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(subject to editorial corrections)\**

Delivered: 19/1/2011

IN THE CROWN COURT IN NORTHERN IRELAND

THE QUEEN

-v-

KEVIN CRILLY

RULING

HART J

[1] Crilly is charged with the false imprisonment, kidnapping, and murder of Captain Nairac in May 1977. In the immediate aftermath of Captain Nairac's disappearance, James Swanston, then a Sergeant in the Special Investigation Branch of the Royal Military Police and Detective Constable Hamilton of the RUC went to Crilly's home at Drumintee, County Armagh where he lived with his mother and father. They spoke to Crilly and asked him whether he had been in the Three Steps Inn the night before. Crilly replied that he had been but left early, went to a party and had a feed of drink. They decided not to arrest him but were later directed to return to the house and arrest him. When they returned Crilly had left the house.

[2] It is alleged that Crilly left the area and went on the run, leaving Northern Ireland and not returning for 27 years. When he returned he used the name Declan Power, his birth name before he was adopted by Peter and Teresa Crilly. In June 2007 the BBC broadcast a program entitled "The hunt for Captain Nairac", part of which consisted of a doorstep interview of Crilly by two television reporters. In the course of the interview, Crilly made a number of statements upon which the prosecution rely as evidence that he brought one Liam Patrick Townson, (sometimes referred to in the papers as Townsen or Townsend but I shall refer to him by his correct name which is apparently Liam Patrick Townson).The Prosecution rely on this as evidence that Crilly drove Townson to where Captain Nairac was being held by his captors in County Louth where Townson then shot Captain Nairac dead.

[3] The Prosecution case against Crilly may be said to have three main components. (1) The admissions made to the BBC reporters, (2) forensic evidence linking Captain Nairac to the interior of a Ford Cortina car allegedly used by Crilly, and (3) evidence relating to the prosecution and conviction of Townson and five others: Gerard Patrick Fearon, Daniel Joseph O'Rourke, Michael Francis McCoy, Owen Francis Rocks and Thomas Patrick Morgan for offences connected with the abduction and murder of Captain Nairac. Because of the passage of time that has elapsed since Captain Nairac's murder and other events during that time, some of the witnesses have died, others are unwilling to attend the trial and some of the original exhibits no longer exist.

[4] The Prosecution seek to adduce hearsay evidence under the provisions of the Criminal Justice (Evidence)(Northern Ireland) Order 2004, (the 2004 Order), relating to each of the three components of the case against Crilly to which I have already referred, but for the purposes of the present application it is only necessary to consider in any detail application number 3 which relates to co-conspirators, although it will be necessary to refer later to components (1) the alleged confession to the BBC reporters and (2) the forensic evidence.

[5] The application before the Court relates to the trials of others involved in the abduction and murder of Captain Nairac and the Prosecution seek to adduce (1) the convictions of those involved, (2) the confessions which they made and which were relied upon by the courts that dealt with their cases, and (3) the judgment of Gibson LJ who tried Fearon, O'Rourke, McCoy, Rocks and Morgan at Belfast City Commission in November 1978. However, in the course of the application Mr Mooney abandoned the application to have the judgment admitted.

[6] On the 8th November 1977, Townson was convicted by the Special Criminal Court in Dublin of the murder of Captain Nairac on or about the 15th May 1977 and the possession of a .32 revolver and ammunition with intent to endanger life also on or about the 15th May 1977, both offences being committed in County Louth.

[7] On the 15th December 1978, after a non-jury trial before Lord Justice Gibson at the Belfast City Commission, Fearon, O'Rourke, McCoy, Rocks and Morgan were convicted of the following offences committed between 13th and 16th May 1977 (except where otherwise stated). Fearon (1) The murder of Robert Laurence Nairac "on a date unknown between 13th day May 1977 and 16th day of May 1977 in the Republic of Ireland". (2) Possession of a Browning semi-automatic pistol and a quantity of ammunition with intent to endanger life between the same dates in the Republic of Ireland. (3) Causing grievous bodily harm with intent to do Robert Nairac grievous bodily harm between the same dates in the Republic of Ireland. (4) "That he stole and unlawfully carried away Robert Laurence Nairac against his will" in County Armagh between the same dates. (5) That he belonged

to a proscribed organisation, namely, the Irish Republican Army between 1st September 1975 and the 25th May 1977.

O'Rourke: (1) The manslaughter of Robert Nairac in Republic of Ireland between the same dates. (2) That he stole and unlawfully carried away Robert Nairac against his will in County Armagh between the same dates.

McCoy: (1) That he stole and unlawfully carried away Robert Nairac against his will in County Armagh between those dates.

