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Judgment: approved by the Court for handing down | *Delivered:* **09/04/2003**
(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

v

ANDREW ROBINSON

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RULING

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NICHOLSON LJ

[1] I gave an ex tempore ruling on the admissibility of certain evidence in this case on 21 November 2002 and I undertook to reduce this into writing. The statements of Diane Osborne, the stepmother of the dead girl, of Robert Wilson Osborne, the uncle of the dead girl and of Louise Laverty, one of her closest friends, were shown to me, duly edited. The prosecution invited me to admit this evidence, which was opposed by counsel on behalf of the accused.

[2] Diane Osborne's edited statement included:

> "I know that their relationship together had numerous arguments but they also seemed to get on very well when they weren't arguing. Towards the end of the relationship I was aware of a decline in Julie-Anne's health and personality. The whole thing came to a head about 6 months ago when Andrew came to my shop. I slapped him across the face and he then started crying and appeared to break down, he said he was under a lot of pressure. He said that if Julie-Anne ever left him he would `do her in'. This is about the time that my relationship with the both of them started going downhill …".

[3] Robert Wilson Osborne's edited statement included:

> "They moved in with me for a few months. They moved to Vara Drive. They stayed there for about two years and moved to 6 Shankill Terrace in the summer of 2000. I used to visit Julie-Anne regularly at Vara Drive and it was during this time that she had a baby, Melissa who is now 18 months. I would have seen them on a regular basis, perhaps five times a week … During some of the arguments at Tara Drive, Julie-Anne threatened to go to her mother's house. On three or four occasions I heard Andy tell Julie-Anne that if she ever walked out with the child he would cut her throat. I acted as peacemaker during these rows … They moved into 6 Shankill Terrace in the summer of 2000 and I continued to keep in contact with Julie-Anne. Each time I was there … the rows happened. I heard him a number of times threaten to cut her throat at Shankill Terrace if she ever left with the child …".

[4] Louise Laverty's edited statement included:

> "I would class myself as Julie-Anne Osborne's best friend … I had made arrangements to go Christmas shopping with Julie-Anne on 9 December 2000. [We came back to 6 Shankill Terrace.] I drove off then and took Julie-Anne and Melissa up to my house. When we were driving up the road Andy started to ring her on her mobile. He said that she was to return and if she didn't he would kill her and [to] tell Louise `I'll shoot her too'. Every few minutes these calls continued and Julie kept saying: That's it, Andy, it's over. He then said that if she kept Melissa away from him or she stayed away for any more than three days he would kill her. We arrived at my house and the phone calls continued, shouting abuse and threats towards her. Eventually I took the phone from her and told him to leave her alone. He started to cry and say he was sorry."

[5] At this stage of the trial Linda Shearer, the mother of Julie-Anne, had given evidence that she had gone on Boxing Day morning to 6 Shankill

Terrace where Julie-Anne and the accused lived and saw both of them. Her daughter's face was "totally closed over, black". The accused said he had lost control. She said she could not look at him. Julie-Anne said: "It's over. We're finished. I'm leaving you and I'm letting everyone know the real Andy and I'll not be with you over Christmas and the New Year" and she took her engagement ring off and put it down and said: "We're finished". He was saying that he was sorry but he always said he was sorry. She stayed there till about 3.30pm to 4.00pm and brought away with her their daughter Melissa. There was a discussion that the accused would stay over with his mother that night. There was no discussion about Melissa involving his mother or himself. The accused rung over on the afternoon of 27 December for her to bring Melissa over [to 6 Shankill Terrace.] She said there was no arrangement to bring Melissa over.

[6] In cross-examination she said the accused had punched Julie-Anne in the eye. In further cross-examination she said that Julie-Anne had told her [on Boxing Day] that she finished with Andrew until he had proved himself to her. 'In other words,' said counsel, `until he had shown that he would behave himself that they were' and she answered `totally finished'.

