

Judicial Communications Office

23 September 2020

COURT DISMISSES APPEALS

Summary of Judgment

The Court of Appeal today delivered its reasons for dismissing appeals against conviction by David Smith and Michael Smith for the murder of Stephen Carson and an appeal against sentence by David Smith.

Background

David Smith and Michael Smith were found guilty by a jury on 8 November 2018 of the following offences:

David Smith	Murder of Stephen Carson;
Michael Smith	Murder of Stephen Carson and possession of a firearm with intent to commit murder.

The Court heard that at 10.00 pm on 25 February 2016, David and Michael Smith forced their way into the home that Stephen Carson (“the deceased”) shared with his partner, Naomi Smyth, and his nine year old son. Michael Smith was armed with a sawn-off shotgun and David Smith was armed with a hammer. A third man entered the property with them. The deceased ran and hid in the bathroom. Michael Smith assaulted the deceased’s partner and David Smith sprayed her and the deceased’s son in the face with a form of pepper spray. David Smith located the deceased who was on the telephone to the police begging for assistance. Michael Smith shot him in the head at close range through the bathroom door. The men left the property. Michael Smith was arrested the following day at his cousin’s flat when the gun and ammunition were discovered in a bag in a wardrobe. David Smith was arrested around the same time at his home. Both defendants made no comment during police interviews although 26 months afterwards David Smith lodged a defence statement in which he claimed to have an alibi for the murder. He claimed at his trial that up to eight people would be able to vouch for his whereabouts but none was called to give evidence. Michael Smith did not give evidence.

Evidence against the Applicants

At paragraph [36] of its judgment, the Court set out the evidence against the applicants which it said was “compelling”. It was a combination of identification, CCTV, ANPR, cell site analysis and VIPER (video identification) evidence. Michael Smith was also found in possession of the murder weapon, ammunition and a burner mobile phone.

Admission of VIPER evidence

Counsel on behalf of Michael Smith contended that the trial judge erred in admitting the identification evidence alleging that the police failed to comply with Paragraph 7 of Annex A of the PACE Code of Practice on identification (“the Code”). This provides that “the suspect or their solicitor, friend, or appropriate adult must be given a reasonable opportunity to see the complete set of images before it is shown to any witness”. It was alleged that the Code was breached as Michael

Judicial Communications Office

Smith's solicitor, Philip Breen, was not given a "reasonable opportunity" to view the images used in the VIPER procedure before the images were shown to the deceased's partner, Naomi Smith. A statement of agreed facts stated that Mr Breen did not attend due to a misunderstanding about the time of the pre-viewing of the images. On the day of the pre-viewing, Mr Breen had a chance encounter with a Detective Sergeant who was not a member of the VIPER team but who knew the procedure was happening at 3.00 pm and informed Mr Breen accordingly. The Detective Sergeant was however referring to the actual procedure rather than the pre-viewing procedure by the solicitor which was scheduled for 1.00 pm. On foot of this exchange Mr Breen arrived at the police station just before 3.00 pm and was advised that since he had not been present at 1.00 pm, the Identification Officer had determined that the procedure would proceed at 3.00 pm as arranged even though Mr Breen had not pre-viewed the images selected for the procedure.

The prosecution disclosed a handwritten note from Inspector Tener which recorded his instruction that if the solicitor attended at 3.00 pm and requested the pre-viewing then it was "too late as the witness was there and in the circumstances he had had his opportunity and had failed to take it. Also it would be unfair to delay the witness viewing and if he raised any objections we would not have time to address them."

The Court of Appeal said it was clear there was a breach of the Code in this case and that it was not a minor breach:

"The explanation for the experienced defence solicitor's non-attendance at 1.00 pm was plainly as a result of the acknowledged misunderstanding set out in the agreed statement of facts which resulted from the mistaken comment by [the Detective Sergeant] to the solicitor that morning."

The Court said it was a matter of concern that a decision about what should happen next was taken when Mr Breen initially failed to appear and before any explanation for his non-appearance was available. It said the explanation was not put to Inspector Tener to see whether he might wish to reconsider his earlier instruction in light of it and so the effective denial of the opportunity to exercise a right enshrined in the Code took place:

"This is a most unfortunate response from the police and this court deprecates it in the strongest terms. The rights enshrined in the Code are the rights of the suspect, not anyone else. The solicitor, acting on behalf of his client, utilises this safeguard to guarantee against unfairness in the conduct of identification procedures. What occurred constituted a very serious breach of an important safeguard and the police were wrong in acting as they did. In taking the actions they did the police denied the suspect (through his solicitor) the "reasonable opportunity" to preview the images which the Code stipulates that he should have."

The Court commented that the actions of the police in this case were "a serious distortion of the mandatory safeguards set out in the PACE Code". It said that such actions mean that the processes used to secure evidence for use in a trial are flawed:

"Using flawed procedures to gather evidence creates the risk that verdicts reached on the basis of that evidence may eventually have to be set aside as legally unsafe. This risk can arise even in cases where the evidence appears to be strong. Whether the risk materialises or not will depend on the impact the breach has on the overall fairness of

Judicial Communications Office

the trial, and not every flaw will create the unfairness that could make the verdict unsafe. But that is not the point. The point for the police is that every breach of the applicable Code puts the verdict in that case in legal jeopardy. For this reason it is critical that all police officers involved in gathering evidence via the VIPER process are scrupulous in delivering the safeguards set out in the Code. Those safeguards exist for the protection of both the accused and the police. They also help give confidence to the public that our criminal justice system works in the best way possible. It is important for everyone that the Codes are followed carefully so that no avoidable risks to verdicts are generated by the actions of the police when administering these procedures.”

