted on the evidence now revealed. Perhaps this is a task best suited to a Judge accustomed to making an assessment of evidence in criminal proceedings, rather than a Minister, no doubt advised by legally qualified officials, but Parliament has decided in section 133 of the Act that this is a decision for a Minister.

[27] While the decisions of the Courts provide the material on which the Minister will make a decision, it is for the Minister to make the assessment. The Minister must form his own view in relation to the material. I refer to Lord Kerr at paragraph 169 of the report in Adams -

> "In my opinion, the decision as to whether the statutory conditions have been fulfilled is one for the Secretary of State to make and he may not relinquish that decision to the Court of Appeal. True, of course, it is that the material on which the decision is taken will derive in most cases from the judgment of the Court of Appeal. True it also is that it would not be appropriate for the Secretary of State to depart from the reasoning that underlies that judgment unless for good reason it is shown to be erroneous but the Secretary of State must make his own decision based on all relevant information touching on the question whether there has been a miscarriage of justice".

The 2012 review by the Department

[28] The Department carried out a review of the evidence and issued the second decision on 10 May 2012, again to the effect that the evidence had not been so undermined that no conviction could possibly be based upon it.

[29] The competing arguments on the application for judicial review have concerned whether the Minister has approached the case in accordance with the approach laid down by the Supreme Court and whether he has taken into account matters that should not have been taken into account or failed to take into account matters he should have taken into account.

[30] Ms Quinliven criticised the Department's review of the evidence. It was contended that the Department took an overly restrictive approach when considering the judgment of the Court of Appeal in quashing the conviction and further that the elements of the evidence that were said by the Department to have remained intact could not be sufficient to support a conviction. The Department identified four items of remaining evidence against the applicant.

[31] The first item referred to in the Department's review was Cpl Blacklock's evidence that he stopped the applicant who then produced a coffee jar bomb. The Department raised the issue as to whether that evidence has been undermined by the revised statement of Boyce or by the new forensic evidence. Reference was made to the finding of the trial judge on the soldiers' credibility not being lightly set aside. The comment was made that the Court of Appeal did not find that Cpl Blacklock's evidence had been undermined.

[32] The Court of Appeal quashed the conviction with particular reference to the Boyce statement and the fingerprint evidence. The Court of Appeal was satisfied that the conviction was unsafe without having to state a conclusion as to evidence being undermined. That is likely to be so in the quashing of any conviction. The undermining of the evidence against the accused is an assessment to be undertaken by the Minister. The decision of the court is unlikely to state the conclusion that the Minister must reach, given the different tasks of the Court of Appeal and the Minister. Given the different tasks being undertaken by the Court of Appeal and the Minister caution must be exercised in seeking to rely on what the Court of Appeal has not stated. On the particular facts the impact of the total forensic evidence on Cpl Blacklock's evidence required assessment. That is not a task that the Department undertook.

[33] The second item in the review was Pte Boyce's statement that he saw the bomb in the applicant's hand, this being stated to be subject to a potential credibility challenge. The Department commented that Pte Boyce's evidence that he saw the applicant with the bomb remained intact and that the Court of Appeal had not gone further than saying that Pte Boyce's statement was significant in itself and that it might have affected the trial judge's assessment of his reliability.

[34] The Department relied on the form of wording the Court of Appeal adopted in relation to Boyce. It is implicit, however, that the Department did not consider the Boyce statement to affect Blacklock's evidence, a conclusion they were entitled to reach. As to the effect of the Boyce statement on Boyce's evidence, the Department recognised the credibility issue raised by the changed account but still regarded the evidence in relation to the applicant to remain intact, a conclusion they were entitled to reach. However this evidence too, as with Cpl Blacklock's, must be subject to assessment in the light of the total forensic evidence.

[35] The third item in the review was the discovery of RDX on the applicant's left hand. The Department commented that while the trial Judge left this out of account the first Court of Appeal stated that it remained a factor in the case which, along with

other forensic factors, the trial judge was entitled to describe as neutral. The Department, however, also stated that this item supported the applicant's guilt.

