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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY DERMOT QUINN FOR JUDICIAL REVIEW

KERR LCJ

Introduction

[1] This is an application for judicial review of a decision of the Criminal Cases Review Commission declining to refer the conviction of Dermot Quinn to the Court of Appeal in the exercise of the powers available to the Commission under the Criminal Appeal Act 1995.

General background

[2] On 13 April 1998 at about 8.30 pm two detective constables of the Royal Ulster Constabulary were ambushed by two gunmen at a lane off the Ballygassoon Road in County Armagh. The road is in a rural area and runs between Armagh city and Moy. As the policemen were travelling in their car along the lane a green Datsun car emerged from a road on the right into the path of the police officers' car. At the same time their car was raked with bullets fired by two gunmen from the side of the lane. Both police officers suffered serious injuries but one of the detectives managed to fire two shots at the Datsun car which at that stage was reversing towards the police car. It then drove off at speed and turned left on to the Ballygassoon Road.

[3] Some 330 yards from the scene of the shooting is a house that was then occupied by a family called O'Hagan. Members of the family heard the shooting and shortly afterwards a green Datsun car arrived at their home. Two masked gunmen alighted and demanded the keys of a brown Peugeot

car that was parked outside the house. The keys were handed over and both the Peugeot and the Datsun were driven off. A man was seen running across a field and the two cars stopped in the hollow of the road, where, it may be assumed, the man entered one of the cars which then sped off. A police search uncovered the two cars abandoned some 2-3 miles from the O'Hagan house. In the Peugeot two balaclava helmets were found that were subsequently examined in the Forensic Science laboratory. I shall have something more to say about this examination presently.

[4] At 9.27 pm on the evening of the shooting, a police officer stopped a car travelling near Benburb, some 5-6 miles form Ballygassoon Road. The car was driven by a Mrs Mary McCartan and the only passenger was Dermot Quinn, the applicant. Mrs McCartan told the police officer that she was taking the applicant to his girlfriend's house in Dungannon. Both Mrs McCartan and the applicant were arrested.

[5] The applicant was interviewed on several occasions between 14 and 19 April 1988. He was asked to account for his movements on the evening of 13 April. He made no reply to any of the questions put to him. A sample of his hair was taken and this was sent to the Forensic Science laboratory for examination. The applicant's jacket was retained by police and it was also subsequently examined by staff at the laboratory.

[6] At the completion of the interviews the applicant was charged with two offences of attempted murder and a single offence of possession of a firearm with intent to endanger life. He was remanded in custody. A preliminary investigation into the charges was conducted on 27 September 1988 at Armagh magistrates' court. Three members of the O'Hagan family had been summoned to give evidence but failed to appear. They were arrested and brought to court the following day. They informed the court that they were unwilling to give evidence through fear of what might happen to them. The magistrate found that a *prima facie* case had not been raised against the applicant and discharged him.

[7] The applicant was arrested again on 16 July 1990. He was cautioned that if he failed to mention any fact that he subsequently relied on in court this could be treated as supporting a case against him. This caution was administered under article 3 of the Criminal Evidence (Northern Ireland) Order 1988. The applicant made no reply and was conveyed to the police office at Gough Barracks, Armagh. He asked to see a solicitor and the police office attempted to contact one on his behalf. Before a solicitor arrived, the applicant was again cautioned in accordance with article 3 of the 1988 Criminal Evidence (Northern Ireland) Order 1988 in the following terms:

> "You do not have to say anything unless you wish to do so but I must warn you that if you fail to

> mention any fact which you rely on in your defence in court your failure to take this opportunity may be treated in court as supporting any relevant evidence against you. If you do wish to say anything, what you may say may be given in evidence."

