Neutral Citation No. [2005] NICA 11 | *Ref:* **KERF5220**

Judgment: approved by the Court for handing down | *Delivered:* **01/03/2005**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

Eamon Foley

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Before Kerr LCJ, Nicholson LJ and Campbell LJ

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RULING

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1. The applicant has applied to this court that he be permitted to call a number of witnesses and that he be provided with certain materials and documents.

2. The witnesses whom the applicant wishes to have called are (i) the owner of the bar at which he had been drinking on the night of the offences; (ii) members of his family who will give evidence of his presence in his home earlier on that evening; (iii) unspecified witnesses who will testify as to his incapacity for sexual relations after having consumed the amount of alcohol that he says he had taken on the night of the offence; (iv) his nephew who will give evidence that an incident with a white van occurred on an occasion other than as related by the victim – the purpose of calling this witness is to impeach the credit of Ms Breslin; (v) witnesses as to the journey times for travel from the bar to the victim's home and from Ramelton to Belfast; (vi) witnesses who will testify as to the inaccuracy or the incompleteness of the transcript of the judge's charge to the jury; (vii) Mr and Mrs Connolly who gave evidence at the trial – the purpose in calling them is to demonstrate the

inconsistency between the evidence they gave and statements made by them; (viii) Dr McCaw and Dr Rao for the same purpose.

3. The material that the applicant wishes to have produced can be summarised as follows: - (i) tapes of his interviews; (ii) tapes of the trial; (iii) the Vascar tapes of the journey travelled by police officers in purported replication of the applicant's journey from the bar to Belfast; (iv) the control swabs taken from the victim; (v) medical reports on the victim, particularly of any gynaecological examination.

4. Section 25 of the Criminal Appeal Act 1980, as substituted by section 4 (2) of the Criminal Appeal Act 1995 deals with the admission of fresh evidence on an appeal against conviction. In so far as is material section 25 provides: -

> "(1) For the purposes of this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice—
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> (a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;
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> (b) order any witness who would have been a compellable witness at the trial to attend and be examined before the Court, whether or not he was called at the trial; and
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> (c) receive any evidence which was not adduced at the trial.
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> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—
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> (a) whether the evidence appears to the Court to be capable of belief;
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> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
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> (c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

5. The proposition that the applicant seeks to establish in relation to his movements on the night in question appears to be that he left the bar at 2.30 am. Evidence has been given, particularly by Mrs Gallen, that it may have been as late as 2.30 that she and others, including the applicant left. We regard it therefore as being established that it was at least reasonably possible that the applicant did not leave the bar until that time. We do not consider that it is necessary or expedient in the interests of justice that he be permitted to call those witnesses, therefore. On the question of the white van we do not consider that the evidence of the applicant's nephew, even if received, would be of any significance in the resolution of any issue on the appeal. In fact, properly analysed, the evidence of Karen Breslin does not seriously conflict with the applicant's as to his time of arrival at her home. As to the witnesses who, it is said, can give evidence about the journey times between Ramelton and the victim's home and between there and Belfast, we have not been persuaded that it is necessary or expedient in the interests of justice that they be called to give evidence. No reasonable explanation has been given for the failure to call these witnesses. The applicant now claims that he was not represented properly by counsel who appeared for him at trial but that claim must be set against an earlier statement made by counsel on his behalf to this court that he would not criticise the manner in which his trial was handled. It must also be viewed against his allegations that his legal representatives generally, the police, various witnesses who gave evidence and a representative of the Northern Ireland Human Rights Commission have all been involved in a mendacious conspiracy designed to secure his conviction. Not a scintilla of credible evidence has been provided to support this claim. We do not consider that there is any basis on which it could conceivably be concluded that the interests of justice require that these witnesses be called. The same holds true for the other witnesses that the applicant wishes to have recalled. It is not sufficient to present a series of unsubstantiated allegations in order to prompt the invocation of section 25. There must be material on which the court can make a judgment that it is expedient or necessary in the interests of justice that these witnesses be called. We cannot act on the unsupported *ipse dixit* of the applicant.

6. The same approach must be taken to the demand of the applicant that material or documents be produced for the purpose of prosecuting his application. Various, ill-defined claims have been made by him as to the relevance of this material but nothing has been put before us that would persuade us that the evidence that they might provide would

afford any ground for allowing the appeal. Nor has there been any explanation that we could regard as reasonable for the failure to refer to this material or to call for its production at the trial. Some of the material (such as the tapes of his interviews) has already been supplied. Much of the remainder could have been obtained on request. We are not prepared at this late stage to permit an essentially speculative exercise to delay the hearing of the application for leave to appeal. It is not without significance that the applicant has had the benefit of advice from no fewer than three legal teams since his conviction but is now not legally represented. Nor is it irrelevant that he has made wide ranging allegations of conspiracy against not only police witnesses but civilians, lawyers, expert witnesses engaged on his behalf and NIHRC. As a personal litigant he is entitled to assistance from the court on technical matters but his unrepresented status cannot be allowed to frustrate the due finalisation of the application for leave to appeal. The applicant's requests for the production of further material and the calling of further witnesses are therefore refused.