Neutral Citation No. [2013] NICC 5

Ref: **TRE8822**

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

Delivered: **28/3/2013**

IN THE CROWN COURT IN NORTHERN IRELAND

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SITTING AT BELFAST

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THE QUEEN

-v-

ROBERT JAMES SHAW RODGERS

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Reasons for Admitting Hearsay and Bad Character Evidence

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TREACY J

[1] Following submissions in respect of these applications which are set out below I, sitting as disclosure judge in this 'Diplock' non-jury trial, allowed the applications and said I would give written reasons later.

[2] The Defendant is charged with the murder of 19 year old Eileen Doherty on 30 September 1973 at Annadale Embankment Belfast. The Crown case is that she had been a passenger in a taxi driven by Mr Sherry, now deceased, the owner of Atlas Taxis on the Ormeau Road. Two unidentified males got into the back of the taxi on the Ormeau Road after she had got into the front seat. In the Annadale Embankment area the taxi was hijacked after the rear seat passenger immediately behind the driver pulled a gun. The taxi driver and Eileen Doherty exited the vehicle and tried to make their escape on foot. The taxi left the immediate area but quickly reappeared when the front seat passenger got out and shot the girl.

[3] The Prosecution case is that the driver of the taxi was guilty as a secondary party and that the Defendant is connected by the fingerprint evidence to the hijacked taxi first as a back seat passenger sitting beside the gunman and as the driver of the taxi after the taxi was hijacked as evidenced by the presence of his palm print on the steering wheel.

[4] The Prosecution case is that the rear seat passenger on the nearside got out of the taxi, into the driver seat and drove the hijacked vehicle while the gunman who

had been sitting behind the taxi driver got into the front passenger seat. It was the prosecution case that the defendant was that person and therefore not the gunman but an integral part of the joint enterprise.

[5] Pursuant to Art18(1)(d), Art20(1) and 20(2)(b) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") the Prosecution seek to admit the evidence of the fingerprint examination of the hijacked taxi which was later recovered at Fountainville Avenue close to University Road. The Prosecution seek to have admitted the evidence of the fingerprint examination by Sergeant Hillis and, in particular, his notebook entry dated 1 October 1973 and the fingerprint file. The notebook entry contains a detailed diagram purporting to show the location of the various lifts made by Sergeant Hillis. The prints included a right palm print marked *'1(b)' on the top left hand side of the steering wheel* **and** a print taken from the *rear nearside inner window marked '7(a)'*. Denis Andrew Thompson, a fingerprint officer employed by the PSNI, compared these prints with fingerprints which were taken from the Defendant on 14 December 2010. He confirmed that he was "certain" as to the match.

[6] The application to admit the evidence of Sergeant Hillis was on the basis that he was unfit to be a witness within the meaning of Art20(2)(b). It is *not disputed* that the prints found on the nearside back window pane and on the steering wheel are those of the Defendant. And thus far no explanation has been given by the Defendant as to why his prints were found in these two locations in the hijacked taxi used in the murder.

[7] The defence submitted rather unrealistically that the Court could not be satisfied that the person who made the statement is identified to the Court's satisfaction per Art20(1)(b). I reject that contention. From the totality of the evidence including that of Mr Thompson I am satisfied beyond reasonable doubt that the person who made the statement has been identified.

[8] The defence also contended that the witness was in fact fit to give evidence at the trial. Alternatively its admission would result in vitiating unfairness and a breach of art 6 because, inter alia, the defence would be denied a proper opportunity of challenging what they characterised as sole and decisive evidence.

[9] As to the question of unfitness I am satisfied from the totality of the medical evidence and, in particular, that of Dr Barbara English, Consultant Psychiatrist, that Sergeant Hillis is unfit to give evidence. In addition to medical reports which were placed before the Court she was specifically asked about her opinion as to his capability of giving evidence about his previous work as an RUC officer. Following her examination she concluded that he suffered from chronic post-traumatic stress disorder and a mood disorder, a depressive disorder. In relation to his capability to give evidence she expressed her clear opinion that "he is not capable of doing that." In an updated report/statement dated 7th January 2013 she confirmed: "As outlined in my report of 9th September 2011 it remains my opinion that if this gentleman was

required to attend court with an expectation that he would discuss matters related to his time in the RUC I would predict that such an attendance would have a very markedly negative impact on his mental health. I would also expect that his level of distress would make it impossible for him to perform meaningfully as a witness. Based on the information above it is my opinion that this gentleman remains unfit to give evidence in court. Given the nature and chronicity of his symptoms I do not expect that this situation will change in the future."

[10] The evidence regarding these lifts and their locations within the taxi is plainly important evidence: (i) the lifts have been compared by Denis Thompson, Fingerprint Officer, with the Defendant's fingerprints taken on 14 December 2010. In his witness statement Mr Thompson said he was "certain" of the match. (ii) the Defendant does not dispute that the prints '1(b)' and '7(a)' were his. (iii) he offers no explanation for their presence in the *two* locations in the taxi.

[11] The Prosecution case is that the print on the rear nearside window and the palm print on the steering wheel *from the Defendant* are consistent with the Defendant travelling in the rear of the taxi, becoming the driver of the taxi after it had been hijacked and being the driver of the taxi at the time Eileen Doherty was shot by the then front seat passenger and thus guilty as a secondary party.

[12] I reject the contention that the adduction of this evidence would result in vitiating unfairness or is otherwise in breach of Art6 ECHR. I remind myself that it is not disputed they are his prints and that he has so far advanced no explanation for their presence. Their presence is highly probative of the Crown case.

