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| **Neutral Citation No: [2023] NICA 51**<br><br>*Judgment: approved by the court for handing down (subject to editorial corrections)** | *Ref:* **TRE12215**<br>*ICOS No:* **91/6656/A01**<br>*Delivered:* **07/09/2023** |

**IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE KING**

**v**

**NIGEL SYDNEY JAMISON**

_____

**Mr Greg Berry KC with Mr Joel Lindsay (instructed by Joseph Magee & Co Solicitors) for the Appellant**
**Mr Samuel Magee KC with Mr Robin Steer (instructed by the PPS) for the Respondent**

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**Before: Keegan LCJ and Treacy LJ**

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**TREACY LJ** ***(delivering the judgment of the court)***

***Introduction***

[1] This is an application by the appellant whereby he appeals his conviction and sentence in respect of two offences of withholding information, contrary to section 18(1)(a) of the Prevention of Terrorism (Temporary Provisions) Act 1989 ("the 1989 Act").

***Application for Leave to Adduce Fresh Evidence***

[2] Pursuant to section 25(1)(b) and (c) of the Criminal Appeal (Northern Ireland) Act 1980 ("the 1980 Act") the appellant seeks leave to adduce the following fresh evidence which was not adduced at the trial:

(i) The evidence as is contained in the affidavits of Nigel Jamison, Paul King, William Dalton Watty and Eleanor Jamison.

(ii) Leave to receive the said evidence at (i) above which is currently in affidavit form by way of oral testimony from Nigel Jamison, Paul King, William Dalton Watty and Eleanor Jamison;

(iii) That the said Nigel Jamison, Paul King, William Dalton Watty and Eleanor Jamison attend and be examined before the court pursuant to section 25(1)(b) of the 1980 Act.

[3] None of the evidence sought to be adduced was given at his trial. He entered a plea of guilty and did not challenge the prosecution evidence.

*Grounds upon which the applicant relies*

[4] Insofar as the grounds set out in section 25(2) are concerned Mr Berry KC submitted:

(a) **Whether the evidence appears to the court to be capable of belief -** The affidavits filed on behalf of the appellant are detailed and Mr Jamison's account on some aspects is supported by those of Mr King, Mr Watty and Mrs Jamison. The appellant submits that the evidence he puts forward is capable of belief and the court should afford him the opportunity to give oral testimony so that his demeanour etc can be properly assessed.

(b) **Whether it appears to the court that the evidence may afford any ground for allowing the appeal –** Respectfully this has been succinctly dealt with by Mr Justice Scoffield at para [24] of the leave judgment where he stated:

> "I am prepared however to exercise my residual discretion to extend time to allow the applicant the opportunity to pursue his appeal since, if his account is correct and were to be accepted by the Crown, the merits are such that it would probably succeed.
>
> It has to be acknowledged that the Crown do not appear to accept the account put forward by the appellant however, if this court were to accept his account it is submitted that his appeal would succeed."

(c) **Whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of an appeal –** Again, it is submitted that the answer to this is 'yes.' If the appellant had given evidence consistent with his affidavit at his original trial and it had been accepted, then it is difficult to see how he would have been convicted of the offences which he now seeks to appeal.

(d) **Whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings –** Again, the leave judgment of Mr Justice Scoffield at para [18] succinctly encapsulates this aspect:

> "I consider it clearly arguable that his version of events, if correct, indicates a will which was overborn which induced the applicant to plead to offences of which he was innocent."

However, it has to be acknowledged that there has been no disclosure or discovery of any documents from the State agencies mentioned by the appellant in his affidavit which would corroborate or confirm the account of events given by the appellant in his affidavits.

[5] The appellant contends that the gravamen of the application to adduce fresh evidence centres upon the court hearing oral testimony from Mr Jamison and therefore being able to assess his demeanour and the credibility of his account (which, they say, to all intents and purposes now hinges on his evidence and the evidence of Paul King, William Dalton Watty and Eleanor Jamison as corroborative witnesses). It is acknowledged that this is an unusual application, but it is said that the facts of this case, as put forward by the appellant, are also very unusual.

[6] The fresh evidence which it is sought to adduce on behalf of the appellant it is argued is necessary and/or expedient in the interests of justice pursuant to section 25(1) of the 1980 Act.

***Background***

[7] The prosecution has set out the factual background to this case which we have largely adopted in the paragraphs that follow. The appellant was arraigned on 6 September 1991 and pleaded not guilty. On 24 September 1991 he pleaded guilty to both offences which were counts 6 and 7 on the indictment being offences of withholding information, contrary to section 18(1)(a) of the 1989 Act in that he failed without reasonable excuse to disclose that information as soon as was reasonably practicable to a constable or a member of Her Majesty's Forces. The counts are summarised as follows:

- Count 6 - withholding information between 1 January 1990 and 30 June 1990, the information being that a gun was being stored in the garage at 11 Centurion Street, Belfast.

- Count 7 - withholding information between 13 December 1990 and 16 December 1990, the information being that a person who he believed to be in the UVF was going to store items which he believed to be firearms or munitions in a garage at 11 Centurion Street, Belfast.

[8] The appellant's co-accused was Samuel McCormick who pleaded guilty to counts 1, 3 and 5 on the indictment:

- Count 1 - possession of a firearm with intent being a pistol between 1 January 1990 and 31 October 1990.

- Count 3 - possession of firearms with intent being four .303 calibre rifles, two .22 calibre rifles and a double-barrelled shotgun between 13 December 1990 and 16 December 1990.

