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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

ROBERT RODGERS

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The appellant was convicted by Horner J, sitting in the Crown Court without a jury, of the murder of Eileen Doherty on 30 September 1973. He appeals the conviction on the following grounds:

(i) evidence of palm prints and their locations within the hijacked vehicle was wrongly admitted as hearsay;

(ii) on the evidence before the court there was no case to answer;

(iii) the proceedings should have been stayed as an abuse of process on the grounds of delay;

(iv) the appellant's conviction for murder in 1975 was wrongly admitted as bad character evidence; and

(v) there was insufficient evidence before the court to convict the appellant of murder.

Mr Berry QC appeared with Mr Devine for the appellant. Mr Mooney QC appeared with Mr McCrudden for the prosecution. We are grateful to counsel for their helpful written and oral submissions.

Background

[2] The prosecution case was that on 30 September 1973 Eileen Doherty, who was 19 years old at the time and a Roman Catholic, was visiting her fiancé, Alexander McManus, who lived in the Ormeau Road area of Belfast close to the Atlas Taxis depot. This was a regular occurrence and it was normal practice for Ms Doherty to get an Atlas Taxi back home to the Andersonstown area of Belfast. Mr McManus would usually accompany her on the journey to ensure she got home safely. On the night in question it was late and Mr McManus was working at the Inglis Bakery at 4am the next morning. It was decided that Ms Doherty would go in the taxi alone. At the taxi depot Ms Doherty was assigned to the taxi being driven by John Sherry together with two other males who were looking for a taxi to the Finaghy area. Neither Mr Sherry nor two other customers sitting in the depot, Mr Montgomery and Mr McAllister, recognised these two males as being regular customers or as being from the area. Ms Doherty sat in the front seat while the two other males sat in the back.

[3] As Mr Sherry drove along the Annadale Embankment he felt something being pressed against his head by the male sitting behind him who told him to turn left. Mr Sherry was unable to make this manoeuvre as he was already in the process of turning right. Mr Sherry glanced at what was being pressed against his head and noticed that it was the barrel of a gun. The males then told Mr Sherry to get into the back seat. Mr Sherry stopped the vehicle and got out. He saw this as an opportunity to escape. He told Ms Doherty to run and did so himself. Both ran towards the King's Bridge and the Annadale Embankment.

[4] In his inquest deposition Mr Sherry said that the male in the rear nearside got out of the back of the taxi and moved into the driver's seat. The two males then drove off at speed around the Stranmillis roundabout, up the Stranmillis Road, down Ridgeway Street, across the King's Bridge and back onto the embankment. Mr Sherry and Ms Doherty had stopped running, but when he saw the car re-appear Mr Sherry again told Ms Doherty to run. Unfortunately Ms Doherty was unable to escape. The male passenger got out of the car, held Ms Doherty by the arm and fired his gun 3 or 4 times shooting her in the head.

[5] Mr Sherry went to a phone box and called the police and ambulance. A passing motorist, Mr Withers, and a cyclist, Mr McDonald, who witnessed the attack tended to Ms Doherty. Ms Doherty was taken by ambulance to the Royal Victoria Hospital but died in the early hours of the morning. She had been shot three times. One of the bullets had entered the left side of the back of her head, passed through the brain and exited through her left cheek.

[6] The scene of the shooting was searched and a .45 copper jacket bullet was recovered. The car was found the next day abandoned in Fountainville Avenue in the University Road area of Belfast. It was taken to Castlereagh RUC Station where it was examined by Sergeant Hillis and Constable Moffitt. A fingerprint examination was carried out by Mr Hillis who recovered several prints. According to a diagram drawn by Mr Hillis at the time of his examination, these included a right palm print taken from the top of the steering wheel (at the 10 o'clock position) and a further left palm print from the rear nearside inner passenger window. These imprints were marked 1(b) and 7(a), respectively. They were initially stored within the bureau but after a period of time they were then placed in the archive store. Medical evidence stated that Sergeant Hillis was suffering from chronic post-traumatic stress disorder and was unfit to give evidence. In support of the prosecution case an application was successfully made to introduce hearsay evidence consisting of the notebook entry prepared by Sergeant Hillis on 1 October 1973 and the fingerprint file which recorded the palm prints taken by him.

