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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **30/04/2021**

IN THE CROWN COURT SITTING IN BELFAST

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THE QUEEN

v

SOLDIER A and SOLDIER C

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RULING ON ADMISSIBILITY OF EVIDENCE

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Mr L Mably QC with Mr S Magee QC (instructed by the Public Prosecution Service)
Ms C Montgomery QC with Ms H Law (instructed by McCartan Turkington Breen Solicitors) for Soldier A
Mr L McCollum QC with Mr I Turkington (instructed by McCartan Turkington Breen Solicitors) for Soldier C

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O'HARA J

Introduction

[1] The defendants are charged with the murder of Joe McCann who was shot dead on 15 April 1972 in the Markets area of Belfast. The prosecution case is that the two defendants who were members of the Parachute Regiment, together with Paratrooper B who is now dead, fired the shots. It is not known which soldier fired the fatal bullet. That was not established in 1972 and cannot be established now, 49 years later. However, on the prosecution case that does not matter because the three soldiers were acting in concert and are all guilty. In the alternative it is said that they are at least guilty of attempted murder.

[2] The evidence which is alleged to implicate the defendants in the killing comes from two sources. The first is their own statements made in 1972 to the Royal Military Police ("RMP"). The second is statements and answers which they volunteered during interviews with the Historical Enquiries Team ("HET") of the PSNI in March 2010. The defendants contend that all of this evidence is inadmissible and should be excluded pursuant to Article 74(2)(a), (2)(b) and Article 76 of the Police and Criminal Evidence (NI) Order 1989.

[3] The prosecution accept that if this evidence is excluded the charges against the defendants must fail. This ruling is therefore fundamental to the trial proceeding any further.

The Background

[4] The parties presented a six page document containing agreed facts about the case. Those facts include the following:

- In 1972 Mr McCann was on the Army Council of the Official IRA.
- At the time of his death he was the Officer in Command, First Battalion of the Official IRA and a member of an IRA active service unit.
- He was in charge of the Markets area and took part in joint Official IRA and Provisional IRA ambushes.
- He was a skilled gunman.
- One of his tactics was to draw a patrol into an ambush and then to fire from cover.
- He was regarded by the security forces as someone who would be armed and would use his weapon to resist arrest.
- He was known to be in Belfast by early March 1972.
- It was reasonable to assume he would have cover from other gunmen, especially in his own area.
- He was suspected of involvement in the murders of two soldiers, the attempted murders of four policemen and other serious incidents.
- Multiple efforts to arrest him had failed.
- He himself had claimed to a journalist that on 8 April 1972 he had encountered special branch officers in central Belfast and had fired shots at them to escape.
- After his death the Official IRA claimed he had been responsible for the deaths of 15 soldiers.

[5] A statement read into evidence by agreement from a policeman who was known only as B, dated 16 April 1972, said that at 2:50pm on 15 April he was an

observer in a car when the driver spotted Mr McCann in the Markets. Policeman B saw a patrol of paratroopers nearby, at a vehicle check point at the junction of May Street and Joy Street. He went over to them, identified himself, said Mr McCann was in the area and that he was wanted. He then ran to the next junction and met Mr McCann. When Policeman B tried to arrest him, Mr McCann pushed him and ran off down Joy Street away from the soldiers. Policeman B and others shouted at him to halt but to no avail. Then Policeman B heard gunfire from behind him i.e. from where the paratroopers were. Policeman B said that he himself did not open fire. Mr McCann fell to the ground and died quickly at the scene.

[6] The pathologist's report from Dr Derek Carson, now deceased, said that Mr McCann was struck by two or possibly three bullets. The fatal shot went through his upper left buttock from behind and caused terrible injuries which led to his death. No forensic analysis was carried out to discern who fired the fatal shot.

[7] The court heard limited accounts from eye witnesses, none of whom made statements to the police in 1972. The only issue of potential controversy was whether warnings were shouted at Mr McCann but otherwise the account set out above from Policeman B appears to be broadly accurate.

[8] There seems to have been little or no police investigation in 1972. In part that may have been because police were at risk if they conducted door to door enquiries in the Markets area. There was considerable hostility to the security forces in nationalist areas at the time – this was the era of internment from August 1971 and Bloody Sunday in January 1972 as well as what seemed like unending bombings and shootings.