- Count 5 - making property available for terrorist purpose being the premises known as Centurion Motors between 13 December 1990 and 16 December 1990.

***Background to the Offences***

[9] These offences arose following a planned search by police of a garage called Centurion Motors at 11 Centurion Street Belfast on Saturday 15 December 1990 at 01:10 hours. The garage was operated and rented by Samuel McCormick and was a car re-spraying/repair business. No-one was present on the premises at the time of the search and entry was gained by cutting the padlock from the front doors.

[10] When searching a pit towards the rear of the premises police found four .303 rifles, two x.22 rifles and one shotgun.

[11] Police then went to Samuel McCormick's home address at 19 Dover Street at 02:45 hours on 15 December 1990. From the statement of Sgt William Skelton on being asked for the keys to his premises he checked the pockets of two jackets before telling police that he had lost them. His Datsun car was checked for these keys, but they were not there, he denied giving the keys to anyone else and said that he was the last person in the garage. McCormick was arrested at 03:40 hours under the 1989 Act and taken to Castlereagh Holding Centre.

[12] McCormick was first interviewed on 15 December 1990 between 10:36 hrs -12:30 hrs (DC Gary Kirkpatrick and DC McMurran). McCormick admitted to police that he had been approached in the afternoon of 14 December 1990 and was threatened by a fella who he then named as MB to keep some stuff, he knew MB was in the UVF. He told police that he gave MB his phone number and house number so that he could collect keys but that in fact he called with him and gave him the keys to the garage and was told that MB would throw them back to the Lawnbrook Club when he was finished. He said the approach was at 12:30 hrs and that Nigel Jamison came in and told him that he was wanted outside. He said he was being threatened and that his part-time helper Nigel Sydney Jamison was present when the approach was made and heard the threats made saying "Aye heard it all." He said Nigel "mucks about at cars." McCormick then said that someone phoned him during the night at about 02:30 hrs to say that the garage was being searched by police and to say that the keys were lost.

[13] At a later interview with DC George Nicholson and DC Neill on 15 December 1990 at 14:47pm-16:05 hrs he gave some additional details about MB and claimed he had refused to keep cigarettes in the garage at the end of last year/start of this year. At his next interview with DC Nicholson at 16:25 hrs –17:45 hrs he detailed the interaction with MB in question and answer format and admitted that he and Nigel knew about MB having the keys. McCormick said he was a member of the Woodvale Defence Association and attended meetings and paid his dues. He later denied being a member of the UVF but accepted involvement in the UDA.

[14] McCormick at a later interview with DC Kirkpatrick and DC Murran on 15 December 1990 between 21:46 hrs and 23:10 hrs was asked if anyone had kept guns there before and he said "MG" came down about a year ago and left an old rusty 9mm pistol with him for a couple of days which he cleaned with wire wool and polish and that he drove a big orange van, lived in Woodvale and does building. He admitted that MG was UDA and admitted that "Anytime I go to UDA meetings you are told if you are asked to store guns you have to do it." He later said that this was about four weeks ago. He described the gun had a magazine but was told by MG that there was no ammunition. He said that MG came to collect the weapon in the orange van.

[15] On returning to the incident on 14 December 1990 McCormick confirmed that when MB was talking about keeping the guns Nigel Jamison "… was standing close to me for the whole conversation." When McCormick was asked if he spoke to Nigel again, he replied that Nigel "phoned me up later and we arranged to go to McCourt's motors today." He was asked did he not mention the guns and said, "We would not discuss matters like that on the phone." On being asked did he usually have matters like that to discuss he replied, "When we had information to pass on to police." He accepted that he had not passed on information to police. McCormick accepted that Nigel Jamison would have gone to Lawnbrook to play snooker and knew MB through the club and the garage. He said the gun kept for MG was kept in a cupboard in the garage beneath all the newspaper he kept for masking.

[16] At a later interview with DC Kirkpatrick on 16 December between 09:50 hrs -11:35 hrs McCormick said that he had forgot to say that he was first approached by MG at the Mayo Street club at a meeting when MG asked him to stay behind and that this was in April or May and that was when he gave him the gun. He said that he told MG about Nigel being an ex-cop but he said that he only had to keep it a short time. He then told police that it was in a gap in the roof in the office at the corner of the garage and it was wrapped in a cloth and then said he took the gun back up to the club the same night and that when he gave him the gun he then went with MG in his van and that MG stopped in the street beside Palmer Street and left the van with the gun but didn't come back with it. He said that MG had come to his garage (the gate) and told him to bring it up to the club about two months ago. He said that he cleaned it, and it was all rusted up. On being asked if anyone else knew it was there, he said "Just Nigel he was there when it was being cleaned." He didn't hide it from him because he didn't think he would say anything. Police asked him

was Nigel not shocked and he replied, "No I just told him that I was cleaning it for MG." On being asked if Nigel had handled the gun he said "he tried to pull it back while I was cleaning it". He confirmed that the gun had a slide. McCormick agreed to go out with police and show them the house where he and MG went with the gun. MG was shown photos of the garage and identified a cupboard to the right of the entrance as where he kept the gun. He described the pit as being at the paint shop and also indicated a space in a wall of the toilet where he first stored the gun.

[17] Nigel Jamison was arrested at Grosvenor Road RUC Station on Saturday 15 December 1990 at 18:10 hrs by Const Philip Shields. He was then taken to Castlereagh RUC station at 18:45 hrspm and handed into custody. The custody record at the section marked "Other information (including medical and dietary requirements)" states:

> "Suffers from nerves on medication Oxazepam + also Tagamett. Milk Diet 3 Oxazepam per day, 1 Tagamett morning to evening Dr Dean 15/12/91."