[7] On 25 September 1974 the appellant, together with a second male, travelled on a stolen motorbike to Parkend Street in Belfast. They waited for Kieran McIlroy to leave his place of work. The appellant then shot Mr McIlroy dead. He was caught by the army fleeing the scene of the murder and arrested. He subsequently pleaded guilty to that murder and was convicted on 11 February 1975. The murder was carried out by the appellant and the other male as members of an unnamed paramilitary organisation. The reason for murdering Mr McIlroy was solely because he was a Roman Catholic. The appellant was sentenced to life imprisonment and was released on licence in 1990.

[8] Between 2001 and 2005 tens of thousands of archived fingerprints were uploaded onto the police's fingerprint database. Over a number of years the process of detecting possible matches took place. The fingerprints taken from the taxi used in Ms Doherty's murder were identified as matching the fingerprints of the appellant contained on file as a result of the 1974 murder. On 14 December 2010 further evidentiary fingerprints were taken from the appellant following his arrest. Fingerprint expert Dennis Thompson gave evidence that these were a match to the prints lifted from the taxi in 1973. The appellant was also interviewed by police on 14 December 2010. At the beginning of the interview his solicitor read out the following prepared statement on behalf of the appellant:

> "I've been arrested in relation to the 1973 shooting of Eileen Doherty. I can confirm that I was not involved in nor have any knowledge of this incident."

The appellant gave no comment answers to the questions put to him by police in interview. The appellant also did not give evidence at the trial. The prosecution submitted that the imprints established the appellant's connection with the taxi and in particular with the steering wheel. There was no innocent explanation offered as to how they got there and the conviction for murder established the propensity of the appellant to commit such a crime.

[9] As a result of the period of time that had elapsed since the offence a number of evidential issues arose during the trial:

(i) Mr Sherry was dead but his deposition taken during the coroner's inquest was admitted as hearsay.

(ii) Constable Moffitt was dead but his statement dated 4 October 1973 was admitted as hearsay.

(iii) Sergeant Hillis was not fit to give evidence due to his current medical condition but his statements, notebook entry and fingerprint file were admitted as hearsay.

(iv) Mr Withers was dead but his deposition to the coroner's inquest was admitted as hearsay.

(v) Mr McDonald was dead but his draft deposition to the coroner's inquest was admitted as hearsay evidence.

(vi) The original police investigation was missing, presumed destroyed. The file included not only statements taken at the time of the investigation but also a photo fit of one of the murderers made with the assistance of Mr Montgomery, who had been present in the taxi depot at the same time as the two murderers.

(vii) The original investigating officer, Detective Sergeant Meeke, refused to assist in the renewed investigation of the case. He had to be issued with a witness summons in order to bring him to court to give evidence. His notebook regarding the original investigation was not available.

(viii) There were no documents relating to the examination of the three scenes of crime, namely, the Atlas Taxis depot, the Annadale Embankment and Fountainville Street.

Hearsay

[10] The principal submission pursued by the appellant was that the disclosure judge, Treacy J, erred in admitting the hearsay evidence of Mr Hillis. First, the learned judge erred in finding that he was satisfied that the statements and the relevant information on the diagram identifying the vehicle were made by Mr Hillis. The identification of the statement maker is a requirement of Article 20(1)(b) of the Criminal Justice (Northern Ireland) Order 2004 . Secondly, the learned judge erred in finding that the medical evidence before him was sufficient to find Mr Hillis was unfit to give evidence because of his bodily or mental condition. Furthermore, the hearsay evidence was the sole and decisive evidence against the appellant and the appellant was unable to effectively challenge it. No disclosures were made by the prosecution to the appellant regarding credibility pursuant to Article 28 of the 2004 Order. The learned judge erred in concluding the evidence was demonstrably reliable, that the admission of the evidence was in the interests of justice and that the appellant's trial was still capable of being fair. In any event, the hearsay evidence of Mr Hillis should have been excluded pursuant to Article 76 of the Police and Criminal Evidence (NI) Order 1989 as there were insufficient counterbalancing safeguards to ensure the appellant could have a fair trial given its admission into evidence.