Rocks: (1) Failing to give information to the police in County Armagh between the 14th and 17th May 1977 about the kidnapping of Robert Nairac. (2) Failing to give information to the police in County Armagh between the 14th and 17th May 1977 about the kidnapping of Robert Nairac.

Morgan: (1) The murder of Robert Nairac between the same dates in the Republic of Ireland. (2) Possession of a Harrington and Richardson revolver and quantity of 7.65 ammunition with intent to endanger life between the same dates in the Republic of Ireland. (3) Possession of a Browning semi-automatic pistol and a quantity of 9mm ammunition with intent to endanger life between the same dates in the Republic of Ireland. (4) That he caused grievous bodily harm to Robert Nairac with intent to do him grievous bodily harm between the same dates in the Republic of Ireland. (5) That he stole and unlawfully carried away Robert Nairac against his will between the same dates in County Armagh.

In each case, with the exception of the membership charge against Fearon, and the two charges of failing to give information against Rocks, the charges also alleged that the defendant "with others" committed each offence.

[8] The Prosecution application is that the confessions made by each of the above should be admitted. By "confessions" are meant the accounts given by them during police interviews and in after caution statements, and, where applicable, their testimony before the appropriate courts. The hearsay notice grounding the application relating to Fearon, O'Rourke, McCoy, Rocks and Townson relied upon Article 22(1)(7) of the 2004 Order, that is preservation of common law rules in relation to common enterprise. However, Mr Terence Mooney QC (who appears for the Prosecution with Mrs Kitson) did not seek to rely on Article 22(1)(7), basing his submissions instead on Article 18(1)(d), which provides that:

"In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if, the Court is satisfied that it is in the interests of justice for it to be admissible".

[9] The application in relation to Morgan is not based upon Article 18(1)(d) because he is dead, and so the Prosecution will have to rely on the provisions of Article 20(2)(a) of the 2004 Order, which in turn may require the Court to consider whether it should exercise its power under Article 30(2)(a) by virtue of Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989, (the 1989 Order). It may also be necessary to have regard to Article 28(2) of the 2004 Order. Mr Kearney, (who appears on behalf of Crilly) referred at some length to matters in the confessions by Morgan as indicating that Morgan's accounts were unreliable, untruthful and contradictory.

[10] However, before considering the evidence which is sought to be admitted, I first of all turn to consider the scope and effect of Article 18(1)(d), which is the counter-part of Section 114(1)(d) of the Criminal Justice Act 2003, (the 2003 Act). Section 114(1)(d) has been considered on several occasions by the Court of Appeal in England and Wales and most recently by the Supreme Court in R v Horncastle [2009] UKSC 14. In my references to, and citations from, the various authorities, I will substitute references to the relevant provisions of the 2004 Order for those in the 2003 Act.

[11] In the context of the present applications it is unnecessary to consider any authority before the decision in R v Y [2008] 1 Cr.App.R. 34. In that case Y was on trial alone for murder and because the appeal was an interlocutory one the Court of Appeal was not concerned with the merits of the application. That was because the trial judge had not considered the merits as he had ruled that Article 18(1)(d) was not available to admit the evidence which the prosecution sought to adduce. However, it appears from the judgment of Hughes LJ that the hearsay evidence was a confession made by a man referred to as X. Although X and Y were accused of complicity in the same murder, they had never been jointly charged. X had pleaded guilty to the murder and in his confession he had implicated Y. The prosecution conceded that it did not have a prima facie case against Y without the confession of X. X's confession was not made in the form of an after caution statement or admission, but was alleged to have been made in the course of a conversation with his girlfriend before he was arrested in which he admitted that he had killed the deceased and alleged that Y was the other assailant.

[12] In Y, Hughes LJ reviewed the background to Article 18(1)(d), and after detailed consideration of its extent, and how it might be applied, embodied the Court's conclusions in paragraphs 61 and 62:

"61. [Article 18(1)(d)] is available in law for all types of hearsay, and on application by any party to a criminal trial. In the case of an out of court statement contained in, or associated with, a confession. [Article 22(1)] paragraph 5 does not exclude the application of [Article 18(1)(d)].

62. But the greatest care must be taken before admitting an out of court statement under [Article 18(1)(d)], to ensure that the [Article 18(2)] factors are fully considered and that overall it is genuinely in the interests of justice that the jury should be asked to rely on the statement without seeing its maker and without any question being addressed to him about it. It is not the effect of Article 18(1)(d), that out of court statements, whether by a co-accused or anyone else, are routinely to be admitted. The considerations set out in paragraphs 49 to 60 above exemplify, but do not purport exhaustively to list, some of the reasons.”