[18] From the statement of Sgt Stephen Addley it was confirmed that the appellant joined the RUC part-time Reserve on 24 May 1977 and was located at Oldpark RUC station. On 2 October 1978 the appellant resigned to commence immediately full-time duties with the RUC Reserve remaining in Oldpark RUC station until his resignation on 27 December 1978.

***Police Interviews***

[19] First Interview: the appellant was first interviewed by police on 15 December 1990 between 20:10 hrs and 21:45 hrs. He was interviewed by Det Sgt Myles and Det Const John Stewart. The appellant was asked what happened last afternoon. The appellant said that he was working in the garage when a man that he knew approached him and asked him if the pit was still in the rear of the garage. The appellant told him that it was, and the man said that a couple of boys of his were having "the heat put on them" and that he wanted to use the pit "to put some stuff in." The appellant stated that he didn't own the garage and that he took this man over to "Sammy" and then walked away. On being asked by police what he heard the appellant said that he heard the man ask Sammy if he would keep some stuff for him but that he didn't hear anything else. He said that man was there for five or six minutes and that he didn't talk to Sammy after that. He stated that he took a car for a test run that he had been working on and that he then left at about 15:30 hrs. The appellant denied being in the UVF. Police challenged him that he had to be trusted by the persons leaving the weapons and he was asked whether he agreed with this. The appellant denied this. Police again challenged him saying that these people would not ask him to hide their weapons if they didn't and the appellant said "I know what you are saying but I can't help you. Look I don't want to say any more." The interview concluded at 21:35 hrs.

[20] Second interview 15 December 1990 between 21:46 hrs and 22:45 hrs. The appellant was interviewed by Det Const Gary Stanbridge and Det Const Brown. At this interview the appellant named the man who approached him at the garage as MB and that he directed MB to McCormick and went inside to get him and then followed McCormick outside. The appellant then admitted that he had heard a conversation or most of a conversation and believed MB was talking about arms, ie guns. The appellant stated that he phoned McCormick at about 22:30 hrs and that when asked McCormick replied that he was "letting them carry on." The appellant was asked why he didn't phone the police last night and said "It had to be thought about" and then "I didn't want the finger pointing at me." Police asked him if that was the real reason and he stated "Aye I'm positive it's the real reason. These guys get that cocky about things they think everyone is loyal to them."

[21] Third interview 16 December 1990 at 09:30 hrs by Det Const Stewart and Det Const Adair. He again recounted the events of the afternoon of 14 December, this time naming the man who approached the garage as MB, who he had known for 12 or 13 years and that everybody in the area knew that he was in the UVF and that he knew from his previous job (the police) that he was high up in the UVF. The appellant described MB as being "edgy or panicky" and that he had said "there's a bit of heat on at the minute and was there any chance of putting a bit of stuff down this hole." The appellant was asked what he thought MB meant by "some stuff" and he said, "I thought it was more than likely that it was firearms or some form of munitions."

[22] The appellant then told police that after getting Sammy who came out and went to speak to MB that he remained very close to them and that "I heard the gist of almost everything that was said between them." The appellant heard MB asking about the two apprentices who worked in the garage and if they ever went down the hole in the garage and heard him asking Sammy about keys and that the stuff would be moved that night and that MB wrote Sammy's phone number down, he thought on a cigarette packet, before walking away in the direction of his own house.

[23] The appellant said that he did not discuss with Sammy about what had been said by MB at that time but that the appellant then phoned Sammy at 22:30 hrs on Friday night and during their conversation he asked him about it, but that Sammy had said he was taking nothing to do with it and that Sammy then asked the appellant to collect him at his house on Saturday morning and drive him to McCourts on the Seven Mile Straight. The appellant said that the next morning he phoned Sammy's house in respect of collecting him but was told by his wife to come over to the house and that it was important. Once there she told him that Sammy had been arrested and taken to Castlereagh and that police had raided the garage and found rifles. The appellant did not tell her what had happened but returned home at about 16:20 hrs, found that police had been looking for him and had left word for him to go to the station which he did, arriving at Springfield Parade at about 16:40 hrs. Police continued to question him that as a member of the police at one time he must have realised the importance of an early report to police.

[24] Fourth interview, 16 December 1990, 11:47 hrs – 13:00 hrs, interview by Det Const Stanbridge and Det Const Brown. It was recorded that police spoke to the appellant at great length about the find of rifles on 14 December 1990. Police then asked the appellant if there was anything else that he was involved in at Centurion Garage. He initially made no reply, he was then asked if about 6–8 weeks ago there was a firearm, a handgun in Centurion Garage. The appellant replied "Not to my knowledge" but when asked if he had any knowledge about firearms, he then went on to say that he came into the garage about ten months ago and was talking to Sammy who opened a car door that they were working on and he saw an automatic firearm, possibly a Browning and that Sammy told him that he had been told to clean it and that he thought it was for the UDA. The appellant said that he lifted the gun and looked at it and saw that it was badly rusted, he did not crash the slide or pull the trigger. He stated that he had nothing to do with cleaning the gun. He was asked why he did not report the matter to police and said that he did not want to get Sammy into trouble. He said that he saw Sammy clean the gun and rubbed some oil on it. The defendant was shown the firearms and denied seeing them before, he stated in relation to the Browning pistol that he had no intention of reporting this because Sammy was a friend, and he didn't want him getting into trouble.