[11] The prosecution called Mr Thompson, a fingerprint expert within the PSNI. He stated that he had worked with Mr Hillis from 1976 to 1984, that he was familiar with Mr Hillis' handwriting and could identify a distinctive feature of his script. The medical evidence regarding Mr Hillis' medical condition was clear and required no further analysis. In the absence of contrary evidence the learned judge was entitled, indeed driven, to conclude that he was unfit within the meaning of the 2004 Order. The appellant failed to engage his own experts either to challenge the medical condition of Mr Hillis or indeed to challenge the authenticity of the notes which the prosecution were seeking to adduce as hearsay. Furthermore, there is no rule of law preventing the admission of hearsay evidence where it is the sole or decisive evidence against the accused. The issue in the present case was whether a fair trial was possible taking into account the safeguards available to protect the accused. The prosecution submitted that, in the circumstances of the present case, there was clear evidence that Mr Hillis was the maker of the relevant documents, he was unfit to give evidence, the evidence was capable of being properly tested and assessed, there were sufficient safeguards in the trial process to protect the appellant and there was no infringement of Article 6 ECHR.

[12] The admissibility of hearsay evidence is governed by Articles 18 to 21 of the 2004 Order.

> "Art.18 - (1)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-
>
> (a) any provision of this Part or any other statutory provision makes it admissible,
>
> (b) any rule of law preserved by Article 22 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)-
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
>
> (c) how important the matter or evidence mentioned in subparagraph (a) is in the context of the case as a whole;
>
> (d) the circumstances in which the statement was made;
>
> (e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it.

….

20. - (1)In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if-

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in paragraph (2) is satisfied.

(2) …

(b) that the relevant person is unfit to be a witness because of his bodily or mental condition;"

The application to admit the hearsay evidence was made under Article 20(2)(b) of the 2004 Order on the basis that Mr Hillis was unfit and in any event under Article 18(1)(d) on the basis that the admission of the material was in the interests of justice. We consider that the application might also have been pursued under Article 21 on the basis that the diagram was a business document but that would not have affected the nature of the test of admissibility.

[13] The 2004 Order incorporates a number of safeguards in Articles 28, 29 and 30.

"28. - (1) This Article applies if in criminal proceedings-

(a) a statement not made in oral evidence in the proceedings is admitted as evidence of a matter stated, and

(b) the maker of the statement does not give oral evidence in connection with the subject matter of the statement.

(2) In such a case-

(a) any evidence which (if he had given such evidence) would have been admissible as relevant to his credibility as a witness is so admissible in the proceedings;

(b) evidence may with the court's leave be given of any matter which (if he had given such evidence) could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party;

(c) evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that he contradicted himself."

[14] This places an onus on the prosecution, where it is seeking to introduce hearsay, to carry out an adequate investigation into the background of the witness to ensure that any relevant material is disclosed. That requires more than simply checking the criminal record of the witness but what is required will vary with the circumstances of each case. Although nothing adverse to Mr Hillis was disclosed that does not, of course, indicate any failure of the safeguard.

[15] A statement that is otherwise admissible may also be excluded by Article 30 of the 2004 Order.

"30.- (1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if-

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

(2) Nothing in this Part prejudices

(a) any power of a court to exclude evidence under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (exclusion of unfair evidence), or

(b) any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise)."

As appears from this provision the residual discretion to exclude under Article 76 of PACE is preserved.

[16] Article 29 of the 2004 Order provides a further safeguard in the event that the evidence is unconvincing.

"29.- (1) If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that-

(a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and

(b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury."

[17] The first basis upon which the prosecution relied to admit the evidence was Article 20(2)(b) of the 2004 Order. There was no issue about the fact that the statement would be admissible if given in oral evidence. The second condition for admissibility is that the court must be satisfied that the person who made the statement has been identified. Evidence was given at the trial by Dennis Andrew Thompson who was a fingerprint officer employed by the PSNI. He said that he knew Mr Hillis very well and worked with him in the fingerprint bureau from 1976 until 1984. Mr Hillis trained Mr Thompson and was his mentor. He was familiar with his writing and the manner in which he set out his sketches and details of an examination. He confirmed that the notes and diagram were those of Mr Hillis. He noted a distinctive flourish in Mr Hillis' handwriting. No contradictory evidence

was called and this material was entirely sufficient to establish that Mr Hillis was the person who made the notes and the diagram (see *Archbold* at paragraph 14-84).

