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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

MacDermott (Eamonn) and McCartneys' (Raymond) Application [2010] NICA 3

IN A MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY EAMONN MacDERMOTT AND RAYMOND PIUS MCCARTNEY

MORGAN LCJ, GIRVAN LJ and COGHLIN LJ

MORGAN LCJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of Weatherup J in which he dismissed the applicants' claims that they had suffered a miscarriage of justice when they were convicted of murder and other offences on 12 January 1979 and were thereby entitled to compensation under section 133 of the Criminal Justice Act 1998. Mr Larkin QC appeared that Mr Brolly for the first appellant. Ms MacDermott QC appeared with Mr Sayers for the second appellant and Mr Maguire QC appeared with Mr Scoffield for the respondent. We are grateful to all counsel for their helpful written and oral arguments.

Background

[2] On 12 January 1979 at Belfast City Commission the appellants were each sentenced to life imprisonment as a result of convictions for offences that included murder and membership of the IRA. The first appellant made 4 written statements to police admitting involvement in a murder and two incidents where shots were fired at soldiers. At his trial he alleged ill-treatment during police interviews. The trial judge was satisfied that the first appellant had not been ill-treated and relied on the statements to convict him. The second appellant made a written statement to police admitting involvement in two murders. At his trial he alleged ill-treatment during police interviews. The trial judge found a prima facie case of ill-treatment but was satisfied beyond reasonable doubt that the second appellant had not been ill-treated and that his statements were relevant and admissible. The appellants' appeals against their convictions were dismissed on 29 September 1982 by the Court of Appeal.

[3] Their cases were subsequently referred to the Court of Appeal by the Criminal Cases Review Commission as a result of which their convictions were quashed on 15 February 2007. John Pius Thomas Donnelly had been called to give evidence on behalf of each appellant at their trial in support of their allegations of ill-treatment. Donnelly had been arrested at the same time as the second appellant and had also been questioned about the recent murder of a policeman. Donnelly claimed that he had been assaulted both at Strand Road and Castlereagh. Medical evidence was called to prove the injuries noted at the time of his transfer to Castlereagh which the examining doctor found were consistent with most of the allegations made. Three days after his transfer to Castlereagh Donnelly was again medically examined and bruising and loss of hair was noted. Since no loss of hair had been noted at the time of his arrival at Castlereagh this must have occurred while he was there. Donnelly also alleged that DC French had written out a statement of confession after a long interview which he then got Donnelly to sign. This is an allegation very similar to one made by the first appellant against the same officer.

[4] Donnelly was cross-examined on the basis that he had been in a fight with police officers at Strand Road and that his injuries were self-inflicted. The trial judge found Donnelly inventive and dishonest and capable of inflicting severe injury on himself if he felt the situation warranted it. He was satisfied the Donnelly had not been ill treated or assaulted at Strand Road. In the course of the prosecution closing speech the trial judge inquired why the charges against Donnelly had not been pursued. Crown counsel simply replied to the judge that he was never returned for trial and the charges were not proceeded with.

[5] When the case was referred to the CCRC they examined the files of the DPP and established that a decision not to prosecute Donnelly was taken because it was considered unlikely that the statement would be accepted as

voluntary because of his injuries and lack of sleep. A recommendation to prosecute two officers involved in his questioning was rejected by a Senior Assistant Director who concluded that because Donnelly claimed that he had been assaulted in virtually every interview it was impossible to establish whether any particular officer had been responsible for any particular injury. In his memorandum the Senior Assistant Director also stated that on the medical evidence there was no doubt that the complainant was assaulted while in Castlereagh. On the hearing of the reference by the CCRC the Court of Appeal concluded that if prosecuting counsel had been informed of the reason for the decision not to prosecute Donnelly he would have so informed the trial judge who might have reached a different conclusion as to whether Donnelly was a person who could inflict severe injuries on himself.

[6] The CCRC also established that approximately 1 month before the interviews of the appellants a man called Robert Barclay had been interviewed by DC French and DC Newell. He alleged at his subsequent trial that he had been slapped, punched and threatened. These allegations were similar to those made by the appellants. Although convicted at first instance Barclay was acquitted on appeal on the basis that it was not possible to exclude the conclusion that the injuries found on Barclay had been inflicted at Omagh police station. Barclay then brought a private prosecution against the named officers. The judge in that trial concluded on 25 April 1979 that there was a strong prima facie case that Barclay had been assaulted. The officers were acquitted, however, because Barclay had been dishonest in relation to certain matters not relating to his injuries and there was uncertainty as to the timing of some of these.

[7] At the hearing of the CCRC reference the Court of Appeal concluded that the admission in evidence of the first appellant's confessions depended upon the acceptance by the judge of the evidence of DC French. If the judge had known of the finding of a prima facie case in the prosecution brought by Mr Barclay against DC French he may well have reached a different conclusion. The Court of Appeal also noted the striking similarity between the description given by Donnelly and the first appellant as to the manner in which their admissions were recorded. If the allegations by Donnelly had been supported and strengthened by the new evidence this could have served also to discredit the evidence given by the police officers in their second appellant's case. On that basis the Court of Appeal was left with a distinct feeling of unease about the safety of the convictions which they accordingly quashed.

Statutory context

[8] The most convenient starting point is the International Covenant on Civil and Political Rights 1966. Article 14 deals generally with fair trial rights.

