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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JOHN CHRISTOPHER WALSH

Before Morgan LCJ, Girvan LJ and McCloskey J

Morgan LCJ (delivering the judgment of the court)

History of the case

[1] The appellant was convicted by HHJ Petrie on 7 December 1992 of possession of an explosive substance, namely a coffee jar bomb, with intent, contrary to s. 3(1)(b) of the Explosive Substances Act 1883 and sentenced to 14 years imprisonment. He appealed against conviction, and in a written judgment, delivered by MacDermott LJ on 7 January 1994, the Court of Appeal upheld his conviction. His solicitors applied on 10 March 1997 to the Secretary of State to review the conviction under s. 14(1)(a) of the Criminal Appeal (NI) Act 1980. On establishment of the Criminal Cases Review Commission, the matter passed into their domain, and by reference dated 27 March 2000, the Commission referred the case back to the Court of Appeal.

[2] The conviction was upheld a second time, in a written judgment of Carswell LCJ given on 11 January 2002. The appellant thereafter asked the CCRC to review his case again, without success, but came before the Court of Appeal in person in January 2007. In a judgment delivered by Kerr LCJ on 24 January 2007 the Court of Appeal granted leave for the appeal to be reopened. An application to admit fresh expert evidence consisting of two reports dated 4 September 2007 and 21 September 2007 from Mr Bayle concerning the significance of the absence of any fingerprints from the appellant on the coffee jar was granted on 9 November 2007. The hearing of the appeal was delayed by reason of changes of representation on the part of the appellant.

[3] On the hearing of this appeal the appellant was represented by Mr Fitzgerald QC who appeared with Mr Devine. The Crown was represented by

Mr McCrudden. We are grateful to all counsel for their helpful written and oral submissions.

The evidence at the trial

[4] On 5 June 1991, at 1.40pm, the appellant was arrested as he walked through an alleyway between Kerrykeel Gardens and Suffolk Road in Belfast. He was stopped by a soldier, Corporal Blacklock, the leader of an army foot patrol, who asked him to take his hands out of his pockets. The evidence of Corporal Blacklock was that when the appellant took his hands out of his pockets, he had a coffee jar bomb in his right hand. Corporal Blacklock told him to put the jar on a nearby wall. Another member of the patrol, Private Boyce, gave evidence that he was on the Suffolk Road and was at most 20 feet behind the corporal in or about the middle of the road, crossing towards the right when he saw the appellant walking towards Corporal Blacklock in the alleyway and being stopped. He claimed that from that time the corporal was always within his sight. As he got closer, he saw that the person was holding a coffee-jar like device in his right hand. He was told to put it on the wall. Private Boyce then bagged his hands for the preservation of evidence.

[5] The army patrol was a four man brick comprised of Corporal Blacklock, Private Boyce, Private Eames and Private Whillis. All but Private Boyce said that they entered Suffolk Road some way, about 150 metres, to the south of the entrance to the alleyway. Neither Private Eames nor Private Whillis saw the corporal stop the appellant or observed the exchange between them. The alleyway lay at a right angle to Suffolk Road and they had no view of it because of a high hedge at its southern corner. They could not confirm or deny the corporal's averment that the appellant had removed the coffee jar bomb from his jacket pocket. Private Boyce's evidence was that the patrol entered the Suffolk Road at a different point, a gate opposite the alleyway. Entry at this location would have allowed him a clear view of the entrance to the alleyway if he had been following Corporal Blacklock at a distance of some 20 feet. If the patrol had entered the Suffolk Road at the point indicated in the other soldiers' evidence, he would not have been able to see the exchange if he had been 20 feet behind Corporal Blacklock on the same side of the road as him, which was a position attributed to him by Corporal Blacklock. If, however, he was towards the opposite side of the road his view into the alleyway would have been better depending upon how close to Corporal Blacklock he was.

[6] Forensic evidence in relation to explosives was given by Dr Murray. Testing revealed traces of RDX, one of the two components of the bomb, on the appellant's left hand but not the inside of his left pocket. There was no explosives residue on his right hand or the inside of his right pocket. In cross-examination Dr Murray agreed that if there was a significant amount of semtex on the surface of the coffee jar bomb and it was in contact with

another surface transfer of residue would be expected. Dr Murray also agreed that if the bomb maker put the explosives in the jar and then continued with his contaminated hands or gloves to assemble the device the outside of the jar would have been contaminated. In answer to the judge Dr Murray said that it probably would not be all that difficult to make sure that there was no contamination on the outside if a conscious effort was made.

