

# Judicial Communications Office

28 January 2021

## COURT DELIVERS REASONS FOR QUASHING CONVICTIONS

### Summary of Judgment

The Court of Appeal<sup>1</sup> today delivered its reasons for quashing Michael Devine's convictions for attempted murder, possession of a firearm and ammunition and belonging to a proscribed organisation. His conviction dates from 1981 and was recently referred to the Court of Appeal by the Criminal Cases Review Commission.

#### Introduction

Michael Devine ("the appellant") was first arrested in January 1979 (when he was aged 17) for a number of suspected offences arising from an alleged paramilitary meeting at Divis Flats during which he allegedly disposed of a gun by throwing it from a window when the meeting was interrupted by an Army raid. The gun had allegedly been used by the appellant on 8 October 1978 to shoot a police officer (Counts 7-10). The appellant was released without charge due to insufficient evidence. In June 1979 it was alleged that the appellant conspired to inflict grievous bodily harm on Kathleen Trainor, a potential Crown witness in a prosecution against Sean Hughes arising from the Divis Flats events (Counts 4-6). On 29 September 1979 the appellant and Paul Kelly were arrested by the police when they were stopped on a motorbike that had been hijacked earlier that evening (Counts 1-3 and 12).

During three police interviews following his arrest on 29 September the appellant was recorded by the interviewing officers as having made full admissions to all of the 12 offences ultimately included on the Bill of Indictment (the extra count being one of belonging to a proscribed organisation, the INLA). Both the appellant and Paul Kelly, independently of each other and without any opportunity to confer, complained to the police doctor that false admissions were being recorded by the interviewing police and alleged that the officers had written things he had not said. He also denied having made the earlier admissions.

The appellant was convicted on 5 February 1981 of 10 offences (he was found not guilty of the offences of hijacking and taking and driving away). Paul Kelly was convicted of possession of a firearm with intent but also found not guilty to the offences of hijacking and taking and driving away. The acquittals on these charges were on the basis that the prosecution had not adduced any evidence identifying the motorbike. The defence case was that no admissions were made and there was no mention or questioning about the motorbike, its alleged hijacking, the alleged attempted murder or the alleged attack on Ms Trainor until the very end of the final interview when a summary of the appellant's alleged admissions were read to him. The trial judge made a number of findings and conclusions including that the appellant's claims about the conduct of the police interviews were "a lying fabrication", that the police officers were impressive witnesses and the appellant was "... a most unconvincing witness ... a conceited and facile liar ... with complete disregard for the truth". The trial judge also found that the appellant's complaints to the police

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<sup>1</sup> The panel was the Lord Chief Justice, Lord Justice Treacy and Lord Justice McCloskey. Lord Justice McCloskey delivered the judgment of the Court.

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doctor were "... without foundation and were made for the express purpose of enabling allegations to be made against the interviewing officers".

Both the appellant and Paul Kelly pursued appeals against their convictions. Paul Kelly's conviction was quashed by the Court of Appeal on 11 September 1981 on the basis that the prosecution had failed to prove that he was intending to commit an offence of hijacking, that he had used the gun to prevent his arrest, or that he intended to use the gun to prevent his arrest or the arrest of another. The appellant had based his appeal on his claim that he had obtained an indication from three witnesses that they would provide statements relating to the attack on Kathleen Trainor. The appellant claimed his counsel advised him to withdraw his appeal on the day it was due to be heard and he accepted that advice.

The Criminal Cases Review Commission ("CCRC") referred the conviction to the Court of Appeal after identifying a number of new factors including the absence of modern standards of fairness in the police interview process (see paragraph [19] of the judgment). The appellant adopted the grounds formulated by the CCRC and added further grounds about the approach taken by the trial judge (paragraphs [20] - [43]). The Crown's ("the respondent's") submissions are set out in paragraphs [43] - [57] of the judgment.

## Governing Principles

The principles to be applied by the Court of Appeal when considering criminal appeals (which includes CCRC referrals) are set out in paragraphs [58] to [61]. These include the principles governing the admissibility of confessions, the court's approach to the safety of such convictions, disclosure at common law and police misconduct.