[7] Miss Barbara Orr lived in 5 Shankill Terrace. She had given evidence that on the evening of Christmas Day there was a party at 2 Shankill Parade. The accused and Julie-Anne and Melissa were at the party from sometime after 11.00pm for half an hour to 45 minutes. They went back to 6 Shankill Terrace. She left the party at 3.00am or so, went to bed and shortly afterwards heard Julie-Anne calling her from outside Julie-Anne's back door. She was standing with the accused. She said: "Come out. I need you." She saw that she had a black eye, went into 6 Shankill Terrace where she found Julie-Anne crying. She had a big black eye and a big bump on her head. Her eye was closed over. A bump up above the left eye and her left eye was starting to close over. She was just in convulsions of crying and seemed scared. The accused was also crying. She did not know what for. He said: "Look what I've done to my Julie-Anne's eye. I'm sorry." Miss Orr said: "It's too late to be sorry now, Andy." He kept saying: "I'll not be with yous tomorrow, you and Melissa." Julie-Anne said "Yes, I know you'll not be, Andy. You'll be in your mum's. We need a break." At this stage he produced a knife which ended up under the settee on which Miss Orr was sitting and she stood in front of where the knife was so that he could not get it. She left the house after 6.00am [on Boxing Day].

[8] In cross-examination she agreed that she had witnessed an emotional scene after he had assaulted Julie-Anne and it was put that he was being told that this was serious. It was made clear to him that he was going to have to move out for a time. And when he was manipulating the knife as described by her Julie-Anne said to him that he had to think about the child before he thought about himself.

[9] Patricia Whenham who gave the party on Christmas evening gave evidence that she went into 6 Shankill Terrace after 6.00am on Boxing Day and saw what had happened in Julie-Anne's house. Later on Boxing Day evening Julie-Anne came into 5 Shankill Terrace where she was. She had Melissa with her. She thought that the accused phoned for her [to go back to 6 Shankill Terrace.] In cross-examination she said that she was near sure it was Andy phoning looking for her. She wanted Andy to take a break because she was afraid of what he might do to her and the child. [Julie-Anne] turned round and said: "I just want him to go up to his mammy's for a couple of days" because said Ms Whenham, she was worried about what he might do to her and the child. There was other relevant evidence given by Desmond Shearer and others.

[10] On 15 November the Crown applied to call Diane Osborne. At that stage I was unaware of the statements of evidence of Robert Wilson Osborne and of Louise Laverty. I had also not read carefully the pathologist's report. Mr Creaney sought to introduce what was said at her shop one day in the summer of 2000. (See her statement of evidence). I had submissions from Mr Creaney QC and Mr McDonald QC and ruled that at that stage of the trial I would not be prepared to admit this evidence but the case might develop in such a way that I might review this ruling.

[11] The report of the autopsy carried out by Professor Crane revealed:

(1) A group of four stab wounds between 2 and 3 cms long on the back and right side of the neck. The margins were clean cut. They extended deeply into the underlying muscles. One of the wounds located below and behind the mastoid area, extended backwards and medially to the atlanto-occipital joint which had been partially incised.

[12] (2) An incision 8 cms long extending downwards and forwards on the right side of the neck. It penetrated deeply down to the cervical spine at the back and the larynx at the front. The right jugular vein and right carotid artery had been divided.

[13] (3) An incision 9 cm long and gaping by about 3.5 cms roughly horizontally across the front and right side of the neck. It exposed the underlying larynx which had been divided between the thyroid and incoid cartilages. It had divided the right carotid artery and had partially incised the inter-vertebral joint between C7 and T1. Just above the left upper margin of this wound was a superficial incision, 4 cm long.

[14] (4) There was an elliptical wound 13 mm long and gaping by 4 mm on the left side of the front of the neck. When a probe was inserted this was found to be in continuity with wound No 3.

[15] A study of the post mortem photographs confirmed that her throat had been cut. An application was made before Professor Crane gave evidence to admit in evidence what Diana Osborne, Robert Wilson Osborne and Louise Lavery had said in written statements of evidence which were edited, as I have indicated.