[36] The presence of the RDX is a factor that the Department is entitled to take into account. It is a step up from noting its presence or from treating it as a factor in neutral forensic evidence to regarding its presence as supportive of guilt. The disregard or neutrality of this factor recognises an issue about its presence being by reason of possible contamination, given the absence of any other forensic connection. The applicant's explanation for the presence of the explosive trace was that he may have touched the wall where he claimed the jar had been when he arrived at the scene. In that event the traces may have been consistent with his account and may not support his guilt. On the prosecution case the presence of the RDX was the result of the applicant being in possession of the jar but it remains to be considered whether, in the light of the total forensic evidence, the absence of other traces connecting the applicant to the jar could be explained. Again the discussion returns to an analysis of the forensic evidence as now revealed. The fact that the RDX was present is not *by itself* an indicator of guilt until possible contamination is excluded.

[37] The fourth item in the review was the explanation for the applicant's presence at the scene at the time. This is a matter on which the trial judge found against the applicant so his credibility was a factor.

[38] The applicant contended that this item should not have been taken into account by the Department. I am satisfied that this is a finding to be taken into account in the assessment by the Department.

[39] The Department's review then proceeded to consider three areas of new evidence. The first matter was the non-disclosure of the presence of the top IRA man in the vicinity. The Department commented that the relevance of this person to the events had not been established and that the Court of Appeal did not identify this as a reason for quashing the conviction.

[40] That this was not identified as a reason for the quashing of the conviction is not a basis on which it should be disregarded. It is a consideration for the Department to take into account.

[41] The second matter was the evidence of Dr Lloyd in the second appeal in relation to residue and fibre transfers. The Department commented that the judgment of Carswell LCJ found that the forensic issues raised by Dr Lloyd had been raised before the trial judge and the first Court of Appeal. The Department stated that Dr Lloyd's evidence was not a factor in the Court of Appeal quashing the conviction.

[42] While Dr Lloyd's evidence was not new evidence arising out of the appeal in which the conviction was quashed, it is nevertheless new evidence in the case as it is part of the factual matrix as it now stands revealed. There may be cases where there is more than one appeal. In the first appeal evidence on a particular issue may have no impact on the outcome of the appeal. On a second appeal the new evidence

rejected in the first appeal may have added significance by reason of other developments. Matters must be treated cumulatively. Dr Lloyd's evidence should be taken into account.

[43] The third matter was the fingerprint evidence from Mr Bayle and Mr Logan. The Department commented that Mr Bayle had expected there to be fingerprints on the jar and that Mr Logan's evidence was that fingerprints might have been lost in bagging. The Department noted the Court of Appeal's statement that had this evidence been before the trial judge he would have had to evaluate whether the forensic evidence was neutral.

[44] However, in setting out its conclusion the Court of Appeal stated that had the fingerprint evidence been available at the trial it might reasonably have affected the trial judge's view as to whether the forensic evidence was neutral. Together with Boyce's statement this led to the conclusion that the conviction was unsafe.

[45] This new forensic evidence has to be weighed with all the other evidence. What is apparent is that the new evidence impacts on the fingerprint evidence given at the trial. This requires a reassessment of all the evidence. Thus the evidence of the soldiers and of the presence of the RDX relied on by the Department must be considered in the light of all the forensic evidence to determine whether the case falls into category two or category three.

[46] For the reasons appearing above there are a number of respects in which the Department's review is incomplete. I propose to refer the matter back to the Department to reconsider the decision in the light of this judgment.

[47] A wealth of material was lodged in Court in the course of this application, much of it not required for the purposes of the decision to be made by the Court. Ms Quinliven quite properly did not refer to all of this material. The time and expense involved in the journey undertaken through the Courts means that applicants must not bring excess baggage, however vital they may consider it to be. Counsel are the first check point and must set aside material not relevant to the decision to be made by the Court.

[48] The Supreme Court decided that MacDermott and McCartneys Application fell within category two and should be the subject of compensation. There was some debate as to whether this Court should decide the issue of entitlement to compensation on this application for judicial review. At first instance I do not propose to make such a decision. Entitlement to compensation for miscarriage of justice is a decision for the Minister as stated in the legislation. At appellate level there may be a different approach but at first instance this is a matter for the Minister. I refer the decision back to the Minister to reconsider in the light of this judgment.