[8] The applicant was asked if he understood the caution but made no reply. He was also given Appendix 'D' which set out the circumstances in which adverse inferences could be drawn against him under the 1988 Criminal Evidence Order. He was asked to read it but showed no interest. It was then read to him and he was asked if he understood or wished to ask anything. He made no reply. He was then interviewed. In the course of the interviews the applicant was asked to account for the firearms residues that had been found in his jacket pocket, the fibres that had been found in his hair, and the glass fragments that had been found in the balaclavas on 13 April 1988. In relation to each of these questions he was warned under Article 5 of the 1988 Criminal Evidence Order of the consequences of his failing to give explanations. He made no reply to any questions. He maintained his silence throughout a second interview which also took place before the arrival of his solicitor. He was charged with attempted murder of the two police officers and possession of firearms and ammunition.

[9] A preliminary investigation into the charges was held on 9 November 1990. Two members of the O'Hagan family attended but said that they did not wish to give evidence. Another member of the family did not attend but a medical report was submitted, explaining his absence. The applicant was duly returned for trial and this began on 27 November 1991 before Hutton LCJ sitting at Belfast Crown Court. Again two members of the O'Hagan family attended the trial but, on entering the witness box, said that they did not wish to give evidence because the proceedings took the form of a non-jury trial. The other member of the family did not attend and police gave evidence that he was too frightened to testify.

[10] The prosecution case was based principally on forensic evidence as to fibres in the sample of hair taken from Mr Quinn and the firearm residues found in his jacket. The court was invited to infer that the applicant had failed to explain or account for these forensic findings in interview by the police because he had no explanation to offer that was consistent with his innocence. The trial judge ruled that the statements of the O'Hagan family which had been taken by police during the investigation should be admitted in evidence under article 3 of the Criminal Justice (Evidence Etc.) Order 1988. The applicant contested the admission of the statements, claiming that since he would not be able to cross-examine the witnesses, the admission of the evidence would result in unfairness to him. Hutton LCJ rejected that argument saying: -

> "I am satisfied beyond a reasonable doubt that the three members of the O'Hagan family did not give evidence at the two preliminary investigations because of fear. I have no doubt that that fear has continued and the reason why [they] did not give evidence at this trial was through fear ... I am satisfied beyond a reasonable doubt that the reason stated in this Court ... that they did not wish to give evidence because this was a non-jury trial is completely untrue. I am satisfied that this was a concocted and untruthful reason which was suggested to them by someone else...
>
> ...The provisions of articles 5 and 6 of the 1988 Order are clearly designed to ensure that the accused receives a fair trial. As I am satisfied, having regard to those provisions, that it is in the interests of justice that the statements of the three O'Hagans should be admitted as evidence, it follows that I am satisfied that the accused will receive a fair hearing."

[11] The applicant gave evidence. He said that at the time of the attack on the police officers he was picking mushrooms on a farm owned by a friend, Joseph McCartan. While engaged in this he had been wearing a woollen hat. He left the McCartan house at about 9 pm in a car driven by Mrs McCartan. When he was stopped by police he told them that he had been picking mushrooms. In relation to the firearms residues the applicant testified that these could have come from a number of sources. He had worked with tools in an engineering works and had handled shotguns while hunting several weeks before his arrest. He had picked up shotgun cartridges and put them in his jacket pocket. When asked why he had not told police of these matters when he was interviewed he replied that he had been arrested on very serious charges and he "did not want to get into anything" until he had seen his solicitor.

[12] Joseph McCartan also gave evidence and supported the applicant's alibi. He claimed that on 13 April 1988 the applicant had been at his farm helping to pick mushrooms until 9 pm. He said that while working at the farm the applicant had worn a woollen hat.