## The Court's Conclusions

The Court firstly addressed a matter which it identified at the hearing as one of some substance, namely the witness statement of Constable Collins and the issues arising there from. Constable Collins was the officer who arrested the appellant on 29 September 1979 following an encounter with him and another male person (alleged to have been Paul Kelly) in the context of a report that a motorbike had been hijacked. The material passages in the statement of Constable Collins are:

*"I ... approached these [two male] persons. As I did so the youth who was astride the bike shouted to his mate 'run Kelly'. ....  
[Following a chase] ...  
I arrested [the appellant] ... and brought him to Hastings Street [police station] ...  
I cautioned him and asked him about the motor bike and he replied that he had found it in Albert Street and that the key, gloves and helmet were with it. I then informed CID ...."*

The appellant's lawyers were in possession of Constable Collins' witness statement at the trial. The constable did not give evidence, being by then deceased. Neither prosecution nor defence sought to adduce in evidence his statement. The constable, as confirmed in the excerpts, reported to CID in the wake of the arrest of the appellant. The Court assumed that the interviewing detectives received a briefing before the interviews of the appellant commenced and said it was clear from the evidence of the interviews that certain of the questions posed by the officers must have been based on the material content of what later became Constable Collins' written statement. Furthermore the

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transcript of the cross examination of Detective Sergeant Harper revealed that prior to the commencement of the first interview he had "*certain information*" about the appellant and his associates and either "*had*" an intelligence file or "*had seen*" such a file containing such information. He further confirmed his pre-interview knowledge of the circumstances of and reasons for the appellant's earlier arrest in January 1979.

The Court said it was clear from the trial transcript that certain answers made by DS Harper in examination in chief and cross examination must have been based on the passage in the statement of Constable Collins relating to what the appellant said in response to the caution. This was referred to in the trial judge's judgment when he made two conclusions, each manifestly unfavourable to the appellant:

*"The first of these conclusions arose out of an analytical exercise which is demonstrably erroneous. The error lies in the judge's assessment that it was "clear beyond peradventure" that prior to the relevant interview Messrs Harper and Lumley knew nothing about the account which the Appellant proceeded to give of how he came to be in possession of the motor cycle. This error is exposed by those aspects of the evidence highlighted above. The judge failed to engage with this evidence. Furthermore there was no engagement with the statement of Constable Collins. It follows that one significant aspect of the judge's reasoning in finding Detective Sergeant Harper and Detective Constable Lumley to be "truthful and convincing witnesses" is unsustainable. Turning to the second conclusion, the judge's withering condemnation of the Appellant's veracity omitted the essential exercise of considering what (per Constable Collins' statement) the Appellant had said about securing possession of the motor cycle when cautioned and the consistency between what he said then (on the one hand) and said later in interview and in evidence (on the other)."*

The Court said the fact that the appellant and Paul Kelly had joint legal representation must also be evaluated in this context. It said the "*Run Kelly*" passage in the statement of Constable Collins was, on any showing, prejudicial to Paul Kelly. In contrast, those passages in the same statement highlighted the potential to undermine the prosecution case and fortify the appellant's defence. The Court noted that the statement of Constable Collins was not deployed on behalf of the appellant either at his trial or as part of his ultimately aborted appeal and said it was concerned with the fact that this was so and not the reasons why this occurred. It said this must give rise to significant concern about the safety of the appellant's convictions.

The next matter addressed by the Court arose out of what the appellant and Paul Kelly recounted to the police doctors who examined them in custody. The appellant underwent two medical examinations by different doctors. In the record of the first, the doctor recorded the appellant's claim that during his three interviews (to date) "*... things have been written down as having been said by him, but he says he hasn't ....*" Notably, according to the record, this interaction between the doctor and the appellant was stimulated by the appellant's request to see the doctor for the specific purpose of communicating this concern. The second of the medical examinations was carried out at around midday the following day, following further interviews. It recorded:

*"Told me that interviewers were writing down things that he had not said and that this am they said that he was denying things that he was supposed to have said yesterday. Says he is refusing to talk to interviewers until he sees a solicitor."*

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The Court said the trial judge, in his judgment, did not engage with any of this evidence. Nor did he engage with the evidence that Paul Kelly had made, in substance, the same complaint about the conduct of the same interviewing officers, namely DS Harper and DC Lumley. Furthermore the judge did not consider the fact that these complaints were made independently of each other, without any communication between the two arrested persons. The Court said that in this way the trial judge failed to engage with evidence which clearly bore on his assessment of the veracity of the testimony of DS Harper and DC Lumley and the evidence of the appellant and that this served to exacerbate its concern.