[25] Fifth interview, 16 December 1990, 14:15 hrs – 16:05 hrs interviewed by Det Const Stewart and Det Const Adair. The appellant was again asked questions about the Browning pistol including whether he had crashed the slide to check if the weapon was loaded and there wasn't a bullet in the breech. The defendant accepted that he knew that but said that he did not fiddle with the gun, that he handled it but didn't do anything else with it and told McCormick to get rid of it. He was again asked if he told police about it and again said that he didn't want to get Sammy in trouble. Police asked him if he was a member of the UDA and he denied this and whether he had joined the police to pass information on and if he passed information on to organisations. This was denied by the appellant. The appellant was told by police that he had committed a criminal offence in relation to these firearms both the pistol approximately ten months ago and the rifles on Friday and now was the time to tell the truth. The appellant stated that he was telling the truth. The appellant asked why he was trusted by MB with these weapons and stated it was maybe because he heard that the appellant knew about the pistol and didn't do anything about it and that's why he approached him. It was noted that police talked to the appellant at length about his time in the police and what had now happened to him. It was noted that the appellant spoke freely and easily about general matters.

[26] Sixth interview, Sunday 16 December 1990 between 16:15 hrs and 17:46 hrs, interviewed by Det Const Stanbridge and Det Const Brown. There was a short conversation about Jamison's previous experience in the police and if there was anything else he wished to tell them. Jamison stated that he had told them all he knew. Police again covered the events of the past couple of days prior to the weapons being found. The appellant was asked about Sammy and his allegiance,

and he said, "Like a lot of us he was roped in years ago." The appellant was asked if he was roped in and said "No. Almost but no." The appellant was asked if there was any other suspicious activity going on about the garage and he related an incident about three weeks ago involving an orange transit sized van coming to the garage with a driver and another man and that he recognised one of the men as associated with the WDA (Woodvale Defence Association) and that Sammy went out to him and was told that they wanted him to keep stuff for them and that afterwards Sammy told him that there were new rules that people had to keep stuff if told. Police spoke to the appellant about what could happen, and Jamison said he asked what would happen and he was told that was up to our authorities.

[27] Seventh interview, 16 December 1990 between 19:20 hrs and 21:00 hrs, interviewed by Det Const John Stewart and Det Const Adair. The appellant was asked if he could think of anything else to tell them and he replied, "Not a thing." There was a discussion about his family, his service as an RUC reservist and other matters. Police put to him that he knew more than he was telling them, and he maintained that he did not and that he had told the truth in the earlier interviews. Other matters were discussed, and the interview ended.

[28] Eighth interview, 16 December 1990 between 21:31 hrs and 23:00 hrs, interviewed by Det Const Gary Stanbridge and Det Const Brown. The police statements record that the appellant was spoken to "… at considerable length in relation to all matters from previous interviews and he stated continually that he had told us the truth in relation to all matters. Jamison spoke about his domestic, family life and about his friendship with Sam McCormick. The interview continued along these lines."

[29] Ninth interview, 17 December 1990, between 10:10 hrs and 11:15 hrs, interviewed by Det Const Stewart and Det Const Brown. The police statements record "Spoke at length about the arms find on 14 December 1990 at Centurion Motors Centurion Street Belfast and the possession of a browning pistol some ten months or so ago. There was no change in any of his answers and he spoke freely about the incidents in question. Spoke about his family and home life for some time."

[30] Tenth interview, 17 December 1990 between 11:45 hrs and 12:45 hrs, interviewed by Det Const Stewart and Det Const Brown. The appellant was asked if he wished to make a written statement after caution and replied "No", he was asked if he had ever been in the UDA or UVF and he replied "No." He was asked if he had ever been asked to join either of these organisations and he said "No." He was asked if he had ever handled guns on any other occasion and replied "No", he was asked if he ever knew of any other guns being kept at the garage in Centurion Street or anywhere else and he said "No."

[31] Eleventh interview, 17 December 1990 between 14:30 hrs and 15:15 hrs, interviewed by Det Const Brown and Det Insp Nairn. The police statements record:

> "Jamison was questioned at length regarding these matters, and he stated he had told us the full truth and he had nothing to hide and that he had co-operated fully in relation to all our questions. We spoke at considerable length in relation to all matters and also about his family and domestic circumstances ..."

[32] On 17 December 1990 at 17:30 hrs the appellant was charged with (1) withholding information between 13 December 1990 and 15 December 1990 and (2) possession of a firearm, namely an automatic pistol, in suspicious circumstances. After caution Jamison replied in respect of Charge 1 "On the first count the object was to inform the RUC at a later time." On Charge 2 he replied, "On the second count in my view it was a technical possession as the gun was only lifted for a few seconds then put down again."

[33] On 18 December 1990 the co-accused was refused bail by Carswell J. D/Con Stanbridge was noted as the officer in charge when bail was refused.

[34] On 19 December 1990 the appellant was granted bail by Shiel J. It was stated that he was not believed to be a member of any organisation. It was submitted on his behalf by his counsel that a distinction could be made between the appellant and his co-accused.

[35] On 11 January 1990 the co-accused was again refused bail by McCollum J. The learned judge stated that Jamison was in a different situation and the charge of possession may be tenuous.

[36] The police report dated 22 March 1991 to the DPP had also recommended the prosecution of Jamison for possession of a firearm in suspicious circumstances and withholding information.