[13] The chances of these two prints being innocently deposited in a taxi in these two locations will be a matter for consideration by the Trial Judge. It is self-evident that these prints are highly probative and it is manifestly in the interests of justice that they be admitted.

Bad Character Application

[14] Pursuant to Art 6(1)(d) of the 2004 Order the prosecution seek to adduce evidence of the conviction of the accused for the offence of murder committed on the 25th September 1974. Following his plea of guilty he was convicted on 11th February 1975

[15] The prosecution submitted that the evidence is admissible under that provision as it is relevant to an important matter in issue between the prosecution and the defendant, namely (i) the identity of the offender; and (ii) whether the defendant had, at the relevant time, a propensity to commit offences of the kind with which he is charged.

[16] The background to this murder was that the defendant and his co-accused, Alan Gibson (who also pleaded guilty), travelled to Parkend Street on a stolen motor

cycle waiting for a young Catholic, Kieran McIlroy, to leave his place of work. Rodgers fired the fatal shots and they made off on the stolen motor cycle and were apprehended by the army approximately 400 yards from the scene. Kieran McIlroy was shot because "he was a Catholic and his assassination was part of a plan of the organisation of which Rogers and Gibson belonged. Our enquiries failed to reveal the name of this organisation."

[17] The admission of subsequent convictions has been considered in a number of cases including by Hart J in R v Robert Clarke [2010] NICC 54 [set out paras [9]-[14]:

> "[9] Mr O'Donoghue conceded, correctly in my view, that he could not argue in principle that it was unfair to admit another murder conviction even where that other murder was committed after the murder which is the subject of the present charge. That must be correct (see *R-v-Glenn [2006] EWCA Crim 3236* cited by Professor Spencer in the second edition of his Evidence of Bad Character at 4.52).
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> [10] A related argument advanced by Mr O'Donoghue with which it is convenient to deal at this stage is that even if the 1975 murder conviction is admitted, the circumstances need not all be and he submitted that the indiscriminate nature of that shooting should not be admitted. I accept that Article 6(3) of the Criminal Justice Evidence (Northern Ireland) Order 2004 (the 2004 Order) could require the court to exclude some of the circumstances of the other convictions as, for example, might be the case if the circumstances were wholly irrelevant and/or might be of such an unpleasant nature as to be more prejudicial than probative. That appears to be the course that was taken by the trial judge in *Glenn* (see the remarks of Lord Justice Pill at paragraph 12).
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> [11] In the present case, if the 1975 murder is to be admitted I do not see that it would be unfair to admit evidence of the circumstances in which the Sterling was fired because it is beyond dispute that the defendant took part in a determined attempt at sectarian mass murder.
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> [12] Should the 1975 murder be admitted under Article 6(1)(d) and Article 8(1)(a) of the 2004 Order?
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> [13] In *R-v-Hanson* the Court of Appeal stated that

there are essentially three questions to be asked in this case:

(1) Does the history of the 1975 murder involving as it did a Sterling submachine gun establish that Clarke had a propensity to commit the sectarian murder of Mr Fusco, a murder in which a Sterling was also used although the murder weapon was probably a Webley .455? I have no doubt that the answer to that question is yes.

(2) Does that propensity make it more likely that Clarke was the gunman who shot Mr Fusco? Again I have no doubt that the answer is yes because it is highly relevant:

    (a) To his willingness to take part in such an attack;

    (b) To his willingness to press the attack home; and,

    (c) To show that he was physically capable of firing a weapon in 1973 despite his physical disability.

(3) Is it unjust to rely on the 1975 convictions and will the proceedings be unfair if they are admitted? I am quite satisfied that it is not unjust to admit the evidence relating to each of the convictions relating to the 1975 murder, nor will the proceedings be unfair if they are admitted because for the reasons given at (2) above they are highly probative.

[13] The gap between the two murders is not very great in terms of time nor can it be argued that the prosecution case is otherwise a weak one because the presence of Clarke's finger and palm prints on the door through which the shots were fired, prints which could not have got there in any other circumstances on the prosecution case, create a strong case against him.

[14] For these reasons I grant the application and

> admit all of the convictions arising out of the 1975 murder, together with the evidence of the facts underlying those convictions as specified in the notice of 22nd December 2009. I will direct that a transcript of this ruling be prepared as soon as possible and it will be provided to the parties."

[18] The correctness of this decision was confirmed on appeal by the Court of Appeal (Morgan LCJ, Higgins LJ and Coghlin LJ) [2012] NICA 2. Having set out the relevant portion of the ruling the court concluded at para [9] that Hart J had adopted the correct approach to admissibility and that his conclusion cannot be criticised.

[19] Adopting a similar approach in this case I consider that the defendant's history of involvement in the sectarian murder of Mr McIroy is relevant to the propensity of the defendant to commit offences of the kind with which he is charged. That propensity makes it more likely that he was involved in and party to the sectarian murder with which he is charged because it is highly relevant to his willingness to take part in such an attack. I am also quite satisfied that it is not unjust to admit the evidence nor will the proceedings be unfair if it is admitted. The gap between the sectarian murders of the two Catholics in Belfast is not substantial in terms of time. Moreover the prosecution case is not otherwise weak because of the undisputed and unexplained presence of his fingerprints in two locations within the hi-jacked taxi used in the murder.

[20] No prejudice has been caused by any delay in making the application. Prejudice to the accused is obviously an important matter for the court in determining whether it is in the interests of justice that time should be extended. If time requires to be extended I am content to do so.

[21] For these reasons I grant the application and admit the evidence of the defendant's conviction for murder together with the evidence of the facts underlying the conviction as set out in the notice.