

Judicial Communications Office

19 March 2021

COURT DISMISSES APPEAL AGAINST CONVICTION

Summary of Judgment

The Court of Appeal¹ today dismissed an appeal against conviction by John Grace who was convicted of a firearms offence in 1993.

Background

On 18 February 1993, John Grace (“the appellant”) was driving a community minibus when he was stopped by an RUC patrol on the Ballygomartin Road, Belfast. The police found a holdall on a rear seat containing firearms and ammunition. Alan Freeburn was the front seat passenger. On 1 December 1993 the appellant pleaded guilty to one count of possession of firearms and ammunition with intent to endanger life or cause serious injury to property contrary to Article 17 of the Firearms (Northern Ireland) Order 1981. He lodged an appeal against sentence which he abandoned on 24 June 1994. Freeburn pleaded guilty on 5 December 1994 to the same count and was sentenced to seven years’ imprisonment. In January 1995, the applicant purported to lodge an appeal based on disparity of sentence but this was dismissed on 26 May 1995 on the basis that he had previously abandoned his appeal.

On 23 March 2017, the appellant lodged an appeal against conviction on the basis that his conviction was unsafe as a result of the undisclosed involvement of a state agent, Colin Craig, who was alleged to have been employed as a covert human intelligence source at the time. It was contended that the appellant had been deprived of the opportunity to pursue an application to stay the proceedings as an abuse of process on the basis of entrapment and that no trial should have taken place. The case made on behalf of the appellant was that he had been asked by Freeburn to drive him to the Glencash Estate, saying that he had a message to deliver and to collect something. The appellant had no suspicions that Freeburn was embarking on a criminal enterprise and was not surprised as Freeburn could not drive. Freeburn went to a house and Colin Craig answered the door handing over a holdall which Freeburn placed in the rear of the vehicle. The appellant drove onto the Ballygomartin Road but was stopped a short distance later when an RUC police vehicle pulled out from a side street. The police officers opened the rear doors of the minibus and found the holdall. The appellant contended that had no knowledge of the contents of the holdall, was not a member of any paramilitary organisation and had no previous criminal convictions. During his police interviews, one of the interviewing officers remarked to him “Do you think this was an accident? It wasn’t, we followed you all the way from Glencairn.”

Colin Craig was a well-known paramilitary commander in the area. The appellant claimed he was terrified of mentioning the name to the RUC, fearing for his safety and that of his young family. He initially pleaded not guilty but then changed his plea to guilty but his fear of Colin Craig’s reputation ensured that he did not disclose that he did not have the necessary knowledge to be guilty of the criminal offence of possession. Colin Craig was shot dead in 1994. It has subsequently emerged from press reports that it is believed that he was a paid informer/state agent for the RUC

¹ The panel was the Lord Chief Justice, Lord Justice Tracey and Sir Donnell Deeny. The Lord Chief Justice delivered the judgment of the Court.

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Special Branch/Military Intelligence. The appellant believes that Alan Freeburn, who may have been a member of the UVF was set up by Colin Craig and that he was used by Alan to pick up illegal weapons because he was the driver of the community bus. However, in light of the later press reporting about Colin Craig, it is suspected that Craig was acting as a state agent and set up the arrest of Freeburn and the appellant.

In case management hearings before the Court of Appeal it was indicated that the appellant did not want to give evidence and no application under section 25 of the Criminal Appeal (Northern Ireland) Act 1980 ("the 1980 Act") was made to admit evidence. On the morning of the hearing, however, a statement from the appellant was provided and it was indicated that he wished to give evidence. The statement was broadly consistent with the account contained in the skeleton argument but added that the appellant had heard that Freeburn had received a prison sentence for robbery and that "the penny dropped" when he saw Colin Craig hand the holdall over to Freeburn.

In considering whether to receive any evidence on appeal the court must (in accordance with section 25(2) of the 1980 Act) have regard in particular to whether the evidence appeared to be capable of belief; whether it appeared that the evidence may afford any ground for allowing the appeal; whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and whether there was a reasonable explanation for the failure to adduce the evidence at the trial. In light of the allegations made in the skeleton argument the PPS conducted a review of disclosure as a result of which the following material was disclosed:

"Information in late 1994 indicated that the UVF believed Colin Craig had been a security forces informer and that it was rumoured within UVF circles that Craig had set up Loyalist 1. Other information indicated that Craig was suspected of having set up John Grace, arrested by the RUC on 18 February 1993. Information in late 1994 suggested that Craig was an RUC informant who had been responsible for the arrest of John Grace found in possession of a number of firearms bound for the UVF in Belfast."

Shortly before the appeal hearing the depositions and some of the trial papers were located. These indicated that when the appellant was stopped by the RUC he informed police that he had just come from the Glencairn Community Centre and was going to the Highfield Estate to pick up children to take them to the swimming pool. The police officer then asked the appellant to open the rear of the minibus. The officer shone a torch on a red holdall and asked the appellant who owned the bag. He replied, "It's my kids' swimming gear". The officer shone his torch inside the holdall which contained one Uzi type machine-gun with a loaded magazine, one pistol with a loaded magazine and a blue box containing rounds of ammunition. When asked to account for the weapons and ammunition the appellant replied, "Nothing to say". Shortly afterwards the appellant turned towards Freeburn in the presence of police and said loudly to him, "I've just picked him up and he knows nothing about it, it's my responsibility". When asked by police where he met Freeburn the appellant said, "I picked him up at Glencairn/Ballygomartin Road just before you stopped us". When asked about the weapons the following exchange occurred:

"Q. How did the bag and weapons get into the van?