[7] Dr Griffen gave evidence in relation to fibres. She had carried out an examination of the coffee jar bomb and found no fibres connected to the appellant's clothing. She said that the jacket pocket would not shed fibres very readily and that a strong contact would probably be required to pull off some fibres from the jacket. She said that the shiny surfaces of the jar and the smooth portion of the cellotape would not provide good receptors but that a substantial amount of the cellotape was sticky side up and was about the most receptive piece of material that you can have.

[8] Inspector Glass dealt with fingerprints. He explained that the fingerprint examination was carried out on 17 June 1991 after the examination for fibres. At an earlier stage the jar had been handled by the ATO and packaged by the scenes of crime officer in a plastic bag. In those circumstances Inspector Glass concluded that it would be highly unlikely that any fingerprints would be retained on the jar for fingerprint examination. In cross-examination he asserted that sticky tape was not a good recipient for fingerprints. "You may get one maybe in about a million". Although he accepted that glass is one of the best recipients of fingerprints he stated that it was a known fact that in general for examination of scenes for fingerprints only about 30% of them would bear fingerprints so that even with a good recipient the chances of getting fingerprints for anything more than 25% is rare.

[9] The learned trial judge rejected an application for a direction that there was no case to answer. The appellant gave evidence. He said that he had come from his home and was going to meet a friend at an inn on the Suffolk Road. He was not familiar with the area but thought the alleyway was a shortcut. He met Corporal Blacklock who motioned to him to take his hands out of his pockets. When he did so the corporal asked the defendant "what is that?" and referred to the device which the appellant says was on the wall to his right nearby. The appellant said that there was another man walking in the same direction as him about 15 feet in front of them who passed the corporal on the corporal's right-hand side whereas the device was on the wall on the left-hand side. The soldiers denied seeing any such person.

The Judgment at First Instance

[10] It was submitted on behalf of the appellant that the absence of any forensic evidence to link him to the coffee jar bomb was a point in his favour.

The learned trial judge concluded that the absence of traces of explosives on the appellant's jacket was not of great significance because the bomb maker was likely to ensure if possible that no traces might contaminate a person carrying the device. He did not place significance on the absence of fibres. The appellant's counsel recognised in light of the evidence of Inspector Glass that he could not advance the appellant's case on the basis of the absence of fingerprints. The learned trial judge concluded, therefore, that the forensic evidence was neutral.

[11] In evaluating the oral evidence the judge looked particularly at the crucial evidence of Corporal Blacklock and Private Boyce. He concluded that neither of them had any reason to try to make false allegations against the appellant. He noted the variance between Private Boyce and the other members of the patrol in relation to their entry onto the Suffolk Road. He concluded that there was nothing to cause any of the soldiers to remember the details of what happened until the events began to occur and he accepted that there was evidence that Boyce as well as Blacklock could have seen the appellant with the device in his hand as Boyce had stated.

[12] The learned trial Judge made various criticisms of the evidence of the appellant but stated that his main criticism related to the fact that although at the hearing he alleged that there was another man in the alleyway in front of him he had not mentioned this at the time. The appellant said that he mentioned this at interview on 7 June 1991 although there is no record of this in the police interview notes. The learned trial judge found it strange that he did not refer to the other person immediately when he was stopped. He went on to draw an adverse inference about the failure to mention this fact relying on Article 3 of the Criminal Evidence (Northern Ireland) Order 1988. He rejected the appellant's account. He accepted the evidence of the soldiers and convicted the appellant.

The Appeals

[13] In his first appeal which was dismissed on 7 January 1994 the appellant focused his argument on the forensic aspects of the case. The court rejected the submission that because traces of RDX were found on the left hand of the appellant one would have expected similar traces on the inside of the left pocket. That would depend entirely upon the nature of contact. The court also rejected the submission that contamination of the right-hand pocket would have been expected if the jar had been kept in it relying on the evidence of Dr Murray that the bomb maker would not have had difficulty in preventing such contamination. The court found that the absence of fingerprints was of no assistance to the appellant and dismissed the appeal.

[14] Following a reference from the Criminal Cases Review Commission (CCRC), the appellant came before the court again on 11 June 2001. He

applied for and was granted leave to call Conor Bradley, Liam Magill and Dr John Lloyd to attend and be examined before the court. Liam Magill was not, in the event, called to give evidence.

