Neutral Citation No [2011] NICA 69 | *Ref:* **COG8351**

Judgment: approved by the Court for handing down | *Delivered:* **22/11/2011**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

MARK CHRISTOPHER BRESLIN (by himself and on behalf of the estate of Geraldine Breslin),
CATHERINA ANNE GALLAGHER, MICHAEL JAMES GALLAGHER (by himself and on behalf of the estate of Adrian Gallagher),
EDMUND WILLIAM GIBSON, STANLEY JAMES McCOMB (by himself and on behalf of the estate of Anne McComb,
MARIAN ELAINE RADFORD (by herself and on behalf of the estate of Alan Radford),
PAUL WILLIAM RADFORD, COLIN DAVID JAMES WILSON,
DENISE FRANCESCA WILSON, GARRY GODFREY CHARLES WILSON,
GERALDINE ANN WILSON (by herself and on behalf of the estate of Lorraine Wilson),
GODFREY DAVID WILSON (by himself and on behalf of the estate of Lorraine Wilson)

Respondents/Plaintiffs;

-and-

JOHN MICHAEL McKEVITT (sued on his own behalf and/or as representing the Real Irish Republican Army ("RIRA") and/or the Army Council and/or leaders and/or members of RIRA),
LIAM CAMPBELL (sued on his own behalf and/or as representing RIRA and/or Army Council and/or leaders and/or members of RIRA),
MICHAEL COLUM MURPHY, SEAMUS DALY

Appellants/Defendants.

Before: Higgins LJ, Girvan LJ and Coghlin LJ

COGHLIN LJ

Further submissions relating to re-trial of Seamus Daly

[1] We refer to the judgment herein delivered by the court on 7 July 2011 and, in particular, to paragraph [127] in the course of which we allowed the appeal of Seamus Daly and indicated that we would hear counsel on the question of a retrial.

A further hearing on the question of whether or not a retrial of Seamus Daly should be directed took place on 14 October 2011. For the purposes of that hearing the plaintiffs/respondents ("the respondents") were represented by Lord Brennan, Mr Lockhart and Mr McGleenan while Ms Higgins QC appeared with Mr Stockman on behalf of Seamus Daly, the defendant/appellant ("the appellant"). We are grateful to both sets of counsel for their helpful and succinct written and oral submissions.

[2] In the course of our judgment we summarised the evidential basis of the case against Seamus Daly as being:

(i) The O'Connor statement.

(ii) The Lisburn telephone evidence.

(iii) The conviction.

The O'Connor statement

[3] As we recorded in our judgment it appears indisputable that without the evidence of the O'Connor statement the case against Seamus Daly would not have succeeded. Consequently, we gave careful consideration to the ruling of the learned trial judge with regard to the admissibility and the weight to be attributed to the O'Connor evidence between paragraphs [103] and [111] of our judgment. There was a significant inconsistency between the statements made by O'Connor to the Gardaí on the morning and in the afternoon of 23 February 1999. The learned trial judge observed that there was no admissible evidence about the reasons for O'Connor's change of position but he did characterise the reason given in his first statement for the omission to bring his phone with him to the public house as "bizarre". For the reasons set out in our judgment the learned trial judge was in error to place any weight upon the apparent consistency of the afternoon statement between 23 February 1999 and December 2001.

The Lisburn telephone records

[4] The learned trial judge described the evidence relating to the movements of the 213 phone on 29 and 30 April 1998 as being at the very least consistent with a scouting operation and movement of the bomb at Lisburn on the following day and, therefore, he held that it constituted evidence of similar activities to those relating to the Omagh incident to which some weight could properly be given. Unfortunately, the learned trial judge did not provide details of the reasoning that led him to such a conclusion. In the course of our judgment we dealt with the Lisburn telephone records between paragraphs [113] and [119] with a summary at paragraph [120]. It may be that the learned trial judge intended to refer to an apparent similarity between a scout car accompanying the car containing the bomb, respectively, at Lisburn on 30 April 1998 and at Omagh on 15 August 1998 and that his reference to a separate scouting operation on 29 April 1998 was in error. Alternatively he may have had a good reason for interpreting the single phone call between Sheila Grew

and Seamus Daly on 29 April 1998 as evidence of such a scouting operation. Unfortunately, he did not provide details of those activities that he considered to be similar and the nature of the similarities.

The conviction

[5] We are grateful to Ms Higgins for quite properly drawing our attention to an error contained in paragraph [122] of our judgment. In that paragraph we referred to the conviction of Seamus Daly resulting from his plea of guilty on 20 November 2000 to membership of Óglaigh na hÉireann on 2 March 2004, some 2 years after the Omagh explosion. Since that conviction was grounded on a plea of guilty it was admissible as an admission and not excluded by the rule in Hollington v. Hewthorn [1943] KB 587 which is concerned with the admissibility of opinion evidence. Daly's conviction, resulting from a plea of guilty, would have been admissible as an admission on his part of membership of a terrorist organisation at the relevant time. His admitted membership related to a period some 2 years subsequent to the Lisburn and Omagh bombings and that would obviously have been a matter for the trial judge to take into account when reaching a final assessment of relevance and weight. During the course of Ruling 13 the learned trial judge recorded at paragraph [5] that it was "common case" that criminal convictions in a foreign court following an admission of guilt were admissible as confessions. At paragraph [9] of the same Ruling he expressed the view that there was no distinction between a conviction for membership of an unlawful association based on events shortly before the index event and a conviction based on events shortly after the index event and, in each case, the question was whether the conviction was of a nature which in the circumstances provided credible evidence of disposition at the relevant time. He acknowledged that where convictions related to a period either a very long time before the index event or a very long time after it the weight of the inference that it constituted evidence of disposition was accordingly reduced. Unfortunately, while the learned trial judge specifically referred to the conviction of the sixth named defendant following a plea of guilty at paragraph [264] of his judgment he did not make any further reference to that conviction when summarising his conclusions at paragraph [269]. In such circumstances, despite the earlier specific references, it is not possible to ascertain whether he took into account the conviction and, if so, what degree of weight he placed upon it.

Discussion

[6] The learned trial judge misdirected himself in taking into account the consistency between statements made by Denis O'Connor on the afternoon of 23 February 1999 and in December 2001. Had he appreciated his error it is not possible to say whether and to what extent that would have affected the weight he would have placed upon the afternoon statement of O'Connor. He did consider that statement would have to be balanced with other evidence. The conviction in March 2004 was a factor that he could have taken into account but there is no clear indication whether or how he did so and, if so, the weight that he attributed to the conviction. There are thus a number of evidential matters that require to be carefully considered in terms of relevance and weight, both individually and balancing them

together, in the course of reaching an overall conclusion as to the case made by the respondents against this appellant. That is not a matter for this court and, accordingly, a retrial will be ordered.