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Judgment: approved by the Court for handing down
*(subject to editorial corrections)** | *Delivered:* **20/12/2016**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

GERARD HARTE

AND

JAMES GARY ROBERTS

_____

Before: Morgan LCJ, Weatherup LJ and Weir LJ

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MORGAN LCJ

[1] These are applications for an extension of time to appeal convictions arising from offences allegedly committed in the 1970s when the applicants were respectively 16 and 17 years old. In each case the applicant was arrested and interviewed without a solicitor present. The prosecution case relied upon statements made in the course of those interviews as the decisive or significant evidence in establishing their guilt. Each contested the admissibility of the statements but in each case the statements were admitted in accordance with the emergency legislation then in force. The statements were accepted as reliable. Each now maintains that the convictions were unsafe by reason of the circumstances of the admission of the statements and the background against which reliance was placed on them. In Roberts a further issue arises in respect of the mental element of the offence. Mr Greene QC and Mr Toal appeared for Harte, Mr O'Donoghue QC and Mr McKenna for Roberts and Mr McCollum QC and Mr McDowell QC for the PPS. We are grateful to all counsel for their helpful oral and written submissions.

Legal Principles

Emergency legislation

[2] This court has addressed the background to the introduction of emergency legislation in Northern Ireland in 1973 and the impact it had on the admissibility of confession statements in R v Brown and others [2013] NI 116. Each applicant has sought to apply those principles which for the benefit of the reader we now set out:

> "[9] 1972 was the worst year of civil unrest in Northern Ireland. In that year there were 467 people killed, 10,628 shooting incidents and 1853 bomb explosions or devices defused. The government convened a Commission chaired by Lord Diplock to consider what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book individuals involved in terrorist activities. The Diplock Commission reported in December 1972. It concluded that witnesses were subject to intimidation by terrorist organisations and were thereby deterred from giving evidence. That also applied to jurors although not to the same extent. The Commission also noted that the detailed, technical common law rules and practice as to the admissibility of inculpatory statements were hampering the course of justice in the case of terrorist crimes.
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> [10] The Commission concluded that trial by judge alone should take the place of trial by jury for the duration of the emergency. It also recommended a departure from the common law test for the admissibility of confession statements. It concluded that a confession made by an accused should be admissible as evidence in cases involving scheduled offences unless it was obtained by torture or inhuman or degrading treatment; if admissible it would then be for the court to determine its reliability on the basis of evidence given from either side as to the circumstances in which the confession had been obtained. It recommended that the technical rules, practice and judicial discretions as to the admissibility of confessions ought to be suspended for the duration of the emergency in respect of scheduled offences.

[11] Some but not all of the Commission's recommendations were implemented in the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act"). Section 6 of the 1973 Act provided for the admissibility of statements of admission.

> '(1) In any criminal proceedings for a scheduled offence a statement made by the accused may be given in evidence by the prosecution in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of subsection (2