[15] Dr Lloyd was a forensic scientist who had not himself seen the bomb but reviewed and commented on the findings and conclusions of Dr Murray's evidence at trial. His evidence was that it would have been difficult to remove all traces of explosives residue from the outside of the jar because of the extreme persistence of semtex. He found that there was no evidence that the outside of the jar had been cleaned. He accepted that a skilled bomb maker taking rigorous precautions could have assembled the device without contaminating the outside of the device with residues. He would have expected fibres from the jacket to be on the bomb and residue from the bomb to be in the jacket pocket.

[16] Conor Bradley's evidence was that he and Liam Magill had been walking up the Suffolk Road at the time of this incident. They saw a soldier at the mouth of the alleyway and when they were 15 to 20 feet away saw a man turn out of the alleyway and come down Suffolk Road towards them. They then turned into the alleyway where they saw two soldiers and "a fellow", who one of the soldiers was holding against the fence with a hand on his chest. He said that he and Mr Magill walked through the middle of the group. The soldiers saw them but didn't stop them. Mr Bradley did not come forward at the time but claimed that in 1996 he saw an article appealing for witnesses in the Irish News and responded to it.

[17] The court rejected Mr Bradley's evidence as not worthy of belief. They did not believe that he was there at all. Neither the soldiers nor the appellant mentioned seeing two men at the relevant time. His account of hearing about the incident and reading the appeal in a newspaper was not credible. In any event the man referred to could not have been responsible for leaving the bomb on the wall as he allegedly passed Corporal Blacklock on the other side of the alleyway. The only explanation for the position of the bomb as contended for by the appellant would require some other person to have left the bomb on the wall before the soldiers arrived on the scene. The court rejected that suggestion as extraordinarily unlikely.

[18] The court did, however, accept the appellant's submissions in relation to the drawing of the adverse inference. Carswell LCJ found that the trial judge should not have drawn an adverse inference against the appellant in relation to his testimony about the man who had preceded him in the alleyway, as it was not an integral part of his defence or something he could reasonably have been expected to mention when questioned. The court indicated that if the evidence had remained as it was at the trial they might have felt constrained to hold that they could not be satisfied that the trial judge must have reached the same conclusion about the appellant's account if

he had not drawn the inference. They concluded, however, that in light of the evidence of Mr Bradley they were satisfied that there was no other man in the entry and in addition concluded that the fact that false evidence had been adduced to bolster the appeal itself undermined the appellant's case. The appeal was dismissed.

The issues in this appeal

[19] The decision to reopen the second appeal on 24 January 2007 was made because that court had not considered certain additional materials in relation to the evidence of the soldiers. In particular Private Boyce had made a further statement on 24 November 1998 in which he now accepted that he had come onto the Suffolk Road at the point indicated by the other members of the brick. He asserted that his position was on the opposite side of the Suffolk Road from Corporal Blacklock. He stated that he saw Corporal Blacklock with the appellant who was static in the alleyway. This information was relied upon by the CCRC in referring the matter to the Court of Appeal but the court considered that no application to admit this evidence had been made to them and they did not, therefore, consider it during the second appeal.

[20] We admitted the further statement from Private Boyce without objection from the Crown. That statement contradicted his evidence at the trial in two respects. He now accepted that he had not enjoyed a view of the alleyway as a result of the emerging from a gate directly opposite it. In fact it was now common case that the gate in question was connected to scrapyard premises into which the soldiers could not have gained entry. His view of the alleyway was now dependent upon the extent to which he could place himself on the opposite side of the road from Corporal Blacklock and sufficiently close to him to enjoy a view into the alleyway. As Mr Fitzgerald pointed out in his submissions one of the difficulties with this account is that in several passages of his evidence Corporal Blacklock had described the set-up of the brick and placed Private Boyce approximately 20 feet directly behind him. If that was correct it called into question the accuracy of Private Boyce's latest statement.

[21] The second respect in which the second statement contradicted Private Boyce's evidence at the trial was his assertion that the appellant was static when he first saw him. Private Boyce goes a little further in his statement in that he suggests that the fact that the appellant was static suggested that the appellant was not a courier and it appears that he was relying on this to suggest that the appellant's involvement was more sinister. Mr Fitzgerald submitted that this latter point tended to suggest that the witness was someone with a propensity to make assertions with a view to supporting an outcome rather than attempting to remember events that had occurred. In any event this cast further doubt on the reliability of Private Boyce's evidence.