[18] As previously indicated the prosecution adduced evidence from a consultant psychiatrist indicating that Mr Hillis had been diagnosed with chronic post-traumatic stress disorder. This had arisen from his experiences while in the RUC. He was under active treatment with both antidepressant and antipsychotic medication. The consultant psychiatrist concluded that if he were required to attend to give evidence his level of distress would make it impossible for him to perform meaningfully as a witness. In those circumstances she concluded that Mr Hillis was not fit to provide evidence in court. The appellant did not seek to have a further medical examination carried out nor was any contradictory medical evidence put forward. The prosecution established, therefore, that Mr Hillis was unfit to give evidence because of his mental condition.

[19] Once the conditions in Article 20(2)(b) of the 2004 Order were satisfied the hearsay evidence was admissible subject to any basis upon which it should properly be excluded. The appellant submitted that the fingerprint evidence was relied upon by the prosecution as decisive evidence in establishing that the appellant was connected to the taxi in which the deceased had been travelling. As a result of the decision of the Supreme Court in R v Horncastle [2010] 2 AC 373 there is no rule of law that hearsay which is the sole or decisive evidence against an accused is inadmissible. It remains the position, however, that the importance of the evidence to the case against the accused is central to the decision as to whether it should be admitted. A helpful analysis of the approach is found in R v Riat [2012] EWCA Crim 1509. Once the hearsay evidence is admissible through one of the gateways the court needs to examine the apparent reliability of the evidence and the practicability of testing and assessing its reliability. That is because such evidence will generally be admissible where it is *either* demonstrably reliable *or* capable of being properly tested.

[20] In this case it was conceded that the imprints attributed to the appellant in the fingerprint file were his prints. It was not contended that there was anything unreliable about the evidence that the prints were lifted from the positions where they were marked on the diagram. It was submitted that the evidence was not reliable because there was no evidence as to when the prints were deposited and no evidence that they were deposited at the same time. That was not a challenge to the reliability of the evidence of Mr Hillis but rather a challenge to the inference which should be drawn from it.

[21] It was submitted that the hearsay evidence ought to have been excluded under Article 76 of PACE. In Riat the court considered that the non-exhaustive considerations listed in Article 18 (2) of the 2004 Order which are directly applicable to an application made under the interests of justice provisions in Article 18(1)(d) are useful aids for any judge considering the exclusion of hearsay evidence under Article 76.

[22] In this case those factors pointed strongly in favour of the admission of the evidence. The fingerprint material clearly had substantial probative value linking the appellant to the taxi and there was no other evidence which could be given in respect of that. The imprints which linked the appellant to the taxi were present on the file and there was no dispute about the fact that they were attributable to the appellant. Mr Hillis was a trained fingerprint expert carrying out an established forensic process of examination. There was no dispute in the appeal about the fact that the imprints were found in the places identified in the diagram. Oral evidence could not be given because Mr Hillis was unfit to do so. The only reason that it was difficult to challenge the evidence was because of its inherent reliability. There was, therefore, no prejudice to the appellant.

[23] This was a case where the evidence was demonstrably reliable. For the reasons given we consider that the hearsay evidence of Mr Hillis was admissible under Article 20(2)(b) of the 2004 Order. If it had been necessary to consider admissibility under Article 18(1)(d) the factors in Article 18(2) would have come directly into play and the outcome would have been the same.

Bad Character

[24] The appellant submitted that Treacy J was wrong to admit the evidence of the appellant's murder conviction in 1975 under the Article 6(1)(d) gateway in the 2004 Order as evidence that was relevant to an important matter in issue between the parties. First, the appellant argued that the 1975 murder was not sufficient to either identify the appellant as the murderer or to establish that he had a propensity to commit offences of the same kind. Secondly, the sole purpose of the bad character evidence was to bolster an otherwise weak prosecution case and in any event the learned judge should have excluded the evidence under Article 6(3) of the 2004 Order on the ground that it had an adverse effect on the fairness of the trial.

[25] The prosecution argued that the 1975 murder showed a propensity by the appellant to commit random sectarian murders with a firearm. The short period of time between the two murders was highly relevant. Moreover, the case against the

appellant was not otherwise tenuous. The evidence of the fingerprint on the rear nearside window and the palm print on the steering wheel was consistent with the evidence that the passenger in the rear nearside had exited the taxi and got into the driver's seat of the vehicle when Mr Sherry and the deceased had initially made their escape.

[26] Article 6 of the 2004 Order deals with the admission of bad character propensity evidence.

> "6. - (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if-
>
> ….(d) it is relevant to an important matter in issue between the defendant and the prosecution…
>
> (3) The court must not admit evidence under paragraph (1)(d)… if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (4) On an application to exclude evidence under paragraph (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

Further safeguards are found in Article 8.