[9] At that time, in fact until late 1973, an understanding was in place between the RUC and the Army whereby the RUC did not arrest and question, or even take witness statements from, soldiers involved in shootings such as this one. This appalling practice was designed, at least in part, to protect soldiers from being prosecuted and in very large measure it succeeded.

[10] By reason of this policy A and C were not questioned by the RUC about the reasonableness of their use of force against Mr McCann. The only exercise in which they were each involved, later on 15 April, the day of the shooting, was giving statements to the Royal Military Police. Their statements were recorded and witnessed by Warrant Officer Wood (now deceased). He was senior in rank to them, A being a corporal and C a private. A and C had no option or choice in this exercise which had the striking features that:

- A and C were ordered to make statements.
- They were not cautioned.
- They had no access to independent legal advice.

[11] An additional element, according to an aide memoire prepared by W/O Wood, was that he was only there to find out what happened and not to assess criminal responsibility. In fact, the purpose of the inquiry was to inform higher military command of what had happened and to make evidence available, if required, to settle any future claims or for an inquest. Only if a soldier volunteered information that he acted illegally was a caution to be given. The other issue of note is that the soldiers were not simply to say that they acted in accordance with the Yellow Card, the instructions to them on opening fire, but were to describe what led them to consider that a particular paragraph of the guidance applied.

[12] In these circumstances the soldiers' statements largely explain what happened. This includes references to them being in riot gear, to them being unable to catch Mr McCann as he ran away, to him ignoring warning shots fired over his head and then to taking aim and shooting at his body. Conspicuously missing is any detailed analysis or explanation of what was in their minds when they fired and why they felt they were entitled to open fire, the sort of material which would have been found if they had been questioned by the police under caution and chosen to respond.

[13] On these statements the question of whether shooting Mr McCann involved the use of reasonable force certainly arises. The defendants do not concede that they amount to confessions of guilt but that possibility is open, at the very least. Despite that it was decided by September 1972 that no charges would be brought against any soldier.

HET

[14] Matters stayed that way until 2009/2010 when the HET of the PSNI became involved. This judgment is not the place to analyse the value and methods of the HET but a brief description is required.

[15] The HET was a unit of the PSNI established as an initiative to re-examine all Troubles' related deaths between 1968 and 1998. Part of its role was to provide answers to questions asked by bereaved families. Another part was to identify new evidential opportunities in cases which remained unsolved. Each case ended with a written report to the bereaved family, if the family wanted one.

[16] The process described by the HET itself was:

(i) Collection and assessment of records and exhibits;

(ii) Review of cases to decide whether investigative or evidential opportunities arose.

(iii) Reinvestigation if there were realistic opportunities with referral to the PSNI Crime Operations Department if criminal proceedings might be undertaken.

(iv) Resolution which might involve judicial proceedings but would certainly involve a written report.

[17] Many of HET's staff were retired police officers, some from within Northern Ireland and some from outside. They did not have powers of arrest but through their experience they knew how to review cases, what to look for and what more might be obtained. In 2010 concerns had arisen about the extent and nature of their role in cases involving deaths attributable to the army. For that reason it was confirmed that if the HET process uncovered evidence which might lead to arrest and prosecution those cases would be transferred from the HET to the Crime Operations Department.

[18] It was also confirmed that the inconsistent use of cautions in the interviewing of former soldiers would come to an end. Henceforth, cautions would be given unless it had been decided that there was no prospect of prosecution. Later in 2013 the HET were criticised by HMIC for giving cautions at all because they were not actually investigators.

[19] From all of this it is apparent that there was at least a degree of ambiguity about the purpose and potential consequences of HET's investigating officers interviewing former soldiers. Was it simply to help understand what had happened before? Were they investigators in the criminal sense at all?

[20] In this case the McCann family unwittingly added to the ambiguity by writing a letter to be shown to the soldiers involved with the HET enquiry. The gist of the letter was that Mr McCann would have viewed them much as he saw himself, a working class man. The family said that they sought the truth, not retribution. They said that Mr McCann would not have borne a grudge towards the soldiers for what they did but that there were people in higher office who were directly culpable. They finished by saying that they could only hope for the truth and to know more about the circumstances of Mr McCann's death.