[13] In a judgment delivered on 23 December 1991 Hutton LCJ found the applicant guilty of all three offences. In reaching his decision the learned trial judge took into account the following matters: -

- Thirty nine acrylic fibres found in the applicant's hair matched the balaclava helmet that had been found in the Peugeot car;

- Firearm residues found in the pocket of the jacket that the applicant had been wearing when arrested on 13 April 1988;

- The applicant had been found in a car some five to six miles from the scene of the attack approximately an hour after it had taken place;

- The manner in which the applicant and Mr McCartan had given their evidence And their demeanour in the witness box which suggested to him that they had been lying;

- The "very strong" inferences that were to be drawn against the applicant under article 3 of the 1988 Order;

[14] The Lord Chief Justice did not draw adverse inferences against the applicant under article 5 of the 1988 Order in respect of his failure to account to a constable at the time of his arrest for the fibres in his hair, the firearm residues in the jacket and the glass fragments in the balaclava. The learned judge considered that it would not be appropriate to draw such inferences since the applicant had been asked to account for evidence that was present at the time of the first arrest on 13 April 1988, not at the time of the second arrest on 16 July 1990.

[15] The applicant appealed his conviction. The appeal was dismissed by the Court of Appeal on 17 April 2003.

[16] On 30 September 1993 the applicant lodged an application with the European Commission of Human Rights, alleging a breach of article 6.1 of the European Convention on Human Rights, taken in conjunction with article 6.3 (c). He complained that the drawing of an adverse inference from his silence in police custody infringed his rights under article 6 paragraphs 1 and 2 of the Convention not to be required to incriminate himself, the presumption of innocence, his right to silence and the principle that the prosecution bore the burden of proving their case without assistance from the accused. He submitted that this must particularly be the case where an accused was penalised for failing to make a statement in an interrogation conducted by the police before he received advice from his lawyer. The report of the European Commission of Human Rights of 11 December 1997 and an interim resolution of the Committee of Ministers of the Council of Europe of 10 July 1998 concluded that the drawing of an adverse inference against the applicant when he had been denied access to a solicitor constituted a violation of the applicant's article 6 rights.

The application to the Criminal Cases Review Commission

[17] On 19 January 2001 the applicant applied to the Commission for a review of his convictions and sentences. On 28 March 2002 the Commission issued a provisional decision and statement of reasons. In this the Commission reviewed submissions that had been made on the applicant's behalf but concluded that it was "not minded" to refer the convictions to the Court of Appeal. Further representations were made to the Commission on the applicant's behalf and after consideration of these the final decision of the Commission was given on 6 August 2002. It was to the effect that the Commission would not make a reference.

[18] In the decision document of 6 August the Commission summarised the final representations made on behalf of the applicant in this way: -

- "It is a basic proposition of domestic law that courts must apply, so far as they are able, treaty obligations entered into by the UK, as a matter of common law and statutory interpretation, Parliament being presumed to legislate in conformity with international obligations. This includes obligations arising from the Convention.

- … the Criminal Evidence (Northern Ireland) Order 1988 does not require the court, in mandatory terms, to draw inferences from silence, the court when interpreting the Order, in so far as it relates to the exercise of the judge's discretion to draw inferences, should have regard to article 6 of the Convention and relevant decisions of ECtHR.

- Since access to legal advice is a fundamental right and since Mr Quinn was interviewed without a solicitor in breach of this right, the domestic courts are bound not to have regard to any matters (whether of evidence or inference) arising from interviews conducted without the benefit of legal advice.

- It follows that the obligation of the domestic courts not to draw inferences from silence and to disallow evidence arising from the interviews is absolute and that the facts of the case may not be taken into account, even where it cannot be supposed that the absence of legal advice had any functional effect on the suspect or the outcome of the interview.

- Since the domestic courts are bound, in the pursuance of their Convention obligations, to exclude evidence or inferences arising from interview in which the suspect had not had the opportunity to receive legal advice, an appellate court is bound to conclude that where such inferences or evidence have been taken into account, any resulting conviction should be treated as unsafe, irrespective of the other evidence in the case."

