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**IN THE CROWN COURT IN NORTHERN IRELAND**
**BELFAST CROWN COURT**

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**THE QUEEN**

**-v-**

**KEVIN CRILLY**

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**HEARSAY RULING (No 2)**

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**HART J**

[1] In this ruling I consider the remaining hearsay applications made by the prosecution. They form a somewhat eclectic collection and it will be necessary to consider separate groups of applications depending upon whether the witnesses concerned are deceased or unwilling to attend. In my ruling yesterday I outlined the circumstances of the case against Crilly that is being alleged by the prosecution and considered the relevant principles to be adopted when considering absent or deceased witnesses. I do not propose to repeat what I said there but will apply the principles I applied in that ruling.

[2] Before turning to the various applications I will first deal with the specific objection made by Mr Kearney in respect of the absence from a number of the statements of the signature of the person by whom the statement was recorded or delivered, for example in the case of Detective Garda Niland. This requirement was required where the statement was to be used at a Preliminary Enquiry under the provisions of s. 3 of the Criminal Justice (Committal for Trial) Act (Northern Ireland) 1968 which applied at the time the statements were recorded. Such a signature is mandatory and without one the statement is inadmissible at a preliminary enquiry, see R-v-Campbell, [1985] NI at page 363. However I do not consider that the absence of such a signature is of any significance when considering whether the statement in question should be admitted. It is a purely formal requirement and one of no significance in this context, particularly when some of the statements were read at the trial before Gibson LJ. I consider that the interests of justice do not require such

statements to be excluded and I am satisfied that it is proper to admit them unless they are not admitted on some other ground.

[3] I now turn to consider the evidence of the deceased witnesses. As I pointed out in my earlier ruling, where a witness is dead the statement is automatically admissible subject to the exclusionary power under art. 76 of the 1989 Order. However, when considering whether the statement should be excluded one should have regard to the art. 18(1)(d) factors. See R-v-Cole and Keet [2008] 1 Cr App R, 5. I consider that one of the factors to which I should have regard in the context of the present application which did not fall to be considered in yesterday's application is whether any difficulties are created for either the prosecution or the defence by the passage of time since these events. As pointed out in my earlier ruling, Crilly went on the run for 27 years, and insofar as that has created difficulties for the prosecution, whether because of the deaths of witnesses or by the destruction of exhibits when the forensic science laboratory was destroyed by a terrorist bomb, it is not in the interests of justice that the defendant should profit by the passage of time caused by him unless the defendant can show that he would be significantly prejudiced by the absence of a particular witness or exhibit.

[4] I will deal with the witnesses in turn. Detective Garda Niland is dead, his statement of some nine pages is very detailed and he gave evidence at the trial. In the statement and in his evidence he described in considerable detail the following:

1. How and where he found various exhibits as a result of his examination of the scene at Flurry Bridge and the field in which it is alleged Captain Nairac was murdered by Townson.

2. His receipt and transmission of other items.

3. His conclusions following his examination of the automatic pistol that is alleged to have been Captain's Nairac's pistol and the revolver used to kill him by Townson.

His evidence is of importance in a number of respects, in particular:

(a) he found blood and hair at the bridge;
(b) he found blood at various locations;
(c) he found blood on the revolver used by Townson to kill Captain Nairac, and;
(d) he established that the revolver was prone to misfiring. That is important in view of Townson's admission that he test fired the gun on the way and the gun misfired a few times before he fired the shot that killed Captain Nairac.

[5] His account is of considerable probative value and appears to be reliable. No other evidence can be given of much of his evidence. Whilst it may be difficult for Crilly to deny it, the weapons are available for examination by the defence, and I

consider that it is unlikely that had he been alive his evidence would have been realistically challenged by Crilly insofar as it related to matters Crilly expressly or impliedly concedes and which are therefore unlikely to be challenged in any real sense. I am satisfied that it is in the interests of justice to admit his statement and the transcript of his evidence.