[22] In response Mr McCrudden submitted that the departures in the new statement were not significant. The trial judge was clearly alive to the fact that Private Boyce was inconsistent with the other soldiers in his evidence about where he had emerged onto the Suffolk Road. In his CCRC statement he said that he operated behind Blacklock and in support of him keeping him in view at all times. He had remained consistent on the central issue about the appellant's movements. It had been accepted that there was no inconsistency in the account given by Blacklock in his latest statement. We consider that the trial judge was best placed to form a view as to the credibility of the soldiers and his assessment ought not lightly to be disregarded. In our view very little weight should be given to the account of Corporal Blacklock about the position of Private Boyce because Blacklock in his evidence indicated that he did not know Boyce's exact position.

[23] The second issue advanced by the appellant related to the significance of the absence of fingerprints on the coffee jar and cellotape. It was clear from the photographs and evidence that the upper portion of the coffee jar had cellotape wound around it to keep portions of the device in place. The evidence also indicated that in some parts the sticky side rather than smooth side of the cellotape faced outwards. Mr Bayle is an experienced fingerprint expert. It was his evidence that the glass, the smooth side of the cellotape, the sticky side of the cellotape and the top of the jar were good receptors for ridge details. If the coffee jar had been held tightly in the right-hand as suggested in some of the evidence he would have expected to find prints. He accepted that Inspector Glass may have been right to say that in general only 30% of scenes contained fingerprints but such a figure was not appropriate for glass. The suggestion that in only 25% of cases fingerprints would be found with glass was not satisfactory. Inspector Glass's assertion that ridge details were found on sticky tape only one time in a million was untrue. Mr Bayle gave his opinion that Inspector Glass was wrong to assert that it was highly improbable that fingerprints could have been found on the coffee jar when forensically examined on 17 June 1991.

[24] We gave leave for Mr Logan, the head of the PSNI Fingerprint Bureau, to be called on the issue of the extent to which the retention of fingerprints might have been affected by the work of the ATO and especially by the bagging of the items. It appears that at this time these items were bagged rather than securely boxed. Both experts accepted that in those circumstances there was a risk of loss of fingerprints by rubbing. Mr Logan did not seek to explain or stand over the percentages offered by Inspector Glass. He said that the receptiveness of sticky tape would depend very much on whether it was clean or dirty, as well as other factors. He had some experience of the effect of bagging and gave his opinion that there was a possibility or risk that some fingerprints would have been lost. Although there was some challenge to the reliability of Mr Bayle as an expert there was no serious challenge to his

criticisms of Inspector Glass except in relation to the effect of bagging and the work done by the ATO.

[25] It is clear that the evidence of Inspector Glass was of considerable significance in that it dissuaded the appellant's counsel from advancing the case that the absence of fingerprints was to the appellant's advantage. The newly admitted evidence suggests that the figures quoted in evidence by Inspector Glass were unreliable. The suggestion that because of bagging it was highly improbable that any fingerprints would remain is at odds with the evidence of Mr Logan whose evidence on this issue was very measured and who said that there was a possibility or risk that fingerprints would have been lost.

[26] The third issue raised by the appellant concerned an alleged non-disclosure. The papers now available indicate that at the time of the detention of the appellant Private Whillis was detailed to go to the Kerrykeel Gardens side of the alleyway. While there he noticed a vehicle in which a person described on intelligence grounds as a top IRA man was travelling. This man was connected to an address on Suffolk Road and another address in Kerrykeel Gardens. In light of the discovery of the coffee jar bomb and his presence in the immediate vicinity he was arrested at 3:35 p.m. that afternoon. He was an interviewed on six occasions on 5 and 6 June 1991. It was put to him that police believed that he may have been the person who drove the bomber to the area. He was released without charge.

[27] There was some forensic investigation of this man's car to see whether he could be linked to the bomb. No link was established. It appears that the forensic notes concerning this were available to Dr Lloyd who was retained on behalf of the appellant for the second appeal. He specifically refers to this man in his report. It does not appear, however, that the custody record or interview notes in relation to him were at any stage disclosed to the appellant or his advisers. The appellant submits that the failure to disclose this material deprived the appellant of an opportunity to explore how this device might have ended up in this location at that time.

[28] Mr McCrudden submitted that the material did not pass the test for disclosure. It did not undermine the prosecution case or assist the defence. In that location at that time it would have been well-known to any court that this was an area in which there was a significant degree of terrorist activity. The Crown did not have a duty to trawl their intelligence files to identify each and every such person. Although there is considerable force in these submissions this is not just a case of identifying someone who is connected to an address in the area. He was seen in the immediate vicinity at the relevant time and the circumstances in which he was seen were sufficient to cause him to be arrested and questioned over two days.