[21] In March 2020 Mr David Hart and Mr Bob Kinnon of the HET, both former police officers, met the defendants at the offices of their solicitors in London. They met A on 17 March and C on 19 March. In advance they had forwarded their 1972 statements, information about the HET and, most probably, the McCann family letter.

[22] The interviews took similar courses:

- Assurances that their personal details would not be disclosed to the McCann family or their representatives.

- An acknowledgement of the presence of their solicitors.

- Advice to them of their right to consult privately with their solicitors.

- Confirmation that they were not under arrest and could leave at any time.

- A caution that what they said may be given in evidence and it may harm their defence not to mention something which was later relied on.

- There was no reference to any suspicion of murder or attempted murder or to any other specific offence, only that they were being interviewed about the death of Mr McCann who was shot and killed on 15 April 1972.

[23] Each defendant had prepared a written statement which was read into the interview record. Also read into the record were their 1972 RMP statements which they each confirmed they had made.

[24] The only difference of substance between the interviews was that as a result of a series of episodes which were proved by agreed medical evidence, A no longer had any independent memory of the shooting and relied on what was in the documents, his 1972 statement in particular. C did have some independent memory, some parts more detailed than others, even though he was being questioned 38 years later.

[25] Mr Hart gave evidence about these interviews and the process. This was to the following effect:

- As per the letter from the HET to A and C dated July 2009 their remit was to re-examine all Troubles' deaths and bring some resolution to the families, with the Ministry of Defence being able to provide some free legal assistance, if required.

- He did not advise either defendant or their solicitor as to the circumstances in which the 1972 statements had been taken.

- HET was primarily looking for new evidence which might lead to a full blown PSNI investigation.

- HET found nothing new and compelling in this case.

- HET had real difficulties in finding witnesses e.g. Soldier B was abroad and declined to engage while Policeman B could not be identified beyond his cypher.

- A had no memory of the shooting by the time of his interview.

- Mr Hart understood that, if one was required, any investigation for a criminal offence would be conducted by the PSNI after the HET work was completed.

- The normal caution at interview is for a specified offence. In this case no such offence was ever identified.

- A and C were not under arrest.

- He had no reasonable suspicion that they were guilty of any offence.

- His interview was not, in his eyes, part of a criminal investigation.

- He did not expect any prosecution to follow.

- He himself asked the PSNI, when they came to see him about the prosecution, whether the defendants would be interviewed by PSNI because that is what he would have expected.

[26] In fact, after the HET report there was no prosecution until after the McCann family asked the Attorney General to order a new inquest. Instead of doing so the Attorney referred the report to the Public Prosecution Service. The defendants were not then interviewed or arrested by the PSNI but in 2017 they were charged with murder.

The 1972 Statement

[27] The prosecution conceded in its written submission on the *voir dire* that the 1972 RMP statements are not in themselves admissible against the defendants. That concession was inevitable. The common law which applied at that time, before any Emergency Provisions Act or Police and Criminal Evidence Order, was summarised in Judges' Rules which were amended in 1964 in England and Wales – see Practice Note [1964] 1 WLR 152. Those rules were not adopted in Northern Ireland until 1976 (see Hansard 13 October 1976) but since they state what the common law was that later date is of no consequence.

[28] It is beyond dispute that at common law the statements would have to have been excluded because they were ordered rather than volunteered and because no caution was issued by the person taking them. The absence of a caution is easily explained by the limited scope of W/O Wood's role – it was not part of a criminal investigation.

The 2010 interviews and statements

[29] It is the prosecution case that although the 1972 statements were not admissible in evidence, as they were originally made, they have <u>become</u> admissible

because they were adopted by the defendants at their interviews in March 2010. Further, it is submitted that the statements volunteered through the solicitors are also admissible as are their answers to questions asked of them by Mr Hart and Mr Kinnon.

[30] For the defendants it is submitted that all statements and interviews are inadmissible. The gist of that submission is that all of the later interviews and statements are based on the 1972 statements. Since the early statements are conceded to be inadmissible, they cannot be resurrected in some way by being included in the 2010 interviews. Furthermore, not only are they still inadmissible but so is everything else which is derived from them. To hold otherwise would be to allow back into the case the fruit of the poisoned tree i.e. the 1972 statements. Or, as Mr McCollum put it, the poisoned tree itself, never mind the fruit.