The third issue of substance was that prosecution adduced eyewitness evidence that the person who hijacked the motorbike had a moustache. The Court said this could not have been a description of the appellant and there was therefore a direct conflict between the eyewitness description of the hijacker and the alleged admissions of the appellant that he was that person. The trial judge did not address this issue in his judgment. The Court considered that it was incumbent upon him to do so.

A further issue of substance of concern was the post-conviction evidence relating to the professional conduct of DS Harper (summarised in paragraphs [35]-[40] of the judgment). The Court said it was not its function to make any finding adverse to DS Harper but that it may properly consider this evidence. It found it impossible to overlook the strong similarities between the conduct attributed by the appellant to DS Harper in compiling interview notes containing fabricated admissions and the conduct alleged against him in *R v Santus*. The Court said this gave it a concern which was aggravated by the other post-conviction evidence relating to the professional conduct of DS Harper and that the cumulative effect of these sources of evidence served to “lengthen the shadow over the reliability of the admissions attributed to the appellant and fortify its reservations about the safety of his convictions”:

“To summarise, there are four issues of substance which, cumulatively, generate irresistible unease about the safety of the Appellant’s convictions. It is unnecessary to give consideration to any of the other grounds of appeal. Our clear conclusion is that the convictions of Mr Devine must be regarded as unsafe. It follows that the appeal is allowed.”

## **Commission Referrals: Disclosure**

The referral which the CCRC made in the case was contained in its detailed report. The report referred to the existence of a so-called “Confidential Annex” entitled: “*Annex 5 – Overview of confidential material in CCRC reference 00111/204 – R v Michael Devine.*” This report was not contained in the papers transmitted to this court but it was provided on the morning of the hearing to the Court and to the PPS. A brief outline (less than 200 words) had been provided by the PPS in its skeleton argument but it was confirmed that consideration had not been given to the question of whether any of these “confidential” materials should be disclosed to the appellant.

The CCRC’s powers and duties relating to the acquisition and disclosure of documents and other materials are governed by sections 17 – 25 of the Criminal Appeal Act 1995 (the “1995 Act”) (outlined in paragraphs [75] – [76] of the judgment). The Court said the statute focuses on the investigative and other activities of the CCRC undertaken with a view to deciding whether to refer a given case to the Court of Appeal but is silent on the matter of the CCRC’s powers and duties of disclosure at the stage of making a referral or subsequently: “It says nothing about making

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disclosure of information and other materials to those persons and agencies who will thereafter be directly involved: the PPS, prosecuting counsel, the defendant, the defendant's legal representatives and the court. Furthermore, the Commission is not subject to the disclosure obligations of prosecutors imposed by the Criminal Investigations and Procedure Act 1996 (the "1996 Act"). In addition there is nothing relevant to the Commission in either the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases or the Attorney General's Guidelines on Disclosure 2020."

The Court said there can be no doubt that in matters of disclosure the CCRC is subject to relevant common law principles. It cited two reported cases in which the NI Court of Appeal has specifically addressed the issue of "*Confidential Annexes*" attached to the report forming the CCRC's referral<sup>2</sup>. The Court also considered the disclosure regime under the 1996 Act where the prosecutor's disclosure obligations arise at two stages. At the first, or preliminary, stage, the materials to be disclosed are those, not previously disclosed, which in the prosecutor's opinion might undermine the case for the prosecution against the accused. The second stage materialises upon receipt of the defence statement. The duty at this stage is to disclose any materials, not previously disclosed, which might reasonably be expected to assist the defence of the accused person as disclosed by the defence statement. By virtue of section 9 of the 1996 Act the prosecutor's disclosure obligations continued thereafter and there is a specific duty to "*keep under review*" the possibility of disclosing further materials which in the prosecutor's opinion might undermine the case for the prosecution or which might reasonably be expected to assist the accused's defence as disclosed in the defence statement.

