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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **11.07.2003**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

GEOFFREY SINGLETON

Before: Carswell LCJ, Nicholson LJ and Higgins J

CARSWELL LCJ

[1] On 5 October 2001 the appellant was convicted at Newry Crown Court on both counts in the indictment on which he was tried, causing grievous bodily harm to Samuel Vennard with intent and assault on Gary Williamson occasioning him actual bodily harm. The trial judge, His Honour Judge McKay QC, sentenced him on 7 February 2002 to 15 years' imprisonment on the first count and three years concurrent on the second. He applied for leave to appeal against conviction and sentence and the single judge gave leave to appeal against sentence but refused leave to appeal against conviction.

[2] On 2 July 2000 the two injured parties Samuel Vennard and Gary Williamson were drinking in Williamson's flat at 10 Sinton Park, Tandragee, in the course of which they reached an advanced stage of intoxication. Both men appear to have fallen asleep. The police arrived in response to a call at approximately 7.30 pm and on entering the flat found Vennard lying on a sofa covered in blood. His lower jaw was fractured in three places and his left cheekbone was also fractured. Williamson was not present at the time, but had on his evidence sustained a cut to the forehead, swelling and bruising to his head and a bloody nose.

[3] The Crown case was that it was the appellant who had inflicted the injuries on Vennard and Williamson. The appellant denied throughout the investigation and in his evidence given in court that he had done so. He made the case that he was at a Drumcree demonstration at the time and that

Vennard and Williamson had had a fight and then decided to blame the injuries on him in order to claim criminal injury compensation.

[4] The evidence tending to link the appellant with the commission of the offences was the following:

(a) Vennard said in evidence that he remembered waking up and seeing the appellant, who was formerly his brother-in-law and was well known to him, standing at the fireplace. He said that he just looked at him and went back to sleep and that the next thing he remembered was the policemen lifting him off the floor. He agreed that in his first statement to the police made on 6 July 2000 he did not mention seeing the appellant. He also agreed that he had no reason to be attacked by the appellant and that there was no argument that he knew of.

(b) Williamson said in evidence that he remembered being woken up and seeing the appellant standing at the fireplace. He hit Williamson over the head with a bottle and Williamson blacked out. When he came to he saw the appellant punching Vennard on the head. He also punched Williamson around the head a couple of times, then left the house by the front door. The witness did not seek hospital attention for his injuries, because he did not think that he needed it.

(c) Constable Mack, one of the police who came to the scene, stated that when he entered the flat at 10 Sinton Park he found Vennard on the settee, dazed and bleeding profusely. He had extreme difficulty talking, but when the constable asked what had happened he said that he had been hit by a person called Geoffrey.

(d) The evidence of Denise Vennard, then aged 12 years, was contained in two statements which the judge admitted. In the first, made on 2 July 2000, she said that about 7.30 pm on that evening she had been in Sinton Park when the appellant, whom she had known to see for years, came into the park and asked for her uncle Sam Vennard. He went to 10 Sinton Park and entered through an open window. A couple of minutes later she heard a man screaming, then saw the appellant come out through the window again and walk off. In the second statement, made on 18 March 2001 by way of addendum to the first, she said that before she saw the appellant after he had been in the 10 Sinton Park she had heard a door slam "and this must have been the back door of the flat."

[5] Defence counsel objected to **t**he admission of Vennard's reply to Constable Mack and of Denise Vennard's written statements, but the judge, after hearing argument concerning each, admitted them. Vennard's statement to Constable Mack, when retailed by the latter, was hearsay and in order to be

admissible had to fall within the exception to the rule against hearsay constituted by statements which form part of the *res gestae.* That is determined primarily by applying the test laid down by the Privy Council in *Ratten v R* [1972] AC 378 and approved by the House of Lords in *R v Andrews* [1987] AC 281, whether there could have been possible concoction or distortion. The trial judge has to satisfy himself before ruling on the admissibility of the evidence that the circumstances proved show such clear spontaneity or involvement with the event that the possibility of concoction can be disregarded: *Ratten v R* at 389, per Lord Wilberforce. The judge in the present case considered these principles and was satisfied that on the facts the possibility of Vennard's concocting the statement had been excluded. He held that the statement made by Vennard about "Geoffrey" being the assailant was part of the *res gestae* and should be admitted. In view of the conclusion which we have reached on other issues, we shall not express an opinion on this part of the case, save to say that we consider that the judge applied the correct principles and it was matter for him to reach his own conclusion.