Neutral Citation No. [2010] NICA 7 | *Ref:* **MOR7797**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **16/03/10**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

JOHN CHRISTOPHER WALSH

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Before Morgan LCJ, Girvan LJ and McCloskey J

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Morgan LCJ (delivering the judgment of the court)

History of the case

[1] The appellant was convicted by HHJ Petrie on 7 December 1992 of possession of an explosive substance, namely a coffee jar bomb, with intent, contrary to s. 3(1)(b) of the Explosive Substances Act 1883 and sentenced to 14 years imprisonment. He appealed against conviction, and in a written judgment, delivered by MacDermott LJ on 7 January 1994, the Court of Appeal upheld his conviction. His solicitors applied on 10 March 1997 to the Secretary of State to review the conviction under s. 14(1)(a) of the Criminal Appeal (NI) Act 1980. On establishment of the Criminal Cases

Review Commission, the matter passed into their domain, and by reference dated 27 March 2000, the Commission referred the case back to the Court of Appeal.

[2] The conviction was upheld a second time, in a written judgment of Carswell LCJ given on 11 January 2002. The appellant thereafter asked the CCRC to review his case again, without success, but came before the Court of Appeal in person in January 2007. In a judgment delivered by Kerr LCJ on 24 January 2007 the Court of Appeal granted leave for the appeal to be reopened. An application to admit fresh expert evidence consisting of two reports dated 4 September 2007 and 21 September 2007 from Mr Bayle concerning the significance of the absence of any fingerprints from the appellant on the coffee jar was granted on 9 November 2007. The hearing of the appeal was delayed by reason of changes of representation on the part of the appellant.

[3] On the hearing of this appeal the appellant was represented by Mr Fitzgerald QC who appeared with Mr Devine. The Crown was represented by Mr McCrudden. We are grateful to all counsel for their helpful written and oral submissions.

The evidence at the trial

[4] On 5 June 1991, at 1.40pm, the appellant was arrested as he walked through an alleyway between Kerrykeel Gardens and Suffolk Road in Belfast. He was stopped by a soldier, Corporal Blacklock, the leader of an army foot patrol, who asked him to take his hands out of his pockets. The evidence of Corporal Blacklock was that when the appellant took his hands out of his pockets, he had a coffee jar bomb in his right hand. Corporal Blacklock told him to put the jar on a nearby wall. Another member of the patrol, Private Boyce, gave evidence that he was on the Suffolk Road and was at most 20 feet behind the corporal in or about the middle of the road, crossing towards the right when he saw the appellant walking towards Corporal Blacklock in the alleyway and being stopped. He claimed that from that time the corporal was always within his sight. As he got closer, he saw that the person was holding a coffee-jar-like device in his right hand. He was told to put it on the wall. Private Boyce then bagged his hands for the preservation of evidence.

[5] The army patrol was a four man brick comprised of Corporal Blacklock, Private Boyce, Private Eames and Private Whillis. All but Private Boyce said that they entered Suffolk Road some way, about 150 metres, to the south of the entrance to the alleyway. Neither Private Eames nor Private Whillis saw the corporal stop the appellant or observed the exchange between them. The alleyway lay at a right angle to Suffolk Road and they had no view of it because of a high hedge at its southern corner. They could not confirm or deny the corporal's averment that the appellant had removed the coffee jar bomb from his jacket pocket. Private Boyce's evidence was that the patrol entered the Suffolk Road at a different point, a gate opposite the alleyway. Entry at this location would have allowed him a clear view of the entrance to the alleyway if he had been following Corporal Blacklock at a distance of some 20 feet. If the patrol had entered the Suffolk Road at the point indicated in the other soldiers' evidence, he would not have been able to see the exchange if he had been 20 feet behind Corporal Blacklock on the same side of the road as him, which was a position attributed to him by Corporal Blacklock. If, however, he was towards the opposite side of the road his view into the alleyway would have been better depending upon how close to Corporal Blacklock he was.

[6] Forensic evidence in relation to explosives was given by Dr Murray. Testing revealed traces of RDX, one of the two components of the bomb, on the appellant's left hand but not the inside of his left pocket. There was no explosives residue on his right hand or the inside of his right pocket. In cross-examination Dr Murray agreed that if there was a significant amount of semtex on the surface of the coffee jar bomb and it was in contact with another surface transfer of residue would be expected. Dr Murray also agreed that if the bomb maker put the explosives in the jar and then continued with his contaminated hands or gloves to assemble the device the outside of the jar would have been contaminated. In answer to the judge Dr Murray said that it probably would not be all that difficult to make sure that there was no contamination on the outside if a conscious effort was made.