[13] Whilst it is therefore clear from Y that an out of court allegation by a co-offender (to adopt the apt phrase used by Mr Valentine) against a defendant is capable of being admitted under Article 18(1)(d) if the court is satisfied that it is in the interests of justice to do so, it does not follow that the court will be easily satisfied that it will be in the interests of justice to do so, and it should not be routine to admit such allegations. Indeed, before admitting such an allegation, the Court is enjoined to approach this question in two stages. The first is to fully consider the nine factors identified in Article 18(2) (and any others the Court considers relevant). The second is to consider whether overall (which I take to mean looking at the circumstances of the case in the round), it is genuinely in the interests of justice that the tribunal of fact should be asked to rely on the out of court allegations without seeing the maker of the allegation, and without any question being addressed to him about the allegations.

[14] It is salutary to bear in mind earlier passages in the judgment where some of these principles are amplified. First of all, at paragraph 57 the Court referred to the R v McLean and Others [2007] EWCA Crim 219, and concluded:-

“For present purposes it is enough to say that the existence of [Article 18(1)(d)] does not make police interviews routinely admissible in the case of persons other than the interviewee, and that the reasons why they are ordinarily not admissible except in the case of the interviewee are likely to continue to mean that in the great majority of cases it will not be in the interests of justice to admit them in the case of any other person.”

Secondly, at paragraph 58, the Court stated:

“In a few cases, it is possible that the accusation can be regarded as sufficiently reliable for it to be in the interests of justice to admit it, even though it cannot be tested by questioning the maker. It seems to us that it is likely that that will be the unusual case.”

[15] That it will be unusual to admit out of court allegations by an absent individual maybe said to be reinforced by Hughes LJ’s reference to the Article 18(1)(d) power at paragraph 48 as "residual", a term also used by Lord Phillips in R v Horncastle at paragraph 31(iii) where he referred to Article 18(1)(d) as providing "...a limited residual power to admit hearsay if the interests of justice require it" . That Article 18(1)(d) is to be cautiously applied is clear from R v Z [2009] 3 AER page 1022 at paragraph 20, and from Lord Phillips' statement in Horncastle at paragraph 39 that "The admissibility of hearsay is being cautiously approached by the courts".

[16] The reasons for the courts to be cautious in admitting hearsay allegations from a co-offender may be said to be two-fold. Firstly, it is second best evidence as the tribunal of fact cannot observe the accuser, nor can his allegation be probed, and for these reasons it cannot be assessed. Hughes LJ put it thus at paragraph 56 of Y:

"...hearsay is necessarily second best evidence, and that it is for that reason much more difficult to test and to assess. The jury never sees the person whose word is being relied upon. That person cannot be asked a single exploratory or challenging question about what he said. Those very real disadvantages of hearsay evidence, which underlay the common law rule generally excluding it, remain critical to the assessment of whether the interests of justice call for its admission".

Secondly, whilst an admission is likely to be true because a person will not usually admit to a serious crime unless he committed it, the same cannot be so readily assumed where an accusation is made against someone else. That is because the accuser may wish to shift some or all of the blame onto someone else, whether to protect himself or someone else, or simply out of animus towards the accused. Finally, he may simply be mistaken about the nature and extent of the role of the accused. See Y at paragraph 58.

[17] Apart from establishing the need to be cautious in applying Article 18(1)(d), and as a result it being unusual to admit hearsay evidence of an out of court allegation by co-offender, a number of procedural matters are emphasised in Y. One is that the court should carefully consider whether the absent witness could

be brought to court and induced to testify, and in Horncastle at paragraph 38(i) Lord Phillips placed a heavy onus on the prosecution saying, "In essence the judge has to be satisfied beyond a reasonable doubt that the prosecution is not able to adduce the evidence by calling the witness".

[18] In the present case evidence was given by Detective Constable Tansey and Detective Constable Weir of their recent approaches to the five surviving witnesses. O'Rourke claims to have recently undergone both chemotherapy and radiography (presumably meaning radiotherapy), and to have to return to Craigavon Hospital the next day (6th January 2011). Although there is nothing to corroborate that he is a cancer patient, presumably that could be easily checked. In any event, whatever his condition, he said he would not be attending the trial. Detective Constable Tansey formed the view that O'Rourke, Townson and Fearon were all quite adamant that they would not attend the trial, and the prosecution put in a letter of the 11th March 2009 from Townson's solicitor saying "That we..." (presumably this should be "he") will not give evidence". The evidence of Detective Constable Weir was that Rocks and McCoy also made emphatic statements that they would not attend the trial.

[19] Mr Kearney justifiably pointed to both officers not having raised the issue of compulsion to give evidence with each man, but I am satisfied beyond reasonable doubt that even if witness summonses could be served, and even if the witness attended the trial, which I doubt, none would give evidence. Each has been convicted of crimes relating to Captain Nairac's abduction or his murder. None has evinced the slightest willingness to assist the police and I regard it as fanciful in the extreme to suggest that any of them would be prepared to give evidence implicating Crilly, which is what they would be asked to do by the prosecution. I am therefore satisfied beyond reasonable doubt that the prosecution has proved that the evidence could not be adduced by these witnesses giving oral evidence.