[19] The Commission accepted the first two of these propositions, subject to the qualification in relation to the first that courts are obliged to give effect to legislation where the words are plain and unambiguous, even when to do so is contrary to a treaty obligation. In relation to the third proposition the Commission accepted that in developing the common law and interpreting legislation the courts in this jurisdiction should take into account any relevant Convention jurisprudence. It suggested, however, that the courts were not bound to do so in a manner that precisely parallels such jurisprudence. It did not accept that the obligation of the domestic courts not to draw inferences from silence and to disallow evidence arising from the interviews was absolute where there had been a breach of article 6. The Commission pointed out that ECtHR had attached various degrees of significance to the breach of a Convention right and that this approach had been mirrored in domestic cases such as *R v Forbes* [2001] AC 473 and *La Rose v Commissioner of Police for the Metropolis* [2001] EWHC (Admin) 553. It questioned the claim that access to legal advice was so fundamental that it had an absolute value and suggested that this was merely a factor to be taken into account.

[20] The Commission concluded that the Court of Appeal would have concluded that the drawing of inferences against the applicant was justified. In support of this conclusion it cited the following factors: -

- The applicant did not object to being interviewed nor did he ask that the interviews be postponed until his solicitor arrived;

- The failure to give explanations could not be related by the applicant to the fact that he had not seen his solicitor;

- The trial judge's reasoning that "if the accused had been working at the mushroom house on the McCartan's farm at Benburb at 8.30 pm on the evening of 13 April 1988 and had been wearing a black woolly hat, it would have been the easiest thing in the world for him to have told those things to the police" was accepted and endorsed by the Commission;

- The Court of Appeal would have concluded that the lack of access to a solicitor was a factor, but no more than a factor, to be taken into account by a judge when deciding how he should exercise his discretion in whether to draw an inference from the failure to give an account to the police. There was such a clear, common sense basis for the drawing of adverse inferences that the absence of a solicitor made little, if any, difference;

- The applicant was precluded from relying on section 7 of the Human Rights Act 1998 – *R v Lambert* [2002] 2 AC 545, and *R v Kansal (No 2)* [2002] 1 All ER 256.

The referral powers of CCRC

[21] Section 10 (1) of the Criminal Appeal Act 1995, so far as is relevant, provides: -

> "(1) Where a person has been convicted of an offence on indictment in Northern Ireland, the Commission—
>
> may at any time refer the conviction to the Court of Appeal …"

[22] The conditions for making a reference are set out in section 13 of the Act. The relevant portion is as follows: -

> "**13 Conditions for making of references**
>
> (1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12 unless—
>
> (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made
>
> (b) the Commission so consider—
>
> (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, …"

The 'real possibility' test

[23] The Commission's power to refer under section 10 (1) may only be exercised if it has concluded that there is a real possibility that the Court of Appeal would not uphold the conviction on the matter being referred. In *R v Criminal Cases Review Commission ex parte Pearson* [2000] 1 Cr App Rep 141

Lord Bingham of Cornhill dealt with the exercise of this power in the following passage: -

> "The exercise of the power to refer accordingly depends on the judgment of the Commission, and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and to no one else. …
>
> The 'real possibility' test prescribed in section 13 (1) (a) of the 1995 Act as the threshold which the Commission must judge to be crossed before a conviction may be referred to the Court of Appeal is imprecise but plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld. The threshold test is carefully chosen: if the Commission were almost automatically to refer all but the most obviously threadbare cases, its function would be mechanical rather than judgmental and the Court of Appeal would be burdened with a mass of hopeless appeals; if, on the other hand, the Commission were not to refer any case unless it judged the applicant's prospect of success on appeal to be assured, the cases of some deserving applicants would not be referred to the court and the beneficial object which the Commission was established to achieve would be to that extent defeated. The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not. The judgment required of the Commission is a very unusual one, because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take."

[24] I respectfully agree with this reasoning. The Commission's task is to evaluate the prospects of success for a reference, if made, and, as Lord Bingham has pointed out, this is a somewhat atypical exercise in that it involves an estimate of how another tribunal will view the arguments that it has to evaluate. In a case such as the present, however, the task is perhaps not as difficult as, for instance, where a decision has to be made whether the

Court of Appeal might receive fresh evidence and, if so, what effect that evidence might have on the safety of the verdict. Here the Commission was engaged on an analysis of legal issues that the Court of Appeal would have to resolve on a largely undisputed factual matrix.