Effects of the breach

The Court, having concluded that there was a serious breach of the Code, then considered whether the denial of the right to influence the images used in the identification procedure had “such an adverse effect on the fairness of the proceedings that the court ought not to admit it” (see Art. 76(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989). In answering this question the Court must consider the nature of the images that the police chose to use in the VIPER procedure. The guidance says ‘ The set of images must include the suspect and at least eight other people who, so far as possible ... resemble the suspect in age, general appearance and position in life.’ The Court was not invited to look at the images but said it had no difficulty in resolving the case without having viewed them.

The Court commented that the Trial Judge had viewed the images twice and heard and saw the witnesses give their evidence and be cross examined. He concluded that he could find “no evidence support a conclusion that the physical appearance of any of the other persons portrayed in either set of images contravenes the requirement of paragraph 2 Annex 2. Nor can I find any basis in the submission that the manner of dress of the respective suspects singles either out from the other portrayed in their respective set of images, so as to impact upon, still less undermines the stated objects at paragraph D.1.2”.

The Court noted that there was no challenge to the Trial Judge’s factual assessment of the images. Moreover the matters to which the solicitor drew attention did not surface during the trial. Mr Breen did not give evidence in the trial and there was no cross examination of the VIPER witnesses regarding the particulars of the images used. Furthermore, the matter was not pursued in the closing speech of counsel and the Trial Judge was not requisitioned on his summing up in relation to this aspect of the identification evidence. Finally, as the Trial Judge rightly observed, the jury was plainly satisfied about the identification evidence as was reflected in their unanimous verdict of guilty:

“For all these reasons we consider that the Trial Judge was entitled on the evidence before him to reach the conclusion [that he did]. We are satisfied that, in this particular case, the breach of the Code which took place did not have a significant adverse effect of the fairness of the proceedings or put this appellant at any substantial disadvantage during the course of his trial. For all these reasons we dismiss this appeal.”

David Smith

The appeal of David Smith was grounded on the contention that the Trial Judge erred in admitting evidence of something the deceased had said about the applicant a week before the shooting. The Court said the evidence against David Smith was compelling. His car was used in the murder. He was caught on CCTV driving his car 4 hours before the murder and 1 hour after the murder. He was

Judicial Communications Office

in the company of his cousin Michael Smith four hours before the murder and Michael Smith was found to be in possession of the murder weapon 25 hours after the murder took place. Furthermore, he was positively identified by an eyewitness as being one of the murderers. David Smith gave an unusual account in his evidence of having an alibi, without having raised the issue in interview and without calling any of the people he said could support his alibi.

The Court said that even if, which we do not accept, the Trial Judge erred in admitting the hearsay evidence its admission, applying the principles in *R v Pollock* [2004] NICA 34, did not render the conviction unsafe. It agreed with the Crown that the hearsay evidence was a small element of the prosecution and paled in comparison to the overwhelming evidence of his involvement in the murder.

The hearsay was the evidence of Naomi Smyth that Stephen Carson told her that he had seen David Smith in the company of Brian "Tiger" Lane close to where he lived in the Ormeau Road a few days before his death. According to her Stephen Carson was panicked and told her that he had taken a detour to ensure that Mr Smith didn't find out where he lived. The prosecution sought to introduce this evidence because Stephen Carson was dead. Following submissions the Trial Judge concluded that the probative value of the statement outweighed the prejudicial effect in its admission. The Court said it was satisfied on the facts of the case that his decision to admit is unimpeachable and the defence had been able to challenge her evidence quite effectively as it produced evidence that Mr Lane had been in prison since 12 February 2016 so that David Smith could not have been in the company of Mr Lane "a few days before" the murder.

The Court said that the Trial Judge had given appropriate directions to the jury, warning of the difficulties the defence faced in challenging hearsay evidence and pointing out some of the deficiencies in the evidence. It noted that David Smith had made no criticism of the judge's direction regarding the hearsay evidence. The Court considered that the Trial Judge was entitled to admit the evidence and having done so properly directed the jury: "If however we were wrong about this we do not consider that its admission rendered the conviction unsafe in light of the overwhelming evidence of his guilt."

On the appeal against sentence by David Smith, the Court considered the Trial Judge was entitled to conclude in light of the "cold-blooded nature of this pre-planned murder" that his personal circumstances did not warrant a reduction in the tariff. It said the judge was correct in rejecting the submission that David Smith's culpability was less than that of Michael Smith:

"David Smith was armed with a hammer, sprayed something in the face of Naomi Smyth, assaulted and threatened her. He was an integral part of this pre-planned murder committed in the presence of the victim's nine year old son. He has a bad criminal record for s.18 wounding (which as the prosecution submit is worse than that of Michael Smith) and he provided the car for use in the murder. The trial judge was entitled to conclude that the culpability of each of the Applicants was equal and sentence them accordingly."

Conclusion

The Court of Appeal dismissed both appeals against conviction and David Smith's appeal against sentence

Judicial Communications Office

NOTES TO EDITORS

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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