The Court also considered whether there are differing approaches to disclosure by the prosecution in an appeal against conviction to the Court of Appeal and in a statutory referral of a conviction to the Court of Appeal by the CCRC, bearing in mind that the 1996 Act does not apply to either species of challenge and, further, a CCRC referral equates to an appeal under section 1 of the Criminal Appeal (NI) Act 1980 "*for all purposes*" (section 10(2) of the Criminal Appeal Act 1995). The Court held the answer was "No" but said it was appropriate too that CCRC referrals can frequently feature material which did not play a part in the prosecution and trial under scrutiny.

It was noted that the Supreme Court has held that in appeals against conviction there is a common law duty of disclosure which it described as "*limited*." In *Nunn*<sup>3</sup>, the UKSC referred to the Attorney General's Guidelines and, in particular, the requirement to make disclosure of any material coming to light post-conviction casting doubt upon the safety of the conviction in the absence of any good reason to the contrary. The UKSC contrasted the differing situations of a defendant at trial and a defendant on appeal, while acknowledging the engagement of two public interests namely (a) the exposure of any flaw in the conviction rendering it unsafe and (b) the finality of criminal proceedings. Finally, it formulated the test of a "*real prospect*" that the post - conviction disclosure pursued "... *may reveal something affecting the safety of the conviction.*" Ultimately the UKSC agreed that the convicted defendant's request for disclosure did not "... *go beyond the simply speculative ...*"

The Court said that *Nunn* is binding in this case and draws attention to the distinction between cases referred to the Court of Appeal by the CCRC and cases where the convicted defendant attempts to pursue a significantly out of time appeal:

"Where the Commission exercises its statutory power of referral it will usually have deployed its extensive powers to gather fresh material which this court must take into

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<sup>2</sup> *R v Morrison and Others* [2009] NICA 1 and *R v Holden* [2011] NICA 35.

<sup>3</sup> *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37.

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account on the issue of safety applying the applicable legal principles. Where a defendant who has not appealed and is significantly out of time fails to convince the Commission to pursue his case he will invariably face significant hurdles in persuading the court to engage in an investigative exercise on disclosure. This emphasises the critical role of the Commission in dealing with suggested miscarriages of justice.”

The Court also drew attention to the CCRC’s policy on disclosure. While this is a published document the Court said there may be limited awareness of its existence (an extract of the policy was included in the Appendix to the judgment). The Court commented that while no issue regarding the policy arose in the present case practitioners should be aware of it and it should inform their interaction with the CCRC in appropriate circumstances. The Court concluded that it has a separate responsibility to consider the disclosure of confidential material as a result of its receipt of a referral from the CCRC. It considered that henceforth in every such case:

- (i) The PPS should, within a period of not more than ten weeks from receipt of the referral, determine which of the confidential materials should be disclosed to the appellant and proceed to do so. This timeframe should provide adequate time and opportunity for any necessary communication between the PPS and the CCRC.
- (ii) Within a further period of ten weeks the appellant should make any appropriate representations about disclosure to the PPS and a comprehensive response should be made.
- (iii) If the processes outlined above do not yield a consensual outcome the appellant should, within a further period of four weeks, make a disclosure application to this court (as in *Holden*).
- (iv) If any such disclosure application fails to generate a consensual outcome or the court considers it necessary having reviewed the confidential annex there will be a combined *ex parte* and *inter-partes* listing before this court, with the two elements to proceed sequentially. In any case where the PPS does not seek the *ex parte* element, this should be communicated well in advance.

Finally, the Court said it wanted to emphasise that it will in all cases be the ultimate arbiter of any contentious disclosure issues. Furthermore, the power of the court to determine disclosure issues, proactively or otherwise, is exercisable at any stage of the proceedings.

## Conclusion

For the reasons given, the Court concluded that there is merit in the CCRC’s referral of the appellant’s convictions and allowed the appeal.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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