[29] The fourth matter pursued by the appellant related to the inference which the second appeal court drew from the false evidence of Mr Bradley. Mr Bradley and Mr Magill made themselves known to police after an appeal for witnesses was published in the Irish News on 1 July 1996. They both made police statements. They were then interviewed by the CCRC and their accounts were consistent with their police statements. The CCRC could not make any definitive judgment on their evidence but concluded that it provided a plausible account as to why the incident became fixed in the minds and why Mr Bradley recalled a man emerging from the alleyway. There was no evidence to suggest that they had been encouraged to come forward by the appellant or indeed that they knew the appellant.

[30] Against that background Mr Fitzgerald submitted that the inference that reliance on the false evidence of Mr Bradley itself undermined the appellant's case was unsustainable. We have closely examined this portion of the judgment. It is clear that the principal issue discussed in this passage is the conclusion that the false evidence of Mr Bradley does not disturb the finding of the learned trial Judge that there was no other man in the entry. That conclusion necessarily cast doubt on the reliability of the appellant's evidence. Although, therefore, the advancement of this evidence might not be said to undermine the appellant's case it certainly left his credibility in the damaged state found by the learned trial Judge.

[31] The appellant also relied on the absence of a good character direction and the new evidence of Dr Lloyd which was admitted on the second appeal. These points were both considered in the course of the second appeal. They were of no assistance to the appellant and there is no reason for us to consider reopening them.

Conclusion

[32] The Court's powers to overturn a conviction are contained in s. 2 of the Criminal Appeal (NI) Act 1980, which provides that the Court of Appeal shall allow an appeal against conviction if it thinks that the conviction is unsafe. The manner in which the court should carry out its task was helpfully reviewed in R v Pollock [2004] NICA 34. At paragraph 32 the following principles were identified:

1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.
2. This exercise does not involve trying the case again. Rather it requires the court, where conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.

3. The court should eschew speculation as to what may have influenced the jury to its verdict.
4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal.

[33] In this case, of course, fresh evidence has been introduced. The approach which the court should apply in those circumstances is set out in the opinion of Lord Bingham in R v Pendleton [2002] 1 CAR 441.

> "The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate the evidence to the rest of the evidence which the jury heard. For these reasons, it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

Of course we are well placed to identify the considerations which led to the finding of guilt because we have the reasoned, written judgment of the learned trial judge and therefore not subject to the disadvantage identified in this passage where the decision is the unreasoned verdict of the jury.

[34] Applying these principles it seems to us that the fresh evidence relating to Private Boyce and the admission by the Crown that he could not have entered the Suffolk Road as stated in his evidence relates to a deficiency in the evidence of Private Boyce which was in any event identified by the learned trial judge. He specifically found that since there was nothing unusual occurring there was nothing to cause any of the soldiers to remember the details of what happened until the events began to unfold. The recollection seven years later that the appellant was static rather than moving when he first saw him is of no more than modest significance.

[35] There is no doubt that the evidence of Inspector Glass prevented any submission contending that the absence of fingerprints on the coffee jar was a point in favour of the appellant. Some of his evidence appears to have misled the court although there is no suggestion that this was deliberate. The fresh evidence indicated a strong likelihood that if the coffee jar had been handled by the appellant as alleged a fingerprint would have been detectable immediately thereafter. It was also clear, however, that the forensic bagging techniques used at that time raised the possibility that any such fingerprint

would have been lost in transfer. If this evidence had been before the learned trial judge it would have been for him to evaluate its significance on the issue of whether the forensic evidence was neutral.

[36] The non-disclosure point is more doubtful. The thesis on which the top IRA man was arrested was that he had transported the bomb carrier to the scene. He was extensively questioned about this and there was no evidence to connect him to the incident. There was no evidence of any other person in the vicinity of the coffee jar at any material time and the question remained as to how it got there. The reference to the top IRA man could at best have provided a partial theory. We have already commented on the previous court's approach to Bradley's evidence.

[37] As a result of the second hearing before the Court of Appeal the adverse inference which formed the main criticism of the appellant's evidence has fallen away. The fresh evidence in relation to fingerprints might reasonably have affected the learned trial judge's view as to whether the forensic evidence was neutral. The second statement from Private Boyce gives some material which might have affected the evaluation of his reliability. For those reasons we are left with a significant sense of unease about the safety of this verdict. We bear in mind that the appellant is a person of previous good character. It is on that basis that we allow this appeal.