[7] Dr Griffen gave evidence in relation to fibres. She had carried out an examination of the coffee jar bomb and found no fibres connected to the appellant's clothing. She said that the jacket pocket would not shed fibres very readily and that a strong contact would probably be required to pull off some fibres from the jacket. She said that the shiny surfaces of the jar and the smooth portion of the cellotape would not provide good receptors but that a substantial amount of the cellotape was sticky side up and was about the most receptive piece of material that you can have.

[8] Inspector Glass dealt with fingerprints. He explained that the fingerprint examination was carried out on 17 June 1991 after the examination for fibres. At an earlier stage the jar had been handled by the ATO and packaged by the scenes of crime officer in a plastic bag. In those circumstances Inspector Glass concluded that it would be highly unlikely that any fingerprints would be retained on the jar for fingerprint examination. In cross-examination he asserted that sticky tape was not a good recipient for fingerprints. "You may get one maybe in about a million". Although he accepted that glass is one of the best recipients of fingerprints, he stated that it was a known fact that in general for examination of scenes for fingerprints only about 30% of them would bear fingerprints so that even with a good recipient the chances of getting fingerprints for anything more than 25% is rare.

[9] The learned trial judge rejected an application for a direction that there was no case to answer. The appellant gave evidence. He said that he had come from his home and was going to meet a friend at an inn on the Suffolk Road. He was not familiar with the area but thought the alleyway was a shortcut. He met Corporal Blacklock who motioned to him to take his hands out of his pockets. When he did so the corporal asked the defendant "what is that?" and referred to the device which the appellant says was on the wall to his right nearby. The appellant said that there was another man walking in the same direction as him about 15 feet in front of them who passed the corporal on the corporal's right-hand side whereas the device was on the wall on the left-hand side. The soldiers denied seeing any such person.

The Judgment at First Instance

[10] It was submitted on behalf of the appellant that the absence of any forensic evidence to link him to the coffee jar bomb was a point in his favour. The learned trial judge concluded that the absence of traces of explosives on the appellant's jacket was not of great significance because the bomb maker was likely to ensure if possible that no traces might contaminate a person carrying the device. He did not place significance on the absence of fibres. The appellant's counsel recognised in light of the evidence of Inspector Glass that he could not advance the appellant's case on the basis of the absence of fingerprints. The learned trial judge concluded, therefore, that the forensic evidence was neutral.

[11] In evaluating the oral evidence the judge looked particularly at the crucial evidence of Corporal Blacklock and Private Boyce. He concluded that neither of them had any reason to try to make false allegations against the appellant. He noted the variance between Private Boyce and the other members of the patrol in relation to their entry onto the Suffolk Road. He concluded that there was nothing to cause any of the soldiers to remember the details of what happened until the events began to occur and he accepted that there was evidence that Boyce as well as Blacklock could have seen the appellant with the device in his hand as Boyce had stated.

[12] The learned trial judge made various criticisms of the evidence of the appellant but stated that his main criticism related to the fact that although at the hearing he alleged that there was another man in the alleyway in front of him he had not mentioned this at the time. The appellant said that he mentioned this at interview on 7 June 1991 although there is no record of this in the police interview notes. The learned trial judge found it strange that he did not refer to the other person immediately when he was stopped. He went on to draw an adverse inference about the failure to mention this fact relying on Article 3 of the Criminal Evidence (Northern Ireland) Order 1988. He rejected the appellant's account. He accepted the evidence of the soldiers and convicted the appellant.

The Appeals

[13] In his first appeal which was dismissed on 7 January 1994 the appellant focused his argument on the forensic aspects of the case. The court rejected the submission that because traces of RDX were found on the left hand of the appellant one would have expected similar traces on the inside of the left pocket. That would depend entirely upon the nature of contact. The court also rejected the submission that contamination of the right-hand pocket would have been expected if the jar had been kept in it relying on the evidence of Dr Murray that the bomb maker would not have had difficulty in preventing such contamination. The court found that the absence of fingerprints was of no assistance to the appellant and dismissed the appeal.

[14] Following a reference from the Criminal Cases Review Commission (CCRC), the appellant came before the court again on 11 June 2001. He applied for and was granted leave to call Conor Bradley, Liam Magill and Dr John Lloyd to attend and be examined before the court. Liam Magill was not, in the event, called to give evidence.

[15] Dr Lloyd was a forensic scientist who had not himself seen the bomb but reviewed and commented on the findings and conclusions of Dr Murray's evidence at trial. His evidence was that it would have been difficult to remove all traces of explosives residue from the outside of the jar because of the extreme persistence of semtex. He found that there was no evidence that the outside of the jar had been cleaned. He accepted that a skilled bomb maker taking rigorous precautions could have assembled the device without contaminating the outside of the device with residues. He would have expected fibres from the jacket to be on the bomb and residue from the bomb to be in the jacket pocket.