[31] The relevant statutory provisions are Articles 74 and 76 of the Police and Criminal Evidence (NI) Order 1989. Article 74(1) provides:

> "74.—(1) In any criminal proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this Article."

Paragraph 2 is then in the following terms:

> "(2) If, in any criminal proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

In this case the defendants rely on both 2(a) and 2(b) i.e. oppression of the defendants and acts said or done. This issue having been raised, the onus is on the prosecution to prove beyond a reasonable doubt that the confessions were not so obtained.

[32] Whether I exclude the confessions under Article 74 the defendants submit that, in any event, they should be excluded under Article 76 which provides:

> "76.—(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[33] Mr Mably's submission for the prosecution on admissibility included the following:

(i) Mr Hart was obliged to caution the defendants in October 2010 in order to comply with Code C in PACE because, even as a civilian, he was investigating a suspected criminal offence. That offence was murder.

(ii) The fact that the caution was given to each defendant shows that there was no ambiguity about the nature of the interview.

(iii) The defendants' solicitors must be taken to have known that the interviews were investigative.

(iv) While the issue of the caution was defective because no suspected crime was identified that is not a breach of any significance.

(v) While the 1972 statement is in itself inadmissible, it does not follow necessarily that it taints the 2010 interviews when it is reintroduced and the defendants' voluntary statements and are interviewed on the basis of them.

(vi) No admission is necessarily inadmissible because it follows on from the 1972 statement.

(vii) The long break from 1972 to 2010 in effect ended the oppression because in 2010 they had legal representation and were cautioned.

(viii) Accordingly, this is not in any sense a further example of the cynical or deliberate denial of rights such as is found in *R v McGovern* [1991] 92 Cr App R 228, R v *Canale* [1990] 91 Cr App R and *Lam Chi-Ming v The Queen* [1991] 2 AC 212.

(ix) The defendants' solicitors must be assumed to have known that the 1972 statements were inadmissible because of the manner in which they were taken.

(x) Even if solider A's statements are excluded, C's are admissible because he answered questions from his memory and did not depend on his 1972 statement which A had to do as a result of his memory loss.

[34] Succinctly and eloquently presented as these submissions were, they must fail. Not only are they contrary to a significant line or lines of authority but they also represent a misunderstanding or misinterpretation of the setting for the 2010 interviews. Among the many points which have not been adequately responded to are the following:

(a) The proposition that the 2010 interviews were part of a police investigation was contradicted by Mr Hart who conducted them with Mr Kinnon. Since his evidence was that they were not investigating suspected criminal activity by the defendants, how could or should the defendants have known that they were?

(b) Mr Hart said a caution was administered only because that had been agreed between his superiors in the HET and the defendants' solicitors. That was a pragmatic way forward but not one which confirmed that a crime was suspected.

(c) The failure to identify a particular suspected crime can be understood in this context but in the context of a trial that failure is not some small breach of the Code. It is a fundamental breach. Indeed, as *R v Kirk* [2000] 1 WLR 567 shows, failure to inform and caution an interviewee in respect of a more serious offence when he has been cautioned for a lesser offence is a basis for excluding a confession on the grounds of unfairness. It is obviously even more serious not to identify any crime at all. (See also the decision of Sheil J in *R v C* [1997] NIJB 37 in which admissions to rape were excluded because of a failure to caution the accused at all at his first interview, a failure which tainted the subsequent interviews at the start of which he <u>was</u> cautioned.)

(d) As Mr Mably conceded, there is no authority to support the contention that the failure to warn an interviewee about <u>any</u> identified offence is not fatal to resisting an admissibility challenge.

(e) I have no basis for assuming that the defendants' solicitors knew in 2010 that the 1972 statements were inadmissible since the aide memoire of W/O Wood which goes to prove this was not uncovered until much later through investigations made on behalf of the defendants.

(f) Authorities such as *Cadder v HM Advocate* [2010] 1 WLR 2601 explain that it is not sufficient for a legal system to ensure that a suspect knows of his right to silence. It is imperative that he can consult with a solicitor so that he may not only be advised of the right but also whether it is in his best interests to exercise it. For a solicitor to give that advice, the solicitor must know what the circumstances of the 1972 interviews and statements were. Had the solicitors in this case known in 2010 what the circumstances were and that as a result the 1972 statements were inadmissible it is barely conceivable that they would have advised A and C to answer questions in 2010 (unless of course those questions were not part of an investigative process) – see *R v McGovern* above.