> "8. - (1) For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include-
>
> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence…

> (2) Where paragraph (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of-
> (a) an offence of the same description as the one with which he is charged…
>
> (3) Paragraph (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case."

[27] The leading authority on the admission of evidence of propensity is R v Hanson [2005] EWCA Crim 824. At paragraph 7 the court set out the three questions which had to be considered.

> " (1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
>
> (2) Does that propensity make it more likely that the defendant committed the
> offence charged?
>
> (3) Is it unjust to rely on the conviction(s) of the same description…and, in any event, will the proceedings be unfair if they are admitted?"

[28] At paragraph 9 the court dealt with the evidence necessary to demonstrate propensity.

> "There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where,

> for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged."

At paragraph 18 the court warned that undue reliance should not be placed on previous convictions admitted as evidence of bad character to show propensity and that evidence of bad character cannot be used simply to bolster a weak case.

[29] The appellant submitted that the 1975 murder conviction was a single previous conviction which did not show propensity. In that case the appellant fired the weapon. In this case the prosecution alleged that he drove the vehicle. In that case a pistol was used whereas in this a revolver was used. The offences occurred in different parts of Belfast at different times of the day and whereas in this case a taxi was used in 1974 a motorcycle was used by the appellant.

[30] We do not accept that this was a weak prosecution case. The imprints of the appellant on the inside of the rear nearside door and on the steering wheel were not explained at interview. There was nothing to suggest that the appellant was a taxi driver for Atlas Taxis or that he ever drove Mr Sherry's vehicle. The appellant's counsel ventured the suggestion that he might have accidentally reached over for the steering wheel while imbalanced in the front seat of the vehicle but there was no factual basis whatsoever for such invention.

[31] This was an attack which had all the hallmarks of a sectarian murder in which the aim was to kill a Roman Catholic. The murder committed in 1974 was carried out for exactly the same reason. Although the alleged role of the appellant and the type of weapon were different the tendency to unusual behaviour consisted of active participation in a sectarian attack close in time to the murder with which this appeal is concerned. That was sufficient to establish that the conviction in 1975 illustrated a propensity to commit a sectarian murder of this kind. In light of the imprints connecting the appellant to the taxi which was used in this murder that propensity made it more likely that the appellant committed the offence charged. We have rejected the submission that this was a weak prosecution case and we consider that there is no other basis upon which it was unjust or unfair to rely on the conviction.

[32] We consider that the conviction was properly admitted under Article 6(1)(d) of the 2004 Order and that the basis for admission was consistent with the guidance given in Hanson.

Abuse of Process

[33] The appellant argues that the 40 year delay in the present case was the fault of the police. They had the appellant's fingerprints on file in 1973, they had the prints from the taxi in September 1973 and they had the prints from the appellant's conviction for murder in 1975. At no point during the period from 1973 to 1975 were the appellant's prints checked against the taxi prints. This was a failure by the investigating authorities to properly investigate for nearly 40 years. Moreover, when the check was carried out nearly 40 years later, it was not triggered by any form of new evidence. In fact, in the intervening period evidence has been lost including the police file which had a photo-fit prepared by one of those at the taxi depot and key witnesses were deceased. This caused irreparable prejudice to the appellant. Furthermore, the original investigating officer refused to assist in the present investigation. The whole case against the appellant was based on his inability to provide an innocent explanation for his palm prints being found in a public taxi. The appellant submitted that the scarcity of available evidence meant that he was unable to properly test what evidence was actually before the court.

[34] The prosecution submitted that the appellant's arguments as to prejudice were purely speculative and there was no evidence that any prejudice in actual fact occurred. Moreover, the appellant had the opportunity to challenge the accuracy of the palm prints, but did not do so. He had the opportunity to give evidence as to how his prints were in the taxi, but did not do so. Neither in his police interview nor at trial did he state he was unable to remember relevant events. His defence was that he was not involved in the murder.