[16] Conor Bradley's evidence was that he and Liam Magill had been walking up the Suffolk Road at the time of this incident. They saw a soldier at the mouth of the alleyway and when they were 15 to 20 feet away saw a man turn out of the alleyway and come down Suffolk Road towards them. They then turned into the alleyway where they saw two soldiers and "a fellow", who one of the soldiers was holding against the fence with a hand on his chest. He said that he and Mr Magill walked through the middle of the group. The soldiers saw them but didn't stop them. Mr Bradley did not come forward at the time but claimed that in 1996 he saw an article appealing for witnesses in the Irish News and responded to it.

[17] The court rejected Mr Bradley's evidence as not worthy of belief. They did not believe that he was there at all. Neither the soldiers nor the appellant mentioned seeing two men at the relevant time. His account of hearing about the incident and reading the appeal in a newspaper was not credible. In any event the man referred to could not have been responsible for leaving the bomb on the wall as he allegedly passed Corporal Blacklock on the other side of the alleyway. The only explanation for the position of the bomb as contended for by the appellant would require some other person to have left the bomb on the wall before the soldiers arrived on the scene. The court rejected that suggestion as extraordinarily unlikely.

[18] The court did, however, accept the appellant's submissions in relation to the drawing of the adverse inference. Carswell LCJ found that the trial judge should not have drawn an adverse inference against the appellant in relation to his testimony about the man who had preceded him in the alleyway, as it was not an integral part of his defence or something he could reasonably have been expected to mention when questioned. The court indicated that if the evidence had remained as it was at the trial they might have felt constrained to hold that they could not be satisfied that the trial judge must have reached the same conclusion about the appellant's account if he had not drawn the inference. They concluded, however, that in light of the evidence of Mr Bradley they were satisfied that there was no other man in the entry and in addition concluded that the fact that false evidence had been adduced to bolster the appeal itself undermined the appellant's case. The appeal was dismissed.

The issues in this appeal

[19] The decision to reopen the second appeal on 24 January 2007 was made because that court had not considered certain additional materials in relation to the evidence of the soldiers. In particular, Private Boyce had made a further statement on 24 November 1998 in which he now accepted that he had come onto the Suffolk Road at the point indicated by the other members of the brick. He asserted that his position was on the opposite side of the Suffolk Road from Corporal Blacklock. He stated that he saw Corporal Blacklock with the appellant who was static in the alleyway. This information was relied upon by the CCRC in referring the matter to the Court of Appeal but the court considered that no application to admit this evidence had been made to them and they did not, therefore, consider it during the second appeal.

[20] We admitted the further statement from Private Boyce without objection from the Crown. That statement contradicted his evidence at the trial in two respects. He now accepted that he had not enjoyed a view of the alleyway as a result of emerging from a gate directly opposite it. In fact it was now common case that the gate in question was connected to scrapyard premises into which the soldiers could not have gained entry. His view of the alleyway was now dependent upon the extent to which he could place himself on the opposite side of the road from Corporal

Blacklock and sufficiently close to him to enjoy a view into the alleyway. As Mr Fitzgerald pointed out in his submissions, one of the difficulties with this account is that in several passages of his evidence Corporal Blacklock had described the set-up of the brick and placed Private Boyce approximately 20 feet directly behind him. If that was correct it called into question the accuracy of Private Boyce's latest statement.

[21] The second respect in which the second statement contradicted Private Boyce's evidence at the trial was his assertion that the appellant was static when he first saw him. Private Boyce goes a little further in his statement in that he suggests that the fact that the appellant was static suggested that the appellant was not a courier and it appears that he was relying on this to suggest that the appellant's involvement was more sinister. Mr Fitzgerald submitted that this latter point tended to suggest that the witness was someone with a propensity to make assertions with a view to supporting an outcome rather than attempting to remember events that had occurred. In any event this cast further doubt on the reliability of Private Boyce's evidence.