[37] On 20 May 1991 the DPP issued a direction to prosecute the appellant only in respect of two offences of withholding information.

[38] On 13 June 1991 the appellant was committed for trial at Belfast Magistrates' Court. A criminal legal aid certificate was granted by the Resident Magistrate for two counsel.

[39] On 6 September 1991 the appellant was arraigned and pleaded not guilty before HHJ Hart. From the DPP Note of Trial defence counsel was K Finnegan QC and E Grant BL.

[40] On 24 September 1991 the appellant pleaded guilty and was sentenced to two years' imprisonment suspended for two years on each offence concurrently, his

co-accused also pleaded guilty on this date and was sentenced to five years imprisonment (HHJ Martin).

***Principles in respect of fresh evidence applications***

[41] The jurisdiction to admit fresh evidence is governed by statute. Section 25 of the 1980 Act provides:

> "(1) For the purposes of an appeal under this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice—
> …
>
> (c) receive any evidence which was not adduced at the trial.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
>
> (a) whether the evidence appears to the Court to be capable of belief;
>
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is subject to the appeal;
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings …"

***Prosecution submissions***

***Whether the evidence appears to the court to be capable of belief***

[42] The appellant's first affidavit is dated 22 February 2021, his second is dated 5 September 2022 and his third and most recent is dated 23 May 2023.

[43] In his first affidavit the appellant states that he was seconded from the RUC into a special operations group which he worked in for fourteen years. It was a group run by the government and was an undercover group. It was disbanded in 1994. The appellant headed a team of eight men. There were four such groups.

[44] With regard to the first affidavit, the name of the group is not provided, nor where it was based, or the names of any of the other men within the appellant's

eight man team, or the names of any of the other men in the three other such groups or the names of any senior officers or handlers.

[45] There is no explanation as to why this appellant was selected for such a role given his lack of military training, his lack of any specialist police training in undercover/covert roles. His previous experience was limited to being a part-time police reservist for a period of sixteen months followed by a three month period as a full-time reservist. The appellant does not say that he undertook any undercover or covert role whilst a reservist in the RUC or received any specialist training.

[46] In his second affidavit at para 3 the appellant describes this unit as being a 'special operations unit' and that he was also involved in undercover operations (trained by SAS). The appellant states that he was paid Ministry of Defence ("MoD") wages in cash, he states that at the time of the relevant offences he had been ordered to live in the area in order to become close to Shankill UVF. The appellant states that he learnt and passed information from 1983–1990. The appellant provides a military ID number. The appellant refers to a base in South Armagh but provides no detail as to the precise location of this base or the years that he was stationed there. Again, the appellant provides no detail as to any senior officer or other named person who was also stationed at this base.

[47] The affidavit of Robert Harkins of the MoD dated 3 March 2023 contains the following averments based upon enquiries made with relevant archives and repositories across the MoD estate:

- [See affidavit at para 4] searches for a "P file" (personnel file) or any other record in respect of a Nigel Jamison dob 06/01/1957 serving between 1979 – 1994 have produced a nil return.

- [See affidavit at para 7] the Army service number 24365231 provided by the appellant at paragraph 45 of his affidavit is a valid Army service number but has been confirmed as relating to a third party.

- [See affidavit at para 8] the averment of the appellant at paras 57–59 of his affidavit that he was involved in the incident at Coalisland Police station and Clonoe and that he was the leader of a team "Zulu One Bravo" and that it was his team that was involved in the subsequent shooting of PIRA members. MoD have acknowledged that a specialist military unit was present at this incident which is currently the subject of ongoing inquest proceedings. A list of potential military witnesses has been identified and the appellant is not amongst them. If the appellant had

been present at this incident or was otherwise known to have operated alongside or been trained by this special military unit this would have been confirmed in their response, instead a nil return was made.

- [See affidavit at para 9] the averment of the appellant at para 60 of his affidavit that the designated name of his unit was CMPOU (Close Military and Police Operations Unit). This has been checked and MoD can confirm that no such unit existed at the relevant time or presently.

- [See affidavit at para 10] no information has been identified to corroborate the appellant's allegations that he was associated with the Army, that he was paid MoD wages in cash as averred by the appellant at paras 5–6 of his affidavit or was otherwise involved in covert operations whether as part of the military or otherwise as averred at paras 43–46 of his affidavit.

- [See para 11] MoD have no information with regard to the matters raised by the appellant concerning private sector work involving close protection from 1996 as averred to by the appellant at paras 62–63 of his affidavit, or the appellant undertaking a seven year tour in the Republic of Ireland and liaison with An Garda Siochana, National Security Unit and G2 Irish intelligence as referred to at para 64 of his affidavit.

[48] The appellant provides no detail as to the locations where he would have received specialist military training, when this occurred, what organisation or unit provided such training, the names of any such persons involved in providing this training or the names of anyone else who was present in the appellant's unit or any other such unit.

[49] In the appellant's third affidavit dated 23 May 2023 he now alleges:

- that his unit was based at Bessbrook Mill. This information has not been previously provided. Again, no information in respect of named personnel is provided.
- that he is a member of IOPS (International Operation Section). This information has not been provided previously, again no information in respect of named personnel is provided.

- alleges that MI5 set up an organisation called "Homewatch." The purpose of this organisation was to masquerade as an extension of his security company and that intelligence was gathered and sent directly to GCHQ. This information has not been provided previously and again no information in respect of named personnel is provided.