[35] The principles governing the approach to abuse of process applications were set out in R v F [2011] EWCA Crim 726:

> "i) The court should stay proceedings on some or all counts of the indictment for abuse of process if, and only if, it is satisfied on balance of probabilities that by reason of delay a fair trial is not possible on those counts.
>
> ii) It is now recognised that usually the proper time for the defence to make such an application and for the judge to rule upon it is at trial, after all the evidence has been called.

iii) In assessing what prejudice has been caused to the Defendant on any particular count by reason of delay, the court should consider what evidence directly relevant to the defence case has been lost through the passage of time. Vague speculation that lost documents or deceased witnesses might have assisted the Defendant is not helpful. The court should also consider what evidence has survived the passage of time. The court should then examine critically how important the missing evidence is in the context of the case as a whole.

iv) Having identified the prejudice caused to the defence by reason of the delay, it is then necessary to consider to what extent the judge can compensate for that prejudice by emphasising guidance given in standard directions or formulating special directions to the jury. Where important independent evidence has been lost over time, it may not be known which party that evidence would have supported. There may be cases in which no direction to the jury can dispel the resultant prejudice which one or other of the parties must suffer, but this depends on the facts of the case."

In R v P [2010] NICA 44 this court also approved the following principles set out in R v Ali [2007] EWCA Crim 691.

"29. *Attorney General's Reference (No. 2 of 2001)* was concerned with the remedy for a breach of article 6(1) rather than the means a court might adopt to avoid unfairness in the prosecution of a delayed trial. The authorities are replete with examples of cases where evidence has been lost or destroyed but nevertheless this court has ruled that the trial judge was correct in refusing to stay the trial. This court has repeatedly emphasised that, during the course of a trial, there are processes, such as the power to exclude evidence under s.78 of the Police and Criminal Evidence Act,

> 1984, which may provide sufficient protection to a defendant against prejudice caused by delay. That is the second principle identified by Brooke LJ in *R (Ebrahim) v Feltham Magistrates Court* [2001] 2 Cr App R 23 at para 74). In that case a video tape, which might have showed images inside a store, where an alleged assault was alleged to have taken place was no longer available. The loss of such a recording is not unusual in cases of delay. Loss or destruction of the video evidence did not lead to a stay in such cases as *Medway* [2000] Crim LR 415, *Dobson* [2001] EWCA Crim 1601 or in the other case decided by the Divisional Court at the same time as *Ebrahim (Mouat v DPP).* The mere fact that missing material might have assisted the defence will not necessarily lead to a stay.
>
> 30. But in considering such powers to alleviate prejudice, Brooke LJ (at para 27) emphasised the need for sufficiently credible evidence, apart from the missing evidence, leaving the defence to exploit the gaps left by the missing evidence. The rationale for refusing a stay is the existence of credible evidence, itself untainted by what has gone missing…."

[36] The delay in this case was approximately 40 years. Prior to 1994 comparison of imprints held by the police was carried out manually. When computerisation was introduced this applied initially to investigations commencing after January 1994. In 2001 this was extended to historic investigations and the Historic Enquiries Team then set about looking at cold cases. It was in the course of that review that the relevance of these imprints came to light. The imprints were retained on the file. There is no challenge to the fact that the imprints were attributable to the appellant. The delay has not affected in any way the ability of the appellant to challenge the accuracy of the imprints.

[37] The learned trial judge recognised that the loss of the police file was unsatisfactory but rejected the submission that this made a fair trial impossible. The appellant positively asserted that he had no involvement in the murder and the learned trial judge rejected the submission that delay of itself provided an explanation as to why the appellant could not give evidence explaining why his

prints were found in two separate locations in the taxi used to murder Eileen Doherty. In coming to that conclusion the learned trial judge recognised that he was unlikely to be able to call on a record such as a diary to remind him of what he was doing on any particular day and would not be able to call on the assistance of friends or relatives to help him.

[38] This was a case in which there was credible evidence of a forensic nature linking the appellant to the vehicle involved in the murder which was unaffected by the passage of time. For the reasons given by the learned trial judge we consider that a fair trial was possible and that he was correct to reject the application for a stay.

Other matters

[39] We do not consider that there is any substance in the remaining points. The evidence of the imprints together with the bad character evidence represented a strong case against the appellant which clearly went well beyond speculation. In spite of the case against him he chose not to give evidence and the learned trial judge concluded that his silence could only sensibly be attributed to his having no innocent explanation for his palm prints being on the inner nearside rear window and steering wheel when the taxi was recovered in October 1973. The palm prints, the bad character evidence and the failure of the appellant to give evidence constituted more than sufficient material to justify this conviction.

Conclusion

[40] None of the grounds of appeal having been made out we dismissed the appeal at the end of the oral argument.