[6] One of the forensic witnesses at the earlier stage was Mr Richard McLean of the Northern Ireland Forensic Science Laboratory who has since died. It appears that all of the blood and hair samples from the scene or from the Cortina alleged to have been Crilly's no longer exist, although the hairs from his hairbrush do. Mr McLean did not have the benefit of DNA examination of the blood and hairs because that technology did not exist at the time, but he set out his conclusions in considerable detail. His notes and records relating to his examination are available. His evidence is of considerable probative value and appears to be reliable. It is also of very considerable importance insofar as he found approximately 650 hairs in the rear footwell of the Cortina. He concluded that they appeared to have been forcibly removed from the head. He also concluded that they were microscopically similar to hairs from the hairbrush but could be distinguished from the hair samples taken from Morgan, Fearon, O'Rourke, Rocks and McCoy.

[7] Mr Kearney submitted that Crilly will be prejudiced by the admission of Mr McLean's report because he could not be cross-examined about matters such as the distribution of the hairs in the car, the absence of blood in the car, the split ends of the hair and the forcible removal of the hairs. These are objections of some significance, although as Mr McLean's notes are available they can be examined by a suitable expert for the defence who could also give evidence as to any deficiencies or limits in respect of visual and microscopic examination of human hair. It is also relevant that the prosecution have to accept any such limitations as to the strength of the inferences to be drawn from Mr McLean's evidence. Looking at the matter in the round I am satisfied that it is in the interests of justice to admit Mr McLean's statement and I do so.

[8] So far as Maurice Nairac is concerned his evidence was purely formal and there is no prejudice whatever to Crilly if it is admitted. So far as Johnson is concerned, there is evidence on the papers from Constable Pedlow to the same effect. Sergeant Beacom was the other officer present with Detective Sergeant Canavan when Rocks made his statement so Detective Sergeant Canavan can deal with the voluntariness and accuracy of the statement. Mr Kearney however pointed to an apparent discrepancy between the written statement recorded by Detective Sergeant Canavan and the account given by Detective Sergeant Beacom who alleged that Rocks saw "Crilly, Maguire and McCormick standing talking to Nairac" in the Three Steps Inn. However, in his written statement Rocks makes no reference to this having occurred. That is a significant omission and, as Detective Sergeant Canavan does not deal with this in his statement, I must assume in favour of Crilly that there is no other evidence that Rocks made such an allegation. In those circumstances, as it would be very prejudicial to Crilly were it

admitted, yet he would not be able to cross-examine Detective Sergeant Beacom about a significant contribution between two accounts alleged to have been given by Rocks, I do not consider that it would be in the interests of justice to admit the statement of Detective Sergeant Beacom and I exclude it. I do not exclude the statement of Maurice Nairac and Robert Stewart and they are both admitted.

[9] I now consider the applications to admit the statements of Michael Diggin, Christopher O'Gara and Owen Corrigan. All three are retired members of An Garda Siochana who were involved in this investigation into Captain Nairac's murder. Each has been recently contacted by the PSNI and has said that he will not attend the trial to give evidence. As they reside in the Republic of Ireland they cannot be compelled to attend by this court. Michael Diggin was a Detective Sergeant and his statement was read at the trial before Gibson LJ. His evidence was that he found no fingerprints on any of the items he examined and his evidence does not therefore implicate Crilly in these matters, but it may be of some significance as continuity evidence.