[35] The inescapable consequence of the compelling submissions of Ms Montgomery and Mr McCollum is that the 2010 interviews and statements must be entirely excluded, including the 1972 statement and the voluntary statements in 2010. In addition to the points made above they highlighted the line of authority running from *Saunders v United Kingdom* [1997] 23 EHRR 313. In that case Mr Saunders had made statements to the Department of Trade and Industry in the course of its investigation into suspected financial wrongdoing but those answers had been given under compulsion, the threat of prison if he refused to answer. When he was later tried for false accounting and theft those statements were used against him in evidence. The European Court of Human Rights held that this was a breach of his Article 6 right to a fair trial, specifically his right not to incriminate himself.

[36] If confirmation was needed of the significance of that judgment it is found in *Beghal v DPP* [2015] UKSC 49 at paragraph 66 where Lord Hughes stated that evidence obtained by means of legal compulsion is a classic case of evidence which will be unfair to admit. He continued:

> "Even without the direct application of Article 6 ECHR the outcome of the (Article 76) judgment is effectively inevitable. Once Article 6, directly binding on a court under section 6(3) of the Human Rights Act 1998, is brought into the equation, there is simply no room for any contrary conclusion, for, as is shown by Saunders v United Kingdom (1997) 23 EHRR 313 (below), Article 6 has the effect that any use in a criminal prosecution of answers obtained under compulsion of law will be a breach of the right to a fair trial. The presence or absence of other evidence implicating the defendant is irrelevant to this proposition."

[37] What was required in this case and what never took place was that the PSNI should have interviewed the defendants under specific caution, the suspected crime being murder. If that had been done and if admissions had been made, a

prosecution would have been possible. It is not possible in the present circumstances where what is put before the court is the 1972 statement dressed up and freshened up with a new 2010 cover. It is all still the same 1972 statement. Mr Hart recognised that. The surprise is that more people did not.

[38] The safeguards which were denied to the defendants in this case are exactly those which the law requires to be offered and which are offered to suspects from every background – republicans, loyalists and all others. The fact that these defendants were soldiers does not mean they get extra protection from the law but nor do they get less.

[39] For the reasons summarised above I exclude the 2010 materials, i.e. the 1972 statement, the 2010 voluntary statement and the 2010 interviews. I find that both limbs of Article 74(2) apply in that there was continuing oppression of the defendants from 1972 which had not been removed by 2010. I also find that the statements and answers may have been obtained as a consequence of things said and done which were likely to render unreliable any confession made in consequence thereof. The things said and done include the ambiguity around the HET interviews and the fact that to the extent that it was possible to question the defendants about what had happened in 1972, they had to rely on their memories of 38 years previously. In A's case, there was no memory at all and C's was limited. The prosecution has not proved to me beyond a reasonable doubt that the statements were not so obtained. In truth they have come nowhere near proving that.

[40] Accordingly, the statements and the answers at interview which are alleged by the prosecution to amount to confessions cannot be admitted in evidence.

[41] In the event that I am wrong in relation to either Article 74(2)(a) or 2(b), I further rule under Article 76 that all of this evidence must be excluded because the circumstances in which it was obtained are such that admitting this evidence would have such an adverse effect on the fairness of the proceedings that I ought not to admit it. In short, this prosecution is based on an attempt to admit in evidence the 1972 statements made to W/O Wood under military orders. That cannot be allowed to happen, not least because as a result of his specific remit he made little or no attempt to question the defendants in detail. It would be grossly unfair to allow the prosecution to rely on this limited account as proof of its case in circumstances where they weren't allowed or asked to expand on it for almost four decades by which time A had no memory and C had only a partial memory.

[42] I finish with the following two points:

(i) The exclusion of the relevant evidence is not in any way due to fault on the part of the Historical Enquiries Team. Their efforts to provide some level of additional information and resolution for the McCann family were determined and sincere. Quite rightly they have not been attacked in this court by the representatives of the defendants.

(ii) The problem with investigating the killing of Mr McCann does not date back to 2010, it dates back to 1972. In large part that was because of the agreement between the RUC and Army which lasted until 1973 and which precluded the police from questioning soldiers. Many judges before me have condemned that practice. I join them in doing so.