Reasons for Admitting Evidence

[16] I considered that it was open to the jury on this evidence taken in conjunction with the rest of the evidence, to infer that the accused had an obsessional love/hate/jealousy relationship with Julie-Anne and his daughter, had an obsession that they might leave him because of his behaviour towards Julie-Anne, not least his behaviour on Boxing Day morning when he punched her and she said to him in front of her mother: "It's over. We're finished etc." (She had arranged a Boxing Day dinner for family members which had to be cancelled and her Christmas was effectively "wrecked") and that he killed her because of that relationship.

[17] I considered that the evidence which I admitted was more probative than prejudicial as evidence of motive for the brutal attack which led to Julie-Anne's death. I took fully into account my discretion at common law to exclude the evidence and my statutory duty to exercise my discretion under Section 76 of the Police and Criminal Evidence (NI) Order 1989 which provides:

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

I exercised my discretion in favour of the prosecution at common law and I concluded that the evidence would not have such an adverse effect as is referred to in section 76.

[18] I was aware that other prejudicial evidence had not been relied on by the prosecution but this did not influence me in making my ruling.

[19] I recognised that I was allowing in evidence of threats to kill which were of themselves criminal offences and that the accused had not put his character in issue.

[20] The evidence which I admitted was, I considered, evidence of declarations of the accused indicating a desire to commit or reason for committing on the night of 26/27 December and the morning of 27 December the offence charged. This evidence was relevant if the jury considered, as they were entitled on the evidence to do, that the accused was then in a state of mind leading him to believe that Julie-Anne would or might well leave him forever or for an indefinite period or for a period which he could not tolerate, and would or might well take their child with her and seek to prevent or limit his contact with the child to an unbearable degree. The evidence was also, (and this ground overlaps with the first, set out at [16],) evidence of motive, of an incitement of the will, of emotion exciting to action, receivable in order to show that it was more probable than not that the accused committed the offence charged.

[21] I had regard to the dictum of Lord Atkinson in argument in R v Ball [1911] AC 47 when he said:

> "Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, and this is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he kill him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his `malice aforethought' in as much as it is more probable that men are killed by those that have some motive for killing them than by those who have not." This passage was cited with approval in Archbold 2003, paragraph 13-34.

[22] The passage is dealt with in some detail at paragraphs 13-34 , 13-35, 13-36, 13-37 and 13-38 of Archbold. In R v Berry (DR) 83G App R 7 the Court of Appeal referred to the "dubious authority of Ball". In R v Williams (CI) 84 Cr App R 299 it was held that evidence of motive was admissible to show that it was more probable that an accused person had committed the offence charged; and in the present case the evidence of the appellant's previous history was admissible, in the trial judge's discretion, as tending to show that the appellant intended his threats to his intended victim to be taken seriously. Dicta of Lord Atkinson cited above and of Kennedy J in R v Bond [1906] 2 KB 389 at 401 were applied. The decision in Berry and a dictum of Lord Hailsham in Boardman [1975] AC 421 at 451 were considered.

[23] Hodgson J read the judgment of the Court of Appeal and I refer to the entirety of pp 301 to 305. The judgment concluded:

> "Having re-examined Ball in the light of the authorities we have concluded that the dicta of Lord Atkinson and Kennedy J correctly represent the law and that no further doubt about the matter need be felt."

I need not set out the authorities and passages from judgments cited by Hodgson J.

[24] The totality of the background or history was not placed before the jury because some of it was regarded as more prejudicial than probative. So much of it as was placed before them was in my view comprehensible and sufficiently complete.

[25] On this evidence presented to the jury together with the rest of the evidence, it was open to them to infer that the accused entertained feelings of possessiveness towards the deceased and his daughter which were so intense that he was not prepared to let either of them go to her mother or stay in 6 Shankill Terrace on their own and thus the jury would be entitled to infer a murderous intent and the carrying out of that intent. It was open to them to infer that he had thought this over for a period of time and put a plan in action which he may well have been harbouring for a significant period of time, based on his belief or fear that she would break off their engagement as, inferentially, she did by taking off her engagement ring and that she intended to leave him permanently or for an indefinite time. I took into account that the more remote in time from the date of the offence the threat was made the less probative it was. The history of this volatile relationship was properly confined by the prosecution to threats to kill if she left him. I do not mean that I would necessarily have excluded other evidence of possessiveness in the past. Se R v Pettman (Unreported: 1985) and the dictum of Purchas LJ cited in Archbold. This evidence was admitted by me, therefore, as evidence of part of a continual background or history. That other parts of the background or history were not referred to or were edited out by the prosecution in fairness to the accused did not disentitle them from calling evidence of part of what would otherwise have been a continual background or history, leaving open to the defence to bring out matters favourable to the accused. This reasoning overlaps with grounds [16] and [20]. And see R v M (T) [2000] 1 WLR 421, R v Sidhu 98 Cr App R 59.