[10] Christopher O'Gara gave evidence at the trial that he found some blood and a complete bullet during the search of the Ravensdale Park area. He was not cross-examined. Owen Corrigan was a Detective Sergeant and gave evidence at the trial of a search of the field and that he received some exhibits. He was not cross-examined. I am satisfied that as this evidence appears to be reliable, is non-controversial and does not implicate Crilly in any way it would be in the interests of justice to admit it. However, Mr Kearney took the point that Article 20(2)(c) had not been complied with because the prosecution has not established that it is not reasonably practicable to secure their attendance. There are two possible avenues by which the evidence of these three witnesses might be obtained for the trial. The first would be to apply to have a witness summons issued by the Crown Court and served on each witness in the Republic by virtue of s. 5 of the Crime (International Co-operation) Act 2003. Although such a summons cannot be enforced by committal against someone outside the United Kingdom, one does not know whether such a notice would have persuaded any of the three to attend court, although their response when approached by Detective Constable Tansey might suggest such a notice may have been no more effective than the invitations to appear the Detective Constable had with him. The second option would have been to try to persuade the witnesses to give evidence by live link from convenient locations in the Republic. Whether either of these options may have been successful with any of the witnesses is unknown because they have not been explored.

[11] Under art. 20(2)(C) of the 2004 Order it is for the prosecution to establish that it is not "reasonably practicable" to secure the attendance of the witness. I consider that in the present case the prosecution have failed to satisfy me that it is not reasonably practicable to secure the attendance of the three witnesses as there is nothing to show that the two options I have referred to have been attempted. Article 20(2)(c) is a condition precedent to admitting this evidence and it has not been met. I therefore

refuse to admit the evidence of Michael Diggin, Christopher O'Gara and Owen Corrigan.

[12] The remaining application is to admit the transcript of the judgment of Gibson LJ. When asked why it was sought to be admitted, Mrs Kitson explained that it was primarily to explain Morgan's culpability, but in view of yesterday's ruling Morgan's evidence is no longer relevant. I can deal with this briefly. The common law rule established in Hollington-v-Hewthorn [1943] KB 587, was that a judgment is inadmissible in later proceedings against individuals who are not parties to the original decision. Hence, even the convictions of those convicted by Gibson LJ would not have been admissible against Crilly as he was not a defendant in those proceedings. The effect of this rule has been partly abrogated in criminal proceedings by articles 72 and 73 of the Police and Criminal Evidence (Northern Ireland) Order 1989 as we have seen in yesterday's ruling. But Gibson LJ did not have to consider Crilly's guilt or innocence as he was not before the court on that occasion and so the common law rule still applies unless articles 72 and 73 apply and they do not apply in those circumstances. It is true that the judgment was referred to in respect of Morgan and Fearon's admissions, but that was not to show that they were guilty but that they had been found to have told lies and were therefore unreliable. I consider that is quite different from seeking to use any part of Gibson LJ's reasoning as proof of Crilly's guilt. I know of no authorities supporting the prosecution application and I consider that it is contrary to principle and the application is therefore refused.

[13] Finally, I turn to Mr Kearney's objection to any part of the transcripts of the evidence of those witnesses being used where they also made statements on the basis that the transcript had not been proved. The transcript is no doubt hearsay as it is the record of what the maker says the witness said. Ideally, if the maker of the transcript is alive he or she would be called to first of all authenticate it. At least one of the shorthand writers whose name appears on one of the portions of the transcript is dead. I am satisfied that it is possible to admit a transcript as hearsay under art. 18(1)(d) and the transcript should be admitted in the interests of justice where the maker is dead or otherwise unable to authenticate the transcript or part of it.

[14] Transcripts provided by court shorthand writers and stenographers in Northern Ireland, in my experience, are invariably of an exceptionally high standard of accuracy. Where a transcript already exists I am satisfied that it is in the interests of justice to admit it as an accurate record provided that its provenance can be vouched if challenged. By provenance I mean that a suitable witness can depose to its being produced from official records whether by the Northern Ireland Courts and Tribunals Service or the Public Record Office of Northern Ireland if the records have been transferred to it. I also consider that as these are court records, judicial notice should be taken of transcripts unless they are challenged on good grounds by the defence. Nothing that I have said applies to any original shorthand writer's or stenographer's notes or records which have not been transcribed. Different considerations may arise

as to the intelligibility of such notes and records, but that does not arise in this case. I therefore admit those portions of transcripts of the evidence given by the witnesses whose statements have been admitted.