[20] Another issue relates to the court's evaluation of the hearsay evidence which it is sought to introduce. Articles 18(2)(d), (e) and (f) all have a bearing on this, because the court has to have regard to (d) the circumstances in which the statement was made, (e) how reliable the maker of the statement appears to be, and (f) how reliable the making of the statement appears to be. Although the relative importance of each of these three factors may vary depending upon the circumstances of each case, all are important when considering the reliability of the allegations sought to be admitted. Mr Mooney asked the Court to have regard to the "potential reliability" of these allegations, but Mr Kearney argued that a higher standard of reliability was required, pointing in particular to references to reliability in Horncastle.

[21] "Reliability" in this context must encompass a number of factors. Firstly, is the allegation itself a credible one in the sense that it is capable of being accepted

as true? Secondly, are there any material inconsistencies, contradictions or omissions within the allegation itself? Thirdly, are there any material inconsistencies or contradictions between each allegation where more than one set of allegations is relied upon, as is the case here? Clearly the weaker the allegation the less reliable it may be considered to be, whilst the stronger the allegation the more reliable it may be. It cannot be the case at this stage that the court should be satisfied beyond reasonable doubt that the allegation is true for that would be to usurp the function of the tribunal of fact. Nevertheless, the Court must be satisfied that the allegation which is sought to be admitted surmounts a high threshold before it can be admitted as can be seen from both Y and Horncastle.

[22] In Y at paragraph 58 in a passage already quoted, Hughes LJ said that, "In a few cases, it is possible that the accusation can be regarded as sufficiently reliable for it to be in the interests of justice to admit it even though it cannot be tested by questioning the maker". In Horncastle Lord Phillips referred to cases "where the evidence is demonstrably reliable" at paragraph 91, and at paragraph 94 he again referred to evidence which is "demonstrably reliable". By requiring hearsay evidence to be "sufficiently" or "demonstrably" reliable to be admitted without the witness being called, I am satisfied that it is clear that the prosecution must show that the evidence surmounts a high threshold of reliability before it can be admitted.

[23] Article 18(2)(b) requires the Court to have regard to what other evidence has been, or can be, given on the matter or evidence contained in the statements sought to be admitted, and it is convenient at this stage to refer briefly to the forensic evidence. The prosecution seek to show that hair samples from a Cortina car driven by Crilly's mother and from Captain Nairac's hairbrush, as well as blood samples from clothes worn by Townson are, similar to those from Captain Nairac. However, the evidence from Doctor McLean and Detective Garda Niland, who are both deceased, is the subject of separate applications so I will leave the forensic evidence to one side for the present application.

[24] The prosecution can rely on certain inferences to be drawn from the certificates of conviction in the case. All are admissible by statute. The certificates showing that Townson was guilty of the murder of Captain Nairac in County Louth is admissible under Section 7 of the Evidence Act 1851, see R v Mauricia [2002] 2 Cr.App.R., and R v Zhang [2008] NICC 4. Those relating to the convictions by Gibson LJ are admissible, are presumptive of guilt and can prove the facts of the crime by Articles 72 and 73 of the Police and Criminal Evidence (Northern Ireland) Order 1989. Although these are the subject of hearsay applications they are not hearsay because they are admissible by statute.

[25] The certificates of conviction to which I have referred earlier establish that Captain Nairac was abducted in County Armagh, that he was assaulted in the



Republic of Ireland and murdered by Townson in County Louth in the Republic of Ireland.

[26] Then there is the evidence contained in the video recording of the BBC Spotlight program. Before considering the inferences that can be drawn from the interview with Crilly that are relied upon by the prosecution, it is necessary to first of all consider whether it is appropriate to have regard to that interview because one of the hearsay applications in the present case is to admit the video, (both visual and audio), as hearsay under Article 18(1)(d) and Article 22(1)(5) of the 2004 Order.

[27] Is the BBC spotlight video recording hearsay? As is pointed out in Blackstone 2011 at F8.44 a film would appear to be admissible at common law as a variety of real evidence, referring to the Statute of Liberty [1968] 1 WLR 739, and in Cook [1987] QB 417 Watkins LJ said that a photograph is in a class of its own to which the rule against hearsay does not apply, see page 424. At F15.16 of Blackstone 2011 the opinion is expressed that a purely mechanical generation of an image is not hearsay. A tape recording is in the same category as a photograph, see R v Magsud Ali, [1966] 1 QB at 701. Subject to the provenance of the recording being established I am satisfied that it is not hearsay evidence but a form of real evidence, just as a CCTV film, a photograph or a tape recording is real evidence. Questions as to its authenticity and reliability in the sense of whether the meaning of any passage has been altered, whether by editing or any other process, are matters for the trial.