[6] We consider that there may be some force in the complaint contained in ground 7, that the judge should have warned the jury that they must decide that Vennard did say that it was "Geoffrey" and did not concoct it. It would in our view have been desirable that the jury should have received such a warning and a reminder that it was for them to find the facts.

[7] The written statement of Denise Vennard was admitted in evidence because the judge was satisfied that she was unwilling through fear to give oral evidence. She made a written statement about the incident on 2 July 2000. Although nervous about giving evidence, she had declared her intention of doing so. On 25 July 2000, however, she received at her home a letter containing a live bullet and a note which read "Take this as a small warning. Drop the court case or it will be the real thing." She then went with her mother to the police station to report the incident and withdraw her written statement. She subsequently repeated her unwillingness to give evidence, stating that she was afraid what might happen to her if she did so and believed that the threat would be carried out if she proceeded.

[8] The statement was admitted pursuant to the power conferred by Article 3 of the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988 (the 1988 Order), which reads:

> "(1) Subject –
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> (a) to paragraph (4); and

(b) to paragraph 2A of Schedule 1 to the Criminal Appeal (Northern Ireland) Act 1980,

a statement made by a person in a document shall be admissible in criminal proceedings as evidence or any fact of which direct oral evidence by him would be admissible if –

(i) the requirements of one of the sub-paragraphs of paragraphs (2) are satisfied; or

(ii) the requirements of paragraph (3) are satisfied.

(2) The requirements mentioned in paragraph (1)(i) are –

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(b) that –

(i) the person who made the statement is outside the United Kingdom; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found."

Article 5 sets out the principles to be followed by the court in ruling on the admission of a statement under Article 3:

"**5.**-(1) If, having regard to all the circumstances –

(a) the Crown Court –

(i) on a trial on indictment; or

(ii) on the hearing of an application under Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charges of fraud transferred from magistrates' court to Crown Court); or

(b) the Court of Appeal; or

(c) the county court on an appeal from a magistrates' court; or

(d) a magistrates' court in summary proceedings within the meaning of Article 2(3) of the Magistrates' Courts (Northern Ireland) Order 1981,

is of the opinion that in the interests of justice a statement which is admissible by virtue of Article 3 or 4 nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of paragraph (1), it shall be the duty of the court to have regard –

(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;

(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;

(c) to the relevance of the evidence that it appears to supply to any issue

which is likely to have to be determined in the proceedings; and

(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."

Article 6 also applies to a statement made to the police for the purpose of criminal proceedings, the category into which the statement in question falls:

"**6.** Where a statement which is admissible in criminal proceedings by virtue of Article 3 or 4 appears to the court to have been prepared, otherwise than in accordance with Article 9 or an order under paragraph 6 of Schedule 13 to the Criminal Justice Act 1988 or under Article 10 or 11, for the purposes –

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard –

(i) to the contents of the statement;

(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in

> unfairness to the accused or, if there is more than one, to any of them; and
>
> (iii) to any other circumstances that appear to the court to be relevant."

Each case must turn on its own facts, but the paramount consideration is that the court must ensure a fair trial, as was emphasised in *R v Cole* [1990] 2 All ER 108 and *R v Quinn* [1993] NI 351.

[9] In the course of his summing up to the jury the judge reminded them that since Denise Vennard's evidence was given by way of statement the defence did not have the opportunity to cross-examine her and explore with her the differences between her first and second statements. In response to a requisition from defence counsel he spelled out more specifically a warning that the weight which the jury should attach to her evidence should be less than if it were oral testimony subject to cross-examination.