[25] It is important to recognise that, in dealing with a challenge to the Commission's decision not to refer a case, particularly where that involves a claim that the Commission had reached a wrong view of the law, the court is not necessarily required to reach a conclusion on the competing legal arguments. If the assessment of the legal issues (and therefore the likely outcome of a reference) taken by the Commission is a tenable one, the court should not interfere, even if it considers that there is merit in the contrary view.

[26] In the event, I consider that the Commission's analysis of the legal principles involved cannot be faulted. It is well established, in my opinion, that the absence of a solicitor during interview, while it may represent a violation of the interviewee's article 6 rights, does not inevitably lead to an unsafe conviction. This is but one of the factors to be taken into account. The present case well exemplifies that proposition. The ECmHR, although it held that there had been a violation of article 6.1 in conjunction with article 6.3 (c) of ECHR regarding the applicant's not having a solicitor present during interview, concluded that there had not been a violation of article 6.1 in relation to the drawing of an adverse inferences in the case. At paragraph 63 of its opinion ECmHR said: -

> "63. The Commission considers that the forensic evidence relating to gunpowder traces and linking him to the car used in the offence could be regarded, on a common sense basis, as a situation attracting considerable suspicion and reasonably allowing inferences to be drawn in light of the nature and extent of any explanations provided by the applicant. The inference drawn from the applicant's silence was thus only one of the elements upon which the judge found the charge proven beyond reasonable doubt. The Commission considers that by taking this element into account the judge did not go beyond the limits of fairness in his appreciation of the evidence in the case."

[27] The fact that an inference is wrongly drawn will, in any event, not lead inexorably to the conclusion that the verdict is unsafe. In *R v Walsh* [2002] NIJB 90 the Court of Appeal concluded that the trial judge had been wrong to draw an inference against the appellant under article 3 of the 1988 Order. It

decided, however, that this did not render the finding of guilt unsafe. At pages 98/9 the court said: -

> "The judge accordingly was not justified in drawing an adverse inference under art 3 of the 1988 Order. That does not end the matter, however, for it is then necessary for us to consider whether his drawing the inference has the effect of making the conviction unsafe. …
>
> In putting forward his submission based on art 6 of the Convention Mr Treacy relied on the decision of the European Court of Human Rights in *Murray v United Kingdom* (1996) 22 EHRR 29. The implication of that decision, if not the exact ratio, is that to draw an adverse inference under article 3 from a defendant's failure to mention a fact during a period when access to legal advice was deferred would be a breach of article 6(1) of the Convention. Mr Treacy submitted that such a breach, constituting unfairness in the conduct of the trial, automatically made the conviction unsafe.
>
> We do not consider that this argument can be sustained. The breach of the Convention, if such it be, took place before the Human Rights Act 1998 came into force, and the effect of the decision of the House of Lords in *R v Lambert* [2001] UKHL 37, is that a person appealing against a pre-Act conviction cannot invoke section 7(1) of the 1998 Act and claim that the judge's act in drawing the inference was unlawful. In *R v Kansal* [2001] UKHL 62, some members of the House of Lords expressed doubts about the correctness of the decision in *R v Lambert*, but the majority decided to uphold it.
>
> In any event, for the reasons which we have expressed above, we consider that neither was the trial unfair nor was the conviction unsafe. … As Lord Bingham pointed out in *R v Forbes* [2001] 1 AC 473 at 487, it is always necessary to consider all the facts and the whole history of the proceedings in a particular case to judge whether a defendant's right to a fair trial has been infringed or not."

[28] The conclusion of the Commission that the failure of the applicant to give any explanation for his refusal to give police an account of his movements, taken in conjunction with the fact that he did not did not object to being interviewed nor did he ask that the interviews be postponed until his solicitor arrived and that he was unable to relate his failure to answer questions to the absence of his solicitors, meant that the Court of Appeal would not have decided that the conviction was unsafe is an entirely tenable one in the circumstances. I have concluded that the Commission's decision that there was no real possibility that the conviction would not be upheld were the reference to be made is unimpeachable.