[28] In my ruling [2010] NICC 19 at paragraph [30] on the no bill application, I referred to statements made by the defendant during the BBC interview, and I do not propose to repeat them, save to refer to where I said that he said "He went to fetch Townson whom he referred to as OC". That needs to be placed in the context of the following exchange:

"Chris McCourt: Well who, who would have been in charge in Dundalk around that time? Crilly: I have, wouldn't have a clue. I honestly. McIntyre: If Townsend was in charge if Townsend was the OC at the time who was the, you went to get Townsend that night. Crilly: Yes. McIntyre: Who was". It is open to interpretation whether Crilly was accepting Townson was the OC when he replied "yes", and for present purposes I will assume in his favour that he was not accepting that.

[29] Taking the BBC interview statements with the matters proved by the certificates of conviction, I am satisfied that there is evidence that (1) Captain Nairac was abducted from the Three Steps Inn and taken to County Louth where he was murdered by Townson. (2) That Crilly admitted his involvement in what happened. (3) In particular he was aware that Captain Nairac had been involved in a struggle outside the Three Steps Inn. (4) That he went and fetched Townson

and brought Townson to the scene of the murder where he left him. (5) It is a legitimate inference that he must have known that Townson was being brought to the scene because Nairac had been kidnapped, even though his identity may not have been known at the time. (6) That Townson was being brought to where the kidnapped man was being held must have been because he was a person of importance whose assistance was sought by the kidnappers. (7) That anyone kidnapped in these circumstances in that area at that time was at risk of injury or death. These matters are relevant when one considers Article 18(2)(b), that is "what other evidence has been or can be given on the matters mentioned in sub-paragraph (a)", that is the allegations about Crilly's role contained in the confessions to which these applications relate.

[30] I now turn to consider the factors identified in Article 18(2)(a) and (c) as these can be conveniently considered together. The content of these allegations, assuming that they are true, have on their face considerable probative value. In addition, they are important in the context of the case as a whole as they add considerable detail to what Crilly's role in these events is alleged to have been over and above the matters I have just referred to. I do not propose to consider these allegations exhaustively but to summarise their effect under a number of headings.

[31] (1) Crilly's role at the Three Steps Inn and in taking Captain Nairac to the field where he was held. Morgan said Crilly left the bar with the others, was involved in seizing Captain Nairac, and drove him to the field before leaving with O'Rourke to go to Dundalk. O'Rourke said he was a passenger in the car driven by Crilly after Captain Nairac was put in the car. He went with Crilly to Dundalk to fetch Townson. McCoy saw Captain Nairac being bundled into Crilly's car which then drove off from the Three Steps Inn. Rocks saw Crilly follow the others out of the bar. Fearon said he followed the Cortina but does not refer to Crilly as being present. Pausing at this point Morgan and O'Rourke therefore deeply implicate Crilly in the events surrounding the abduction of Captain Nairac at the Three Steps Inn and have him driving their captive to where he is left. McCoy lends some support to this, whereas Rocks doesn't implicate Crilly more than Crilly has implicated himself Fearon doesn't refer to him at all. The evidence of Morgan and O'Rourke in particular therefore implicates Crilly much more deeply at this point than he has admitted.

[32] (2) Crilly's role in going to Dundalk to fetch Townson, and returning to where Captain Nairac is being held captive. Morgan said that Crilly was sent to Dundalk "...to get Townson or some of the boys". Morgan knew Townson was in the "Provia" and on the run. O'Rourke said that he and Crilly were told to go to a pub in Dundalk where he spoke to Townson, and they all drove back together. Rocks said that his car stopped beside Crilly's, obviously on the return journey as Townson was in the car. Townson said "We went out the road in Kevin Crilly's car". He collected his gun on the way and fired a test round from the gun whilst in the car. These accounts confirm Crilly's admission that he went to fetch someone,

but add the important fact that Crilly must have realised Townson was armed and intending to use the gun because he had test fired it.

[33] (3) Crilly's presence and actions at the field where Captain Nairac was being held prisoner once Townson arrived. Fearon said that Crilly was still at the field after Captain Nairac had been killed, but, as I will explain, this was contradicted by Morgan and O'Rourke. Townson, Rocks and McCoy did not refer to Crilly's presence or absence at this stage.

[34] The allegations against Crilly in relation to the three headings are clearly of considerable importance in the context of the case as a whole, but how much probative value do these allegations have? When considering their probative value one of the most important considerations is whether each allegation is consistent with allegations made by others, or whether there are material inconsistencies between the accounts given by the co-offenders in respect of their own roles, and the role they alleged was played by Crilly, and there are a significant number of such inconsistencies.