[10] It was submitted on behalf of the appellant that the admission of the statement was a breach of Article 6(1) and Article 6(3)(d) of the European Convention on Human Rights. Article 6 provides:

> "1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
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> 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3 Everyone charged with a criminal offence has the following minimum rights:
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> a to be informed promptly, in a language which he understands and in

> detail, of the nature and cause of the accusation against him;
> b to have adequate time and facilities for the preparation of his defence;
> c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> e to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[11] On its face the provision in Article 6(3)(d) appears absolute, but it has not been so interpreted in the Strasbourg jurisprudence or in the English authorities in which it has been considered. In *Kostovski v Netherlands* (1989) 12 EHRR 434 the prosecution of the applicant for armed robbery was based to a decisive extent on statements made by two anonymous witnesses. One of these witnesses was heard by an examining magistrate, in the absence of the applicant and his counsel. Neither was heard by the trial judge. The ECtHR held that there had been a violation of Article 6(3)(d), taken together with Article 6(1) of the Convention. The approach of the Court appeared at paragraph 39 of its judgment:

> "It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law. Again, as a general rule it is for the national courts to assess the evidence before them.
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> In the light of these principles the Court sees its task in the present case as being not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair.
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> This being the basic issue, and also because the guarantees in Article 6(3) are specific aspects of the right to a fair trial set forth in paragraph (1), the

> Court will consider the applicant's complaints from the angle of paragraphs (3)(d) and (1) taken together."

The Court stated at paragraph 41:

> "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected."

The Court appreciated the reasons for the admission of evidence by statements from anonymous witnesses, given the degree of intimidation and the threat of reprisals. It went on, however, to hold at paragraph 44:

> "Although the growth in organised crime doubtless demands the introduction of appropriate measures, the Government's submissions appear to the Court to lay insufficient weight on what the applicant's counsel described as `the interest of everybody in a civilised society in a controllable and fair judicial procedure.' The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact, the Government accepted that the applicant's conviction was based `to a decisive extent' on the anonymous statements."

[12] The conviction of the defendant in *Unterpertinger v Austria* (1986) 13 EHRR 175 was held to have been in breach of Article 6 on similar grounds. It was based mainly on the written statements of members of the defendant's

family, who under Austrian law were not obliged to give evidence. Moreover, the defendant was not permitted to adduce evidence to attack their credit. The ECtHR stated at paragraph 31 of its judgment that in itself the reading out of statements in this way could not be regarded as being inconsistent with Article 6(1) and 6(3)(d), but the use made of them as evidence must nevertheless comply with the rights of the defence, which it is the object and purpose of Article 6 to protect. In the circumstances of the case the defendant did not have a fair trial and there was a breach of Article 6(1), taken together with the principles inherent in Article 6(3)(d).

[13] The principles laid down in these cases have been followed in subsequent Strasbourg cases, and it is sufficient to refer to three decisions. In *Doorson v Netherlands* (1996) 22 EHRR 330 the applicant was convicted of drug trafficking on the evidence of two witnesses who had not been heard in his presence and whom he had not had an opportunity to question. The desire to maintain their anonymity was not regarded by the Court as unreasonable, in the light of evidence about the frequency of threats or actual violence against persons giving evidence against drug dealers. The witnesses had been questioned by the investigating judge at the preliminary stage and at that hearing defence counsel were able to cross-examine about any matters except those which might lead to disclosure of their identity. The finding of guilty was not based solely or to a decisive extent upon the testimony of these witnesses. The Court held on balance that the Dutch court was entitled to consider that the interests of the applicant were outweighed by the need to ensure the safety of the witnesses. There accordingly was not a breach of Article 6 of the Convention.

[14] The European Commission of Human Rights upheld a conviction in *Trivedi v United Kingdom* (1997) Application no 31700/96, where on a prosecution for false accounting the trial court admitted in evidence the written statement of an elderly patient of the defendant who was too ill to give evidence, pursuant to the provisions of the Criminal Justice Act 1988, the equivalent of those in the 1988 Order. The Commission noted in particular that the court had conducted a detailed inquiry into the witness's condition, including his memory at the relevant time, gave the defendant's counsel opportunity to comment to the jury on the statements with a view to casting doubt on the witness's credibility or reliability and expressly warned the jury that they should attach less weight to his statement than to the testimony of witnesses whose evidence had been tested in court. The Commission also noted that the conviction was also founded on other evidence as well as that of the maker of the statement. It therefore found that the proceedings were fair and not in breach of Article 6, and dismissed the complaint as manifestly ill-founded.