[50] The appellant avers to the remaining affidavits, but these do not provide any independent corroborating evidence to support the appellant's case that he was an undercover officer.

***Discussion and conclusion***

[51] For the reasons outlined in the prosecution submissions we consider that the evidence sought to be adduced is plainly not capable of belief. It is clear to the court that his extravagant and unsubstantiated claims are simply not credible.

***Whether it appears to the court that the evidence may afford any ground for allowing the appeal***

[52] In *R v Guinness* [2017] NICA 47 at para [3], the court considered the principles in respect of the abandonment of an appeal and cited *R v Smith* [2013] EWCA Crim 2388 in which Jackson LJ, delivering the judgment of the court, stated:

> "Criminal litigation is a process in which the defendant is required to make a series of irrevocable (or usually irrevocable) decisions: for example, whether to plead guilty, whether to give evidence and so forth. If things go badly for the defendant, he cannot simply go back to square one and try a different tack. Criminal litigation is not a tactical exercise."

***Effect of a guilty plea***

[53] We agree that the fact that the appellant pleaded guilty to these offences is of particular relevance in this appeal. An unequivocal plea of guilty is a clear and public admission of guilt. Where a plea is entered and accepted by the court, the resultant conviction flows from the plea which is an admission. By pleading guilty he has accepted that there was a factual and evidential basis establishing his guilt. (see *Re Fitzpatrick and Shiels application* [2014] NI 277 para [27]).

[54] We were referred to the decision in *R v Tredget* [2022] EWCA Crim 108. It refers to those cases where an appeal is brought when there has been a plea of guilty and the sole question that must be addressed is whether the conviction is safe. The principle recognised in the judgment is that where there has been a plea of guilty

"this is a major and normally a dominant part of the facts and circumstances of the case." The court identified three categories of cases where a conviction may be unsafe.

[55] The first category where a conviction may be unsafe following a plea of guilty is where the guilty plea is vitiated, such as where there was an equivocal plea or that the plea was unintended. Other circumstances include where the trial judge gave an adverse ruling which was incorrect in law and which effectively removed any defence from the appellant, or where improper pressure was applied by the judge. Where an offender's own counsel gave incorrect legal advice to the extent that the plea was in fact a nullity, or where the appellant had been deprived of a good defence in law which in all likelihood would have succeeded this may, in limited circumstances, render the plea a nullity (paras [153]–[159]).

[56] As the prosecution correctly submit this first category is of no application to the appellant in the circumstances of this case.

[57] The second category involves cases where the accused should never have been put on trial because the proceedings were an abuse of process in which circumstances the conviction based upon a plea of guilty was as unsafe as one following trial. See *Tredget,* para [160] including, by way of example, entrapment, or where an abuse of process is established which renders it unfair to try the defendant at all, and citing *R v Togher* & *Ors* [2001] 1 Cr App R 33 at para 31:

> "The court in *Togher* at page 161 G approved what it described as the "*broad*" approach adopted in *R v Mullen* [1999] 2 Cr App R 143; [2000] QB 520, per Rose LJ:
>
> > '... for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. Indeed the Oxford Dictionary gives the legal meaning of 'unsafe' as 'likely to constitute a miscarriage of justice.'"

[58] In *Togher* the court held that proceedings could amount to an abuse of process where the guilty plea was "founded upon the irregularity of non-disclosure." 9(para [59]).

[59] We were also referred to *R v Hamilton & others* [2021] EWCA Crim 577 in which the grounds of appeal related to whether the Post Office had properly discharged its duties of investigation and disclosure under the Criminal Proceedings and Investigations Act 1996 ("CPIA 1996") [59].

[60] The court considered the legal framework of the CPIA 1996 and stated that the burden is on the accused to show, on a balance of probabilities, that he is entitled

to a stay of proceedings on grounds of abuse of process and that a stay of criminal proceedings is always an exceptional remedy, citing *R v Togher & others* at [33]. See judgment at para [64].

[61] In *R v Hamilton* at para [69] it states:

> "Where a defendant has entered an unequivocal and intentional plea of guilty, the resultant conviction will rarely be found to be unsafe. It is nonetheless possible for fresh evidence to be admitted and for an appeal to be allowed in such circumstances: see *R v Jones* [2019] EWCA Crim 1059 at [25]. In *R v Togher and others* it was held that a conviction may be quashed on grounds of abuse of process even when a guilty plea has been entered, though only if "it would be inconsistent with the due administration of justice to allow the pleas of guilty to stand" (see paragraph [33]). In a case in which a defendant who has pleaded guilty appeals against his conviction on grounds of non-disclosure, the court must consider whether the plea was entered in ignorance of evidence going directly to his guilt or innocence. As it was expressed in *R v Togher and others* at [59], the question is whether the guilty plea was "founded upon" the irregularity of non-disclosure. In *R v Early and others* [2002] EWCA Crim 1904 at [18] the court emphasised the crucial importance of a prosecuting authority making full relevant disclosure before trial. It held that a defendant who pleaded guilty at an early stage should not, if adequate disclosure had not been made, be in a worse position than a defendant who, as a consequence of an application to stay the proceedings as an abuse, benefited from further orders for disclosure culminating in the abandonment of proceedings against him."
> [prosecution emphasis]

[62] At para [125] it states:

> "We also bear in mind that many of the appellants pleaded guilty. But as we have already said, *R v Togher and others* provides clear authority that a conviction following a guilty plea may be quashed on grounds of abuse of process where the plea was "founded upon" the irregularity of non-disclosure. …"

[63] We agree with the prosecution that in the present appeal, the position is reversed, the appellant made admissions to police at interview and voluntarily

pleaded guilty, on his case, in order to protect his undercover status and because he was advised that he was under threat. The plea was not "founded upon" an irregularity of non-disclosure created by the police or the prosecution authorities. Extensive enquiries have been made with MoD and no such relevant disclosure has been found to support the appellant's allegations.