Article 14(6) provides for compensation for those pardoned or released on appeal out of time:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

The United Kingdom signed and ratified the ICCPR on 20 May 1976. It initially sought to implement it by a Ministerial Statement. The first of those Statements was made on 29 July 1976 by the then Home Secretary who explained the reason for making an ex gratia payment from public funds.

> "The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages."

The use of the terminology "wrongful conviction" was clearly intended to equate with the term "miscarriage of justice" in article 14 (6).

[9] The next relevant Statement was made on 29 November 1985 when the Home Secretary announced in Parliament that compensation would be paid to all persons where that was required by the United Kingdom's international obligations and in particular by article 14 (6) of the ICCPR. Thereafter statutory effect to this obligation was given by section 133 (1) of the Criminal Justice Act 1988 which provides:

> "(1) Subject to subsection (2) below when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non disclosure of the unknown fact was wholly or partly attributable to the person convicted."

The wording of the statute closely follows the wording of the ICCPR with the term "beyond reasonable doubt" replacing "conclusively".

[10] The meaning of this provision arose for consideration in R (Mullen) v Secretary of State for the Home Department [2004] UKHL 18. In that case the claimant was convicted of conspiracy to cause explosions and sentenced to 30 years imprisonment. After he had been in prison for 10 years the Court of Appeal quashed his conviction on an appeal out of time on the ground that his deportation from Zimbabwe to the United Kingdom had involved an abuse of process rendering his conviction unsafe. His claim for compensation failed at first instance but succeeded in the Court of Appeal. On appeal to the House of Lords the appeal was allowed and the appellant's claim failed. The two leading judgments were given by Lord Steyn and Lord Bingham. The difference of approach between them remains unresolved. Lord Steyn held that in order to establish a miscarriage of justice it was necessary to establish that the person concerned was clearly innocent. If that is the proper test it is accepted by the appellants that they cannot succeed.

[11] Lord Bingham observed that the Court of Appeal had allowed the appeal because there had been an abuse of executive power which had led to the appellant's apprehension and abduction. He noted, however, that the court had identified no failure in the trial process and concluded that it was only for failures of the trial process that the Secretary of State was bound to pay compensation. Since there had been no challenge to the correctness of the conclusion reached by the jury as to the appellant's guilt there was no question of any failure of the trial process and the claim, therefore, had to fail.

[12] It was not necessary for Lord Bingham to reach a concluded view on the meaning of "miscarriage of justice" and he did not do so but he set out his approach in two passages within his opinion. At paragraph 4 he dealt with the Ministerial Statements.

> "[4] It is apparent from their statements that Mr Jenkins and Mr Hurd were addressing the subject of wrongful convictions and charges. For present purposes, wrongful charges need not be considered. The expression "wrongful convictions" is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may

> be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

In this passage he identifies two categories of claimant who might satisfy the test. The first is those who can demonstrate that they are innocent and the second is that group of persons who can demonstrate that something has gone seriously wrong in the investigation of the offence or conduct of the trial as a result of which someone has been convicted *who should not have been convicted*. It is clear, however, that he does not include within those who might satisfy the test persons who can demonstrate only that they might not have been convicted.

[13] At paragraph [9] he addressed the expression "miscarriage of justice" thus:

> "(1) The expression "miscarriage of justice" in section 133 is drawn directly from the English-language text of article 14(6). In the article the expression describes a concept which is autonomous, in the sense that its content should be the same in all states party to the ICCPR, irrespective of the language in which the text appears. Nonetheless, "miscarriage of justice" is an expression which, although very familiar, is not a legal term of art and has no settled meaning. Like "wrongful conviction" it can be used to describe the conviction of the demonstrably innocent: see *People (DPP) v Pringle* (*No 2*) [1997] 2 IR 225, 230, 236, 246. But, again like "wrongful conviction", it can be and has been used to describe cases in which defendants, guilty or not, certainly should not have been convicted."

In this passage he clearly identifies the same two categories as those who satisfied his test at paragraph [4].

Conclusion

[14] It is common case that in 2007 the Court of Appeal set aside the convictions of each appellant on the basis that the court was left with a distinct feeling of unease about the safety of those convictions. The learned trial Judge in the court below properly recognised at paragraph 20 of his judgment that the court should take its cue from the Court of Appeal in determining a successful appellant's entitlement to compensation but that it was necessary to have regard to the circumstances set out in the judgment as well as the conclusion expressed in the judgment. At paragraph 24 of the judgment he reviewed the factors upon which the Court of Appeal relied and characterised those issues as constituting a basis for the conclusion that something had gone seriously wrong with the conduct of the trial.

[15] That is not, however, the test as propounded by Lord Bingham. In the second category of cases it is necessary to demonstrate that something has gone seriously wrong in the conduct of the trial resulting in the conviction of someone who *should not* have been convicted. In this case the new facts upon which the appellants rely raise issues about the credibility of one police officer and one other witness. It is not possible to come to any conclusion as to whether the new facts would have led to a different outcome in respect of the assessment of either witness. The new evidence was sufficient to give rise to unease about the safety of the conviction but this is a case in which at its height it can only be said that the appellants *might not* have been convicted. Such a case lies outside either of the categories identified by Lord Bingham. That is also the reasoning of the decision in Boyle's Application [2008] NICA 35 by which we are bound.

[16] It follows, therefore, that whether the approach propounded by Lord Steyn or Lord Bingham is followed the appellants cannot bring themselves within either test and accordingly the claims for compensation cannot succeed. The appeals must be dismissed.