[26] This evidence was in my view admissible in so far as it might reasonably be regarded by the jury as explanatory of the conduct of the accused, as charged on the indictment, as an integral part of the history of the

crime alleged, notwithstanding that a significant part had been edited out. The evidence, if accepted, went directly to prove the actual crime for which the accused was indicted, paraphrasing the dictum of Kennedy J in R v Bond [1900] 2 KB 389 at 401 – to prove motive or intention and the actual killing. This reasoning overlaps with [16], [20] and [25].

[27] This evidence was also relevant in my view to the issue whether the accused was genuinely upset to find that Julie-Anne was dead and was therefore not the killer – as judged by his behaviour at the scene where the body was found on the afternoon of the killing when he acted "hysterically" and was taken to hospital to be treated for "shock" and to the issue whether the worst thing he had done to her was to slap her and punch her on the face on 25/26 December, as he repeatedly said.

[28] It was not admitted as evidence of disposition or propensity but as relevant, in so far as it showed how he reacted on other occasions to the risk that she would leave him so that the jury, if they saw fit, were entitled to infer that on the night of Christmas Day/Boxing Day and morning of Boxing Day he resorted to stabbing and cutting her throat, amongst many other injuries and killed her. See R v Futcher [1995] 2 Cr App R 251.

[29] It was admissible as tending to show the true relationship between the parties: see Hegan (1873) 12 Cox CC 357: B [1997] Crim LR 220 and Blackstone [2003] F 12.23. Criminal charges cannot fairly be judged "in a factual vacuum": R v Sawoniuk [2000] 2 Cr App R 220.

[30] I also took into account the decision of the Court of Appeal in R v Giannetto [1997] 1 Cr App R 1 at p10. In particular I had regard to the following passage from the judgment of Kennedy LJ:

> "Recognising that he might have difficulty in persuading us that the trial judge was wrong to admit the evidence, Mr Barton went on to submit that if the evidence was properly admitted the trial judge nevertheless failed to direct the jury as he should have done as to the use which could properly be made of the diary extracts and the affidavits. The jury, it is said, should have been warned not to regard any perceived propensity by the appellant to assault his wife as evidence that he either murdered her or caused somebody else to do so. In our judgment the judge (Rougier J) did give an appropriate warning in clear and unambiguous language when he said at page 86 of the summing-up:

> `Do not forget, members of the jury, that in those situations parties both say and do things that they do not really mean and which they subsequently regret, wild threats can be made. If you think that the defendant did both threaten and assault Julia, bear in mind, nevertheless, that there are literally thousands of people, wives, who have been threatened and assaulted in a similar situation and are still walking this earth. There is a very big gulf between that sort of thing and the butchery with which we are concerned here.'"

[31] In the course of my ruling I stated that having regard to the decision in Giannetto it seem to me appropriate that the judge in summing-up should give an appropriate warning and stated that I proposed to say something similar to the warning given by Rougier J.

[32] My note indicates that I said words to this effect in my summing-up:

> "Do not forget, members of the jury, that people in domestic situations both say and do things that they do not really mean and which they subsequently regret. Wild threats can be made. If you think that the accused did both threaten and assault Julie-Anne Osborne, bear in mind, that there are hundreds of women, wives [I substituted `hundreds' for `thousands' because I was dealing with Northern Ireland] who have been threatened and assaulted in domestic situations and are still alive. There is a very big gulf between that sort of thing and the butchery with which we are concerned here."

For these reasons I admitted the evidence. Most of them overlap or state the same reason in different words. I would not have admitted the evidence on the ground set out at [27] alone.