[15] In *Luca v Italy* (2001) Application no 33354/96 the main evidence against the applicant on a drugs charge was that of a suspect charged in

connected proceedings. That person exercised his right to remain silent, but, as permitted by Italian law, his statement was read at the applicant's trial. The ECtHR applied the principles laid down in the decisions to which we have referred. It was not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based. He was therefore denied a fair trial and there was a violation of Article 6, paragraphs (1) and (3)(d) of the Convention.

[16] In the light of these authorities the English courts have held that where written statements made by witnesses outside the country or persons in fear have been admitted under the provisions of the Criminal Justice Act 1988 equivalent to those of the 1988 Order, there is not a breach of Article 6 of the Convention if the procedure overall is directed to ensuring that there is no unfairness towards the accused. In *R v Gokal* [1997] 2 Cr App R 266 a challenge was mounted to the admission of such a statement on the ground of breach of Article 6 (although the Human Rights Act 1998 had not then been enacted). Ward LJ, giving the judgment of the Court of Appeal, after examining *Kostovski v Netherlands* and *Unterpertinger v Austria,* concluded at page 280:

> "Since the whole basis of the exercise of the discretion conferred by section 26 is to assess the interests of justice by reference to the risk of unfairness to the accused, our procedures appear to us to accord with fully with our treaty obligations."

[17] A similar conclusion was reached in *R v Thomas and others* [1998] Crim LR 887, in which the statement made by a witness in fear was admitted in evidence. The Court of Appeal examined the Strasbourg authorities in order to ascertain whether the admission of the statement would be contrary to the provisions of the Convention (although again the decision pre-dated the coming into force of the Human Rights Act 1998). Roch LJ, giving the judgment of the court, concluded at paragraph 41, after citing passages from *Kostovski v Netherlands*:

> "We note that those statements of principle require that all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. The use of the word `argument' recognises that not all European systems accord to an accused the right to cross-examine witnesses. These statements of principle accept that there can be occasions when statements of witnesses obtained at a pre-trial stage may be used as evidence. The giving of an adequate and

> proper opportunity to challenge and question a witness to an accused does not have to occur in every case as the words `as a rule' indicate. The European Court went on to recognise the importance of the struggle against organised crime but to remind domestic courts that justice in a democratic society cannot be sacrificed to expediency.
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> In our opinion, the narrow ground which the trial judge has to be sure exists before he can allow a statement to be read to the jury coupled with the balancing exercise that he has to perform and the requirement that having performed that exercise he should be of the opinion that it is in the interest of justice to admit the statement having paid due regard to the risk of unfairness to the accused means that the provisions of sections 23 to 26 of the 1988 Act are not in themselves contrary to Article 6 of the Convention."

[18] We respectfully agree with the decisions of the Court of Appeal in *R v Gokal* and *R v Thomas*. The provisions of the 1988 Order are so framed that the court must ensure that the trial will be fair if the statement is admitted. The provisions of Article 6 incorporate the safeguard which appears prominently in the Strasbourg jurisprudence, that the prosecution case must not be founded solely or to a decisive extent upon the statement admitted. In the present case there was other evidence, given orally and subject to cross-examination, directly implicating the appellant and Denise Vennard's statement was in our judgment ancillary to that. We therefore consider that the judge was entitled to admit her statement, if satisfied that the trial would be fair if it was admitted. That would not in our opinion constitute a breach of Article 6 of the Convention. We accordingly would not regard ground 1 of the amended notice of appeal as having been made out. We would observe, however, that the judge did not spell out why he thought that it was in the interests of justice that the statement should be admitted, and it was preferable that this should be done.