[22] In response Mr McCrudden submitted that the departures in the new statement were not significant. The trial judge was clearly alive to the fact that Private Boyce was inconsistent with the other soldiers in his evidence about where he had emerged onto the Suffolk Road. In his CCRC statement he said that he operated behind Blacklock and in support of him keeping him in view at all times. He had remained consistent on the central issue about the appellant's movements. It had been accepted that there was no inconsistency in the account given by Blacklock in his latest statement. We consider that the trial judge was best placed to form a view as to the credibility of the soldiers and his assessment ought not lightly to be disregarded. In our view very little weight should be given to the account of Corporal Blacklock about the position of Private Boyce because Blacklock in his evidence indicated that he did not know Boyce's exact position.

[23] The second issue advanced by the appellant related to the significance of the absence of fingerprints on the coffee jar and cellotape. It was clear from the photographs and evidence that the upper portion of the coffee jar had cellotape wound around it to keep portions of the device in place. The evidence also indicated that in some parts the sticky side rather than smooth side of the cellotape faced

outwards. Mr Bayle is an experienced fingerprint expert. It was his evidence that the glass, the smooth side of the cellotape, the sticky side of the cellotape and the top of the jar were good receptors for ridge details. If the coffee jar had been held tightly in the right-hand as suggested in some of the evidence, he would have expected to find prints. He accepted that Inspector Glass may have been right to say that in general only 30% of scenes contained fingerprints but such a figure was not appropriate for glass. The suggestion that in only 25% of cases fingerprints would be found with glass was not satisfactory. Inspector Glass's assertion that ridge details were found on sticky tape only one time in a million was untrue. Mr Bayle gave his opinion that Inspector Glass was wrong to assert that it was highly improbable that fingerprints could have been found on the coffee jar when forensically examined on 17 June 1991.

[24] We gave leave for Mr Logan, the head of the PSNI Fingerprint Bureau, to be called on the issue of the extent to which the retention of fingerprints might have been affected by the work of the ATO and especially by the bagging of the items. It appears that at this time these items were bagged rather than securely boxed. Both experts accepted that in those circumstances there was a risk of loss of fingerprints by rubbing. Mr Logan did not seek to explain or stand over the percentages offered by Inspector Glass. He said that the receptiveness of sticky tape would depend very much on whether it was clean or dirty, as well as other factors. He had some experience of the effect of bagging and gave his opinion that there was a possibility or risk that some fingerprints would have been lost. Although there was some challenge to the reliability of Mr Bayle as an expert, there was no serious challenge to his criticisms of Inspector Glass except in relation to the effect of bagging and the work done by the ATO.

[25] It is clear that the evidence of Inspector Glass was of considerable significance in that it dissuaded the appellant's counsel from advancing the case that the absence of fingerprints was to the appellant's advantage. The newly admitted evidence suggests that the figures quoted in evidence by Inspector Glass were unreliable. The suggestion that because of bagging it was highly improbable that any fingerprints would remain is at odds with the evidence of Mr Logan whose evidence on this issue was very measured and who said that there was a possibility or risk that fingerprints would have been lost.

[26] The third issue raised by the appellant concerned an alleged non-disclosure. The papers now available indicate that at the time of the detention of the appellant Private Whillis was detailed to go to the Kerrykeel Gardens side of the alleyway. While there he noticed a vehicle in which a person described on intelligence grounds as a top IRA man was travelling. This man was connected to an address on Suffolk Road and another address in Kerrykeel Gardens. In light of the discovery of the coffee jar bomb and his presence in the immediate vicinity he was arrested at 3:35 p.m. that afternoon. He was an interviewed on six occasions on 5 and 6 June 1991. It was put to him that police believed that he may have been the person who drove the bomber to the area. He was released without charge.

[27] There was some forensic investigation of this man's car to see whether he could be linked to the bomb. No link was established. It appears that the forensic notes concerning this were available to Dr Lloyd who was retained on behalf of the appellant for the second appeal. He specifically refers to this man in his report. It does not appear, however, that the custody record or interview notes in relation to him were at any stage disclosed to the appellant or his advisers. The appellant submits that the failure to disclose this material deprived the appellant of an opportunity to explore how this device might have ended up in this location at that time.

[28] Mr McCrudden submitted that the material did not pass the test for disclosure. It did not undermine the prosecution case or assist the defence. In that location at that time it would have been well-known to any court that this was an area in which there was a significant degree of terrorist activity. The Crown did not have a duty to trawl their intelligence files to identify each and every such person. Although there is considerable force in these submissions this is not just a case of identifying someone who is connected to an address in the area. He was seen in the immediate vicinity at the relevant time and the circumstances in which he was seen were sufficient to cause him to be arrested and questioned over two days.