[64] The third category case is one where it is established that the plea is a false one and the appellant did not, in fact, commit the crime.

> "162. In the case of category 1, the ordinary consequences of the public admission of the facts which is constituted by the plea of guilty are displaced by the fact that the plea was vitiated, whether in fact or by reliance on error of law. In the case of category 2, the ordinary consequences of the public plea are irrelevant, because the defendant ought not to have been subjected to the trial process (or to that form of trial process) at all. But ordinarily, the plea of guilty, by a defendant who knows what he did or did not do, amounts to a public admission of the facts which itself establishes the safety of the conviction. There remains, however, a small residual third category where this cannot be said. <u>That is where it is established that the appellant did not commit the offence, in other words that the admission made by the plea is a false one.</u>

[65] *Tredget* at para [171] sets out that it will normally be possible to treat a conviction as unsafe only if it is established that the appellant had not committed the offence:

> "171. It can nevertheless exceptionally occur that a reasoned legitimate doubt may be entertained by this court about the verdict reached by the jury following disputed evidence, and this may be sufficient to establish that the conviction is unsafe. But following a freely made guilty plea, the conviction does not depend on the jury's assessment of disputed evidence. The evidence has never been heard, still less tested. It cannot be appropriate to enquire how it might have emerged and might have been assessed if there had been a trial. A submission that the evidence leaves a doubt about the guilt of the defendant is simply inappropriate. In such a case, of a free and informed plea of guilty, unaffected by vitiating factors, it will normally be possible to treat the conviction as unsafe only if it is established that the appellant had not committed the offence, not that he or she may not have committed the offence. Therefore, the test is not that of

> *"legitimate doubt"*, still less a *"lurking doubt"*, but instead it must be demonstrated that the appellant was not culpable. This is essentially consistent with four of the authorities set out above. In summary, the decision in *Verney* was based on the court's conclusion that the appellant could not have committed the offence because he had been in custody at the relevant time. In *Barry Foster*, although Watkins LJ did not describe the approach in precisely these terms, he nonetheless set a high test when he suggested that no jury could be sure of the appellant's guilt, adding that the court should only intervene in a case of this kind if the grounds were sufficiently compelling. In *Saik*, fresh evidence demonstrating the appellant was not guilty of the offence was said to represent a classic example of material that potentially undermined the safety of the verdict. The DNA evidence in *Noel Jones* wholly exonerated the appellant."

[66] The appellant does not dispute the facts of what occurred, or his admissions at police interview, or that he voluntarily entered a guilty plea in which he had the benefit of solicitor and counsel. Instead the appellant relies on his claim that he was an undercover agent at the time he committed the offences and his suggestion, at least with regard to the 14 December 1990 incident, that he did advise local police officers of the arms finds at the relevant time.

[67] As to his alleged role, the appellant does not aver that he was provided with any express or implied authority to become involved in offences by his handlers or whether he received any advice or guidance as to how to conduct himself.

[68] With regard to his allegation that he reported either or both incidents to police, no material has been disclosed which would assist the appellant's case that he made such reports to police.

[69] In respect of count 6, involving the rifles and the shotgun, the appellant refers to this incident on 14 December 1990 when MB came to the garage and asked Samuel McCormick to store items. He stated that he never had any contact with them, but he assumed they were firearms or munitions given the person who was asking.

[70] With regard to count 7 the only possible reference to this offence in the appellant's second affidavit is at para 23 which states: "not long before this I had seen McCormick with a 9mm gun. This was in a bad state, and he told me that he had been asked to clean it. I told him it was useless and to throw it away." It is not clear if this relates to the incident at count 7. In the appellant's fourth police interview he was asked if he had seen a firearm being a handgun in the premises

some 6–8 weeks ago and he denied this stating "not to my knowledge." During eleven police interviews the only other firearm referred to by the appellant was that he said he was in the garage with McCormick working on a car door and saw a rusted automatic pistol inside a car door, possibly a Browning. The appellant stated that this was about ten months before, that he did not crash the slide but only handled it briefly and that he saw McCormick clean it and that he rubbed oil on it. The appellant makes no reference to telling McCormick that this weapon was useless or to throw it away during his police interviews.

[71] In his second affidavit the appellant briefly refers to speaking to Police "about this" at para 24 and that he spoke to Const Michael Rankin and Alwyn Johnston and provides more detail at para 27 and was told that this information would be passed on. This appears to refer to the arms find on 14 December 1990. The appellant is not clear what information, if any, was passed on in respect of the automatic pistol ten months previously. The appellant does not state in his second affidavit that Michael Rankin and Alwyn Johnston were his handlers within the specialist operations unit. If they were not his handlers the appellant provides no explanation as to why he would inform local police officers rather than his own handlers.

[72] In para 18 of the appellant's affidavit he states "*My main objective was MB a senior figure in the UVF staff*" but does not explain why, given the importance of this individual, he did not inform his handlers within the specialist undercover unit of this information.

[73] It has been established that there is no material to disclose which assists the appellant's allegation that he was an undercover agent and that he did report either or both matters to police. Instead the only evidence in respect of the appellant providing this information emanates from the appellant. Taking into account the frailties of the appellant's account this falls very far short of establishing that the appellant did not commit the offence.

***Whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings***

[74] We agree in respect of the discretion to admit fresh evidence and consideration of the interests of justice that, where the evidence could and should have been put before the jury then, unless a reasonable and persuasive explanation is provided for this omission, it is unlikely that the interests of justice test will be satisfied (see *Erskine and Williams* [2010] 1 All ER 1196 and *R v Wilson* [2022] NICA 73 at para [63]).

[75] The appellant has provided no cogent reason as to why this evidence could not have been put before a jury or why he did not seek to advise the police and prosecuting authorities of his alleged undercover role. This could have been communicated either by the appellant or, he could have asked his alleged handlers to convey this to the police at any time after he was released on High Court bail on 19 December 1990.

[76] If the appellant did not wish to disclose his undercover role, he could have contacted Michael Rankin or Alwyn Johnson and asked them to confirm with the officer in charge of his case that he had reported the firearms finds to them as local police officers. The appellant could have contacted these officers or Derek Martindale once he had been released on bail after 19 December 1990 or at any time up until the time of his plea of guilty on 24 September 1991.

[77] The appellant describes one meeting with Derek Martindale on 15 December 1990 prior to his arrest but no further discussions with his handlers (whether army or police) or senior police officers in the period leading up to him entering a plea of guilty on 24 September 1991. This is despite the fact that the appellant had been, he says, a member of a specialist undercover unit working for twelve years since December 1978 and was being advised to plead guilty to offences to which he had a defence which could not be challenged, firstly that he had reported the weapons finds, and secondly that he was working as an undercover operative at the time.

[78] With regard to his police interviews, the appellant named an alleged senior member of the UVF from his second police interview onwards. If the appellant was under threat from this organisation, he had no difficulty in naming a senior member of that organisation to police. The appellant's case is that these admissions, including the naming of this person alleviated the threat to him as opposed to increasing it.

[79] The appellant avers that he was told the case would not get through committal, then when it did, he was told that the prosecution and the judge would be made aware of his position. The prosecution observe that the appellant provides no detail as to the following:

- The identity of the person(s) who gave these assurances.
- When and in what circumstances these assurances were provided.
- Why these assurances were not met.
- Whether the prosecution or the judge were advised of his undercover status prior to him entering his pleas of guilty.
- Whether the suspended sentence imposed by the court was due to information being provided to the judge.

[80] The only explanation provided is at para [38] of the affidavit where he states in vague terms "Matters did not proceed as planned …" with no further detail.

[81] The appellant at para 34 of his second affidavit avers that his cover was at risk and his life was under threat. The appellant also avers that the UVF were targeting him as an informer as he had been present at the time of the offences and it was known that he was ex-police. Despite the nature of these threats the appellant avers that his undercover work in Northern Ireland continued from 1990 until his unit was disbanded in 1994.

[82] He provides no explanation as to how he was allowed to continue undercover operations in Northern Ireland when his identity and the fact that he was an ex-police officer was known to the UVF. He does not advise as to how long the threat against him remained extant or why he could not have brought this application sooner.

[83] There is no material to disclose relevant to any threat to the appellant at this time or thereafter.

[84] The report from Dr Bownes refers to the appellant's long-standing mental health and personality difficulties. This is supported by the custody record for the present offences recording that the appellant suffered from nerves and was on prescribed medication. There is force in the prosecution contention that the medical evidence is a contra-indication that the appellant had a long-standing covert intelligence role as well as a specialist military role.

***Consideration***

[85] The appellant voluntarily decided to make admissions to police at interview and plead guilty at an early stage and did so with the benefit of legal advice including that of senior counsel.

[86] The plea of guilty was consistent with the appellant's stance adopted at police interview. Over thirty years later the appellant's case now is that he was compelled to admit the offences at police interview and subsequently pleaded guilty because he was an undercover agent. Contrary to any suggestion of compulsion, the appellant did not make full admissions in his first police interview.

[87] Despite extensive enquiries by MoD no supporting documentary material has been found to support any of the allegations made by the appellant. On the contrary, the MoD affidavit contradicts the appellant in respect of a number of material allegations made.

[88] The appellant's allegations contain little or no detail which could independently verify his claims such as names of potential witnesses in the units which he served and details such as time, location and training.

[89] We agree that the combination of the MoD responses in the affidavit together with the absence of any such independent corroborative evidence leads to the conclusion that the appellant's evidence is not capable of belief.

[90] No abuse of process or failure to make material disclosure is alleged by the appellant of such a fundamental nature as would vitiate the plea of guilty or afford any ground of appeal. The appellant chose not to make this case during his extensive police interviews and chose not to instruct his legal advisers of the true position and thereby allowed the court to sentence him, on his case, on a false premise. The appellant has then failed to correct this error for over thirty years. The appellant was fully informed of the relevant facts at the time when he entered his pleas of guilty and, even on his own case, elected not to avail of this suggested defence/mitigation.

[91] This evidence would have been admissible at the time of the appellant's trial, and he could have provided this information to police or the prosecuting authority at the time of his trial.

[92] We are satisfied that there is no reasonable explanation for the failure to adduce the evidence in those earlier proceedings.

[93] In applying the interests of justice test we refuse the application to admit fresh evidence.

[94] The parties are agreed that the effect of refusing the application to admit fresh evidence is that there is no basis for impugning the safety of the conviction and that the appeal must therefore be dismissed.