A. I don't know

Q. You told me it was your kids' swimming gear and now you are denying knowledge of it, why is that?

A. I'm saying nothing more until I see the detectives.

Q. Why do you have these guns. What's the point?

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A. Tell that to the RIR man that was killed in our estate last week.”

That was a reference to the murder of a near neighbour of the appellant by Republican terrorists a few days earlier. The papers also contained the trial judge’s sentencing remarks which referred to the plea made on behalf of the appellant accepting that he had no intention of using the firearms but had been prevailed upon to move them. The judge noted that what had led to the agreement to move the weapons was the appellant’s emotion over the killing of a soldier in the community near to him. The judge went on to accept that this was not a course of action but a one-off reaction as a result of his emotional imbalance.

The Court said there were numerous difficulties with the account contained in the appellant’s proposed statement:

- In his statement he said that “the penny dropped” when Craig provided the holdall to Freeburn. The Court said that at the very least he must have suspected that the holdall was connected to paramilitaries and that Freeburn was, therefore, also connected to paramilitaries: “There is simply no innocent explanation for his statement at the scene that the holdall contained his kids’ swimming gear. The purpose of that statement was to prevent the holdall from being opened”;
- The appellant sought to persuade the police that he had just picked Freeburn up. The Court said that statement was made in circumstances where the appellant had at least a suspicion that Freeburn was involved in paramilitary activity but perhaps more importantly was then aware that the holdall contained weapons and ammunition: “The purpose of that statement could only have been to attempt to exonerate Freeburn, the suspected paramilitary”. The Court said the appellant had never suggested that this statement was induced by fear;
- There was a very strong implication in the appellant’s answers to police at the scene that he sought to link the find of the guns to the murder of his neighbour. The Court said that was the case the appellant made at the time of his plea and he had offered no explanation as to why he would have made such a case up at the time of the detection;
- The appellant had every opportunity both at the scene and in the course of his interviews to make the case that he had nothing to do with the find: “Instead his strategy was to draw attention to himself as the person responsible. He offered no explanation for taking that course”; and
- The appellant had the advantage of experienced counsel and solicitors. The Court said he had every opportunity to explain to them any dilemma which he faced. It said his instructions to them were to enter a plea on the basis that this was something that he had become involved in because of a misplaced desire for retribution as a result of the murder of his neighbour.

The Court commented that the evidence which the appellant proposed to give in his statement did not go directly to the issue of entrapment. It said this was not a case where the appellant claimed he was inveigled into participating in some crime by the actions of any person connected to a public authority and that while Freeburn may have been an instigator there was nothing to suggest that he had been entrapped into committing this crime. The Court said that insofar as the appellant contended he was unable to make his case because of his fear of Craig it was relevant to note that Craig was murdered in 1994 and that after that date there was no reason connected to Craig for him to refrain from making any case he wished:

“We do not consider, therefore, that this account which [the appellant] proposed to give approximately 24 years later was capable of belief. We also consider that he had

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every opportunity to explore this account with his counsel and solicitors prior to his decision to enter a plea of guilty. This was a voluntary plea which should not lightly be set aside.”

The Court noted that the test for the admission of fresh evidence under section 25 of the 1980 Act is whether it is expedient or in the interests of justice to admit the evidence. It said the appellant now wanted to argue that he should not be convicted of this offence because he did not have sufficient knowledge and control of the items to constitute possession of law. The Court said this was a case which it was plainly open to him to make a trial and in light of the discrepancies that it had identified it did not consider that it was either expedient or in the interests of justice to permit him to raise that case now.

Disclosure

The essence of the ground of appeal was that there was a failure of disclosure at the original trial about the involvement of Colin Craig in the provision of information to the police. That led to a number of *ex parte* hearings before the Court of Appeal which resulted in the disclosure made by the PPS and noted above and a further disclosure indicating that the UVF and Loyalist paramilitaries believed that Craig was a “tout” and set up a Loyalist.

The Court said the obligation of disclosure in this case is governed by the common law. It referred to the essential principles set out by the House of Lords in R v H [2004] UKHL 3 where Lord Bingham observed the prosecution disclosure was a requirement of basic fairness:

“Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.”

The Court concluded that there was nothing disclosed as a result of the PPS review which suggested that Craig was the instigator of the arrangement to collect the weapons or that there was any involvement by police in instigating, inducing or inciting the commission of the offence.

Entrapment

The appellant’s case was based on the proposition that if proper disclosure had been made it would have enabled him to pursue an argument for a stay of the proceedings on the grounds of abuse of process. The Court referred to its recent review of the case law in cases of state actor entrapment in R v Hill [2020] NICA 30 at [16]-[18]. It said there was no evidential base for a finding of entrapment in this case:

“We are satisfied that a thorough disclosure process was undertaken to ascertain whether there was any material that could have been helpful to the appellant but no such material was available.”

Conclusion

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The Court was satisfied that there was no failure of disclosure in this case and no basis for an argument of abuse of process based upon entrapment. It held that the conviction is safe and dismissed 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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