[35] (1) Was there a scouting run by Morgan and Fearon? In a handwritten document apparently recording Morgan's account of events which was Exhibit 151 at the trial, Morgan described how he was approached by McCormick and asked to take Fearon with him while Morgan scouted the road to the border via Finch's shop to see if there were any Army patrols in the area. Morgan said he and Fearon did so, and reported back to McCormick at the Three Steps that the road was clear. This statement is not relied upon by the prosecution, but has been disclosed to the defence. However, the prosecution rely on another written statement signed by Morgan which was made to Chief Inspector Mitchell on 25th May 1977 at 4.50 pm in which there is no mention of such a scouting run by Morgan or Fearon. In his judgment Gibson LJ found that Morgan's account of scouting the road was untrue, and Morgan admitted that it was untrue during an interview with Chief Inspector Mitchell which started at 3.47 pm on 25th May 1977.

[36] Although Morgan repudiated his initial admission that he had scouted the road with Fearon, when Morgan's initial admission was put to Fearon the latter said that it was true during an interview with Detective Constable Dalton between 2.15 pm and 4.40 pm on 24th May 1977. However, Gibson LJ held that Fearon's statement that he and Morgan had scouted the road was untrue, and that Fearon "...made these admissions in order to attain conformity with what Morgan had said". Therefore, detailed but eventually contradictory accounts were given by Morgan and Fearon that they had gone on a scouting run by car before Captain Nairac was taken from the Three Steps Inn and across the border, an account which was later repudiated by Morgan, and rejected by Gibson LJ so far as Fearon was concerned.

[37] (2) Did Crilly remain at the field after he returned with Townson until after Captain Nairac had been shot dead or did he leave before Captain Nairac was shot? In the interview with Detective Constable Dalton and Detective Sergeant Simpson between 2.15 pm and 4.40 pm on 24th May 1977, Fearon said that when he, O'Rourke and Morgan left the field and drove away Crilly was one of those who was still in the field after Captain Nairac had been shot. Neither Rocks nor McCoy admitted to being present at any time at the field where Captain Nairac was murdered, and they said nothing about Crilly's presence or alleged involvement at that time. However, O'Rourke and Morgan contradict Fearon's account. O'Rourke alleged that Crilly had already left the field before the shot was fired that accidentally hurt McCormick, and before Captain Nairac was shot dead. O'Rourke alleges that Crilly was told to take the car away, and left a few minutes before O'Rourke heard a shot. O'Rourke said that Crilly never came back. Morgan's account on this point supported that of O'Rourke and also contradicted Fearon, because in Exhibit 126 Morgan said that "Kevin Crilly was away. He must have went away when we were aware from Maquire's car". Leaving Townson aside for one moment, these are the only accounts which expressly refer to whether Crilly was present in, or had left, the field at the time of Captain Nairac's murder, and they are completely contradictory.

[38] At this point I must refer to the evidence relating to Townson. During an interview in Dundalk Garda Station on Monday 30th May 1977 that started at 3.15 pm, Detective Inspector Courtney described how Townson admitted firing the shot that killed Captain Nairac. It would seem that Townson was not asked to make a further statement at that time because he agreed to take Inspector Courtney and several other Gardai to two locations. At the first he indicated where some clothes were found hidden, and at the second he indicated where two handguns were found, together with ammunition. One of the guns was identified as Captain Nairac's, and the other as the weapon from which the shot was fired that killed Captain Nairac .

[39] Subsequently Townson was alleged to have dictated a lengthy statement to Garda Laurence Crowe starting at 5.25 pm that afternoon. However, it is unclear whether that statement was admitted in evidence at Townson's trial before the Special Criminal Court. At present the prosecution have been unable to produce a copy of the judgment of the Special Criminal Court, but the defence have obtained a copy of the judgment of the Court of Cr.App.R which dismissed Townson's appeal against conviction. The judgment of the Court was delivered by O'Higgins CJ, and his references to the various grounds of appeal suggested to Mr Kearney that at the trial the unsigned written statement allegedly made by Townson must have been ruled to be inadmissible, an inference that Mr Mooney for the prosecution accepted was probably correct. I agree, and therefore feel that as there is a real doubt (to put it no higher) whether this statement was held to be admissible in Townson's trial, I must leave it out of account. The only allegation made by Townson that implicates Crilly is therefore contained in his short oral

confession to Detective Inspector Courtney which Townson is alleged to have said "We went out the road in Kevin Crilly's car".