[29] The fourth matter pursued by the appellant related to the inference which the second appeal court drew from the false evidence of Mr Bradley. Mr Bradley and Mr Magill made themselves known to police after an appeal for witnesses was published in the Irish News on 1 July 1996. They both made police statements. They were then interviewed by the CCRC and their accounts were consistent with their

police statements. The CCRC could not make any definitive judgment on their evidence but concluded that it provided a plausible account as to why the incident became fixed in their minds and why Mr Bradley recalled a man emerging from the alleyway. There was no evidence to suggest that they had been encouraged to come forward by the appellant or indeed that they knew the appellant.

[30] Against that background Mr Fitzgerald submitted that the inference that reliance on the false evidence of Mr Bradley itself undermined the appellant's case was unsustainable. We have closely examined this portion of the judgment. It is clear that the principal issue discussed in this passage is the conclusion that the false evidence of Mr Bradley does not disturb the finding of the learned trial judge that there was no other man in the entry. That conclusion necessarily cast doubt on the reliability of the appellant's evidence. Although, therefore, the advancement of this evidence might not be said to undermine the appellant's case it certainly left his credibility in the damaged state found by the learned trial judge.

[31] The appellant also relied on the absence of a good character direction and the new evidence of Dr Lloyd which was admitted on the second appeal. These points were both considered in the course of the second appeal. They were of no assistance to the appellant and there is no reason for us to consider reopening them.

Conclusion

[32] The Court's powers to overturn a conviction are contained in s. 2 of the Criminal Appeal (NI) Act 1980, which provides that the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction is unsafe. The manner in which the court should carry out its task was helpfully reviewed in R v Pollock [2004] NICA 34. At paragraph 32 the following principles were identified:

1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been

introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.

3. The court should eschew speculation as to what may have influenced the jury to its verdict.
4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal.

[33] In this case, of course, fresh evidence has been introduced. The approach which the court should apply in those circumstances is set out in the opinion of Lord Bingham in R v Pendleton [2002] 1 CAR 441.

> "The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate the evidence to the rest of the evidence which the jury heard. For these reasons, it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

Of course we are well placed to identify the considerations which led to the finding of guilt because we have the reasoned, written judgment of the learned trial judge and are as marked therefore not subject to the disadvantage identified in this passage where the decision is the unreasoned verdict of the jury.

[34] Applying these principles it seems to us that the fresh evidence relating to Private Boyce and the admission by the Crown that he could not have entered the Suffolk Road as stated in his evidence relates to a deficiency in the evidence of Private Boyce which was in any event identified by the learned trial judge. He specifically found that since there was nothing unusual occurring there was nothing to cause any of the soldiers to remember the details of what happened until the events began to unfold. The recollection seven years later that the appellant was

static rather than moving when he first saw him is of no more than modest significance.

[35] There is no doubt that the evidence of Inspector Glass prevented any submission contending that the absence of fingerprints on the coffee jar was a point in favour of the appellant. Some of his evidence appears to have misled the court although there is no suggestion that this was deliberate. The fresh evidence indicated a strong likelihood that if the coffee jar had been handled by the appellant as alleged a fingerprint would have been detectable immediately thereafter. It was also clear, however, that the forensic bagging techniques used at that time raised the possibility that any such fingerprint would have been lost in transfer. If this evidence had been before the learned trial judge it would have been for him to evaluate its significance on the issue of whether the forensic evidence was neutral.

[36] The non-disclosure point is more doubtful. The thesis on which the top IRA man was arrested was that he had transported the bomb carrier to the scene. He was extensively questioned about this and there was no evidence to connect him to the incident. There was no evidence of any other person in the vicinity of the coffee jar at any material time and the question remained as to how it got there. The reference to the top IRA man could at best have provided a partial theory. We have already commented on the previous court's approach to Bradley's evidence.

[37] As a result of the second hearing before the Court of Appeal the adverse inference which formed the main criticism of the appellant's evidence has fallen away. The fresh evidence in relation to fingerprints might reasonably have affected the learned trial judge's view as to whether the forensic evidence was neutral. The second statement from Private Boyce gives some material which might have affected the evaluation of his reliability. For those reasons we are left with a significant sense of unease about the safety of this verdict. We bear in mind that the appellant is a person of previous good character. It is on that basis that we allow this appeal.