The absence of retrospective effect of the HRA

[29] Section 6 (1) of the Human Rights Act 1998 provides: -

> "**6.** - (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

[30] Section 7 (1) provides: -

> "**7.** - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-
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> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

[31] As the Court of Appeal in *Walsh* (*op. cit.*) observed, the House of Lords in *R v Lambert* decided that a person appealing against a pre-Act conviction cannot invoke section 7(1) of the 1998 Act and claim that the judge's act in drawing the inference was unlawful. That position has been confirmed, albeit in a different context, in *Re McKerr* [2004] NI 212. In that case the respondent's father had been shot dead by members of the Royal Ulster Constabulary in November 1982. The respondent sought judicial review on the ground, inter alia, that the Secretary of State for Northern Ireland's continuing failure to provide an art 2 compliant investigation was unlawful and in breach of article 2 of the convention. On appeal to the House of Lords

the Secretary of State argued that section 6 of the 1998 Act was not applicable to deaths occurring before that Act came into force on 2 October 2000. It was held that before 2 October 2000 there could not have been any breach of a human rights provision in domestic law because the 1998 Act had not come into force.

[32] The House of Lords held that there was no obligation to hold an article 2 compliant investigation into a killing which had occurred before the 1998 Act came into force since that obligation was triggered by the occurrence of a violent death and did not exist in the absence of such a death. By the same token there was no obligation deriving from the 1998 Act to comply with article 6 of ECHR before 2 October 2000. Lord Nicholls of Birkenhead dealt with the issue of retrospectivity in this way: -

> "[17] In the present case the question of retrospectivity arises in the context of section 6 of the 1998 Act and article 2 of the convention. It arises in this way. Section 6 of the Act creates a new cause of action by rendering certain conduct by public authorities unlawful. Section 7 (1) (a) provides a remedy for this new cause of action. A person who claims a public authority is acting in a way made unlawful by section 6(1) may bring proceedings against the authority if he is a victim of the unlawful act. Thus, if the Secretary of State's failure to arrange for a further investigation into the death of Gervaise McKerr is unlawful within the meaning of section 6(1), these proceedings brought by his son fall squarely within s 7; if not, not.
>
> [20] … article 2 may be violated by an unlawful killing. The application of section 6 (1) of the 1998 Act to a case of an unlawful killing is straightforward. Section 6(1) applies if the act, namely, the killing, occurred after the Act came into force. Section 6(1) does not apply if the unlawful killing took place before 2 October 2000. So much is clear.
>
> [21] The position is not so clear where the violation comprises a failure to carry out a proper investigation into a violent death. Obviously there is no difficulty if the death in question occurred

> post-Act. The position is more difficult if the death occurred, say, shortly before the Act came into force and the necessary investigation would fall to be held in the ordinary course after the Act came into force. On which side of the retrospectivity line is a post-Act failure to investigate a pre-Act death?
>
> [22] In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death itself is not within the reach of section 6, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for section 6 to apply, the death which is the subject of investigation must itself be a death to which section 6 applies. The event giving rise to the article 2 obligation to investigate must have occurred post-Act."

[33] Applying this reasoning to the present circumstances the Court of Appeal could not find that the trial judge's drawing of an adverse inference was unfair on account of its failure to comply with article 6 of ECHR because the applicant's trial, occurring as it did before 2 October 2000, did not attract the protection of the Convention. The Court of Appeal could not apply the Convention retrospectively to the conduct of the trial and could not therefore have found that there was an unfairness in the trial process, much less that the verdict was unsafe.

Conclusions

[34] The claim that the Commission's decision not to refer the applicant's case to the Court of Appeal was unlawful cannot be sustained. The application for judicial review must be dismissed.