[19] Ground 3 of the notice of appeal was that the judge did not give the jury a sufficient direction warning of the risks in relying on Denise Vennard's evidence. It was incumbent on him to ensure that they fully realised the drawbacks imposed on the defence: *R v McCoy* (2000) 6 Archbold News 2. As we have set out, the judge reminded them that the defence did not have the opportunity to cross-examine, and supplemented this after receiving a requisition. It was objected that this was too exiguous, and we agree that a

more emphatic warning directed to the risks in relying on untested evidence should have been given to the jury.

[20] Ground 2 is based on the refusal of the judge to discharge the jury when a potentially prejudicial piece of hearsay evidence was given by Constable Mack. Early in his cross-examination he mentioned that when Denise Vennard told him about the assault he and Constable Kinnear were going to another location in response to a 999 call. In re-examination he enlarged upon this when he said in the space of a few questions:

> "On the 2nd of July we received a radio transmission to attend a domestic dispute, eh regarding Geoffrey Singleton …
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> Initially we were going to 16 Sinton Park …
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> We had received a radio transmission, the effect of which was that there had been a domestic [interrupted] …"

The appellant's counsel at once objected in the absence of the jury that this was inadmissible hearsay and so prejudicial that the judge should discharge the jury. The judge decided that it was insufficient reason to discharge them and proceeded with the trial. On appeal counsel submitted that it was not realistic to expect the jury to exclude this from their minds, and if only one member raised the point during their deliberations it could have a disproportionate effect in impelling them to reach the conclusion that the appellant had, contrary to his case, been at the scene. In our opinion there is force in this argument. The evidence was certainly hearsay and should not have been given. Once it was a question of discharging the jury it was a matter for the discretion of the judge, but he may not have fully appreciated the significance of the evidence, in the light of the appellant's defence that he was at the Drumcree protest. In these circumstances we are not content with the safety of the conviction.

[21] In ground 8 the appellant contended that the judge should have given the jury a *Lucas* direction, to the effect that they should not regard his lie in advancing an alibi as proof of guilt in itself. It has been held in a number of recent decisions that such a direction is commonly required in cases where the defence relied on is an alibi: see, eg, *R v Lesley* [1996] 1 Cr App R 39 and the discussion in Archbold, 2003 ed, para 4-402. It has to be borne in mind that this does not necessarily apply where the case basically turns on the acceptance or rejection of the defendant's alibi, for its rejection necessarily involves the conclusion that he was lying: *R v Harron* [1996] Crim LR 581; *R v Middleton, The Times,* April 12, 2000; Archbold, para 4-402a. Mr Macdonald QC submitted on behalf of the appellant that the present case did not fall

within this exception, since it was possible that his true case was that he was at the scene but did not commit the assault, while he invented the false alibi in order to cover up the fact that he was there for some other discreditable purpose. The judge may not have appreciated the existence of this possible case, shadowy though it may have been in the light of the evidence, but it is another ground on which the safety of the conviction can be attacked.

[22] Ground 9 of the notice of appeal was that the judge should have given the jury a *Turnbull* direction on the dangers involved in identification evidence. It is stated in the authorities that a direction should be given where a statement such as Denise Vennard's is admitted in evidence: *Scott v R* [1989] AC 1242; *R v Cole* (1990) 90 Cr App R 478; Archbold, para 9-134. Mr Macdonald submitted that the rule applied in the present case, for it extended to recognition situations. This could be regarded as more than a little unrealistic in relation to Denise Vennard's evidence in the present case. She had known the appellant for years and spoke to him at the scene. The rule requiring a *Turnbull* direction is aimed at preventing mistaken identification from leading to wrongful convictions. There may not be much possibility of that having occurred in the circumstances of this case, and a very mild warning might have sufficed. The authorities are, however, in favour of giving one, and it is again another pointer against the safety of the conviction.

[23] We have had regard to the submission that the cumulative effect of the various defects alleged against the summing-up made the conviction unsafe. We have concluded, not without reluctance, that it was such that the conviction should not stand. We shall order a new trial before another Crown Court judge, in which all matters will be open for decision. We do not think it appropriate in these circumstances to express any opinion on the question of sentence.