[40] Given the contradictions in the evidence relating to whether Crilly was in the field or not when Captain Nairac was killed, Mr Mooney conceded that he did not think that on the evidence the prosecution presently have the prosecution could prove that Crilly was in the field at the time of the shooting. This concession recognises the very considerable difficulty created by the contradictory accounts relating to whether or not Crilly was in the field when Captain Nairac was murdered, because Crilly said in the BBC interview that he wasn't there because "I dropped Townson off and I took off and that was it ... I wasn't there afterwards, no." That is supported by Morgan and O'Rourke but contradicted by Fearon. If all the allegations were admitted one has to ask which would the prosecution invite the trial judge to accept as true? How could the trial judge be satisfied beyond reasonable doubt that Crilly was present at that stage when he would not have the benefit of the evidence of Morgan, O'Rourke and Fearon being given and tested by cross-examination? Mr Mooney's realistic concession therefore accepts the answer must be that the trial judge could not resolve the contradictions, and so the probative value of the allegations of Morgan, O'Rourke and Fearon on this issue is minimal at best, if not worthless.

[41] But, as I have recounted, these are not the only material inconsistencies which cast doubt on the reliability of other allegations made by Morgan and Fearon because they made false admissions about going on a scouting run from the Three Steps Inn. It is not clear whether Fearon gave evidence before Gibson LJ although he is referred to in his judgment at page 492 as giving evidence, but Morgan did, and Gibson LJ found him to be "both untruthful and unreliable as a witness in many respects". So Morgan's evidence in many respects was unreliable, and his account of Crilly's presence at the field was contradicted by Fearon. I do not consider that Morgan's allegations against Crilly can be regarded as sufficiently reliable to pass the high threshold of reliability test because he was found to be an untruthful and unreliable witness in many respects, and some of his allegations about Crilly are contradicted by Fearon.

[42] Can Fearon's account that Crilly was in the field be regarded as reliable? I consider as it was contradicted by Morgan and O'Rourke it cannot, because there is nothing that the prosecution can point that would enable the trial judge to prefer one allegation over another without other evidence, and without the benefit of oral testimony from the various accusers. That leaves the allegations of McCoy and Rocks that Crilly was present and that Captain Nairac was put into Crilly's car according to McCoy. Their accounts are not inconsistent, nor are they contradicted by other evidence, and therefore they have greater probative value than those of Morgan, Rocks and Fearon. McCoy also said that he later saw Crilly in his car with someone who is probably Townson.

[43] Each of the allegations relied upon was made during police interviews and may therefore as regarded as accurately recorded in the light of the convictions of the defendants, something that is relevant under both Article 18(2)(d) and (f), but I am required to consider how reliable the maker of the allegation appears to be. For the reasons I have already given I do not consider that Morgan, O'Rourke and Fearon can be considered to be reliable. So far as McCoy and Rocks are concerned they appear to be reliable.

[44] I now turn to Article 18(1)(h). So far as the inconsistencies and contradictions between the accounts of Morgan, O'Rourke and Fearon are concerned, these could be challenged at the trial in the way that they have been during this application. It would be more difficult to challenge the evidence of McCoy and Rocks without Crilly giving evidence, but he could give evidence if he wished.

[45] Finally I turn to Article 18(1)(i). Undoubtedly Crilly would be prejudiced were some or all of the allegations to be admitted, but prejudice by itself is not a reason for admitting material probative of a defendant's guilt. The question must be would Crilly be unfairly prejudiced? I accept that it would be difficult for Crilly to challenge the evidence of any of the allegations, but it would not be an insurmountable difficulty. Firstly, he could point to any weaknesses or contradictions in the allegations themselves, or in any other part of the evidence that undermined the witness concerned. Secondly, he could give evidence to contradict the allegations. See R v Cole [2008] 1 Cr.App.R. at page 93.

[46] Finally I am required to consider whether it is genuinely in the interests of justice to admit each of the confessions containing these allegations. In doing so I consider that whilst I should have regard to the contents of one confession where that may undermine or contradict another, where, as here, the prosecution seek to rely on out of court allegations against the defendant by different co-offenders, I must decide whether each confession should be admitted separately under Article 18(2), and then consider whether it is genuinely in the interests of justice that the trial judge should be asked to rely on the out of court allegations without seeing the maker of the allegation, and without any question being addressed to him about the allegations.

[47] Before addressing those questions, there are two other matters to which I must turn, one of general application to each of the allegations, the other touching on Morgan only. The general question is how much significance is to be placed on the interests of the community in seeing that those charged with serious crimes are made amenable for those crimes. As Lord Steyn put it in Attorney General's Reference (No. 3 of 1999) [2001] 2 AC 91:

"There must be fairness to all sides. In a criminal case this requires the Court to consider a triangulation of

interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

This may be thought to suggest that all three interests are entitled to be given the same weight, but this is not necessarily the case. Lord Hutton pointed to the risk of convictions being obtained at too high a price if obtained by unfair acts in the same case when he said:

"On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price."

In *Horncastle* Lord Phillips expressly addressed this at [18] in the context of hearsay evidence:

"There are two principal objectives of a fair criminal trial. The first is that a defendant who is innocent should be acquitted. The second is that a defendant who is guilty should be convicted. The first objective is in the interests of the individual; the second is in the interests of the victim in particular and society in general. The two objectives are sometimes in tension and, where they are, the first carries more weight than the second".

Therefore, insofar as there may be a tension between those objectives in the present case the interest of the defendant carries greater weight.

[48] The second matter refers to Morgan alone. As earlier stated he is dead and so the application in his case is not made under Article 18(1)(d) but under Article 20(2)(a) of the 2004 Order which provides that the allegation is automatically admissible, subject to the exclusionary power under Article 76 of the 1989 Order. Mr Kearney drew my attention to Blackstone 2011 16.21 and the decision in R v Cole and Keet [2008] 1 Cr.App.R. 5, where Lord Phillips CJ commented at page 85 that the test under Article 76, "Is unlikely to produce a different result from that of "the interests of justice" in Article 18(1)(d)", and at page 92 paragraph 39 applied the Article 18(1)(d) factors. I propose to take the same course in relation to Morgan's confessions.

[49] Having regard to the deficiencies and contradictions in the various confessions made by Morgan, O'Rourke and Fearon, I am not satisfied that it

would be in the interests of justice to admit them. I consider for the reasons that I have given they are of little, if any, probative value insofar as the allegations against Crilly are concerned because they are not sufficiently reliable, and for that reason alone I would not admit them. If, contrary to the view I have formed, they are of sufficient probative value to pass the high threshold of reliability test, I am not satisfied that it is genuinely in the interests of justice to admit them when they will not be produced to give evidence and for their evidence to be tested. For a defendant to be tried for murder where the prosecution case would depend to a considerable extent upon inferences to be drawn from materially contradictory out of court allegations by co-offenders whose accounts cannot be challenged or tested, would, as Mr Mooney conceded, be a bold step to take. That out of court allegations by absent witnesses can be admitted is clear from R v Cole and Keet, but to permit the prosecution to rely on out of court allegations where the evidence of the makers of those statements can be shown to be unsatisfactory in material respects, and where there is insufficient other evidence upon which the prosecution can rely to establish the actions to which those witnesses speak, would be a step too far in my opinion. Given the need for caution before admitting such evidence that is emphasised in the authorities to which I have referred.

[50] I now turn to the statements of McCoy and Rocks. I consider that they are capable of passing the high threshold of reliability. They were proved to be voluntary. They are important as establishing that Crilly was involved in the abduction of Captain Nairac at the Three Steps Inn, and that Captain Nairac was put in Crilly's car. They are also important because they confirm Crilly's admission that he brought someone from Dundalk. Crilly can contradict their accounts if he wishes to do so. Not only that, but when considering whether it is genuinely in the interests of justice to admit these statements it is an important factor in favour of doing so that Crilly's admissions in the BBC interviews show that he was in the Three Steps Inn that night, that he was aware of a "bit of a battle outside" (which is capable of supporting the inference that he knew Captain Nairac had been abducted there), and that he was later with Townson who killed Captain Nairac. That the evidence of McCoy and Rocks confirms some of Crilly's admissions is a very important consideration because Crilly's admissions mean that their allegations against Crilly are not the only evidence against him. Taking all these factors into account I am satisfied that it is in the interests of justice to admit the confessions of McCoy and Rocks and I do so.

[51] I now turn to the evidence of Townson. For the reasons I have explained I am now only concerned with the brief oral admissions he made. I am satisfied these are of considerable probative value and importance. They were recorded by the officers and were accepted as voluntary by the Special Criminal Court and the Court of Criminal Appeal. Their content appears to be highly reliable insofar as his role is corroborated by the discovery of the clothes and weapons at the locations to which he took the Gardai. As with McCoy and Rocks his admissions are partly confirmed by Crilly's admission in the BBC interview that he went and



got Townson that night, and then dropped Townson off. Thus Townson's evidence is not the only evidence against Crilly. If Crilly disputes that Townson fired a shot from the car to test fire the gun Townson collected on the way to where Crilly says he dropped Townson off, Crilly can do so. This evidence is important because it shows that Crilly knew that Townson had a gun and was checking that it worked. Taking all of these factors into account I am satisfied that it is in the interests of justice to admit this confession by Townson and I do so.

[52] In so far as the written statements by McCoy and Rocks are concerned, and the short oral confession of Townson, for the avoidance of doubt I admit the relevant statements of the officers who interviewed each of those co-offenders leading up to the admissions being made, as well as those to whom they were made. If there was any dispute as to which officer's evidence is covered by the ruling that can be referred to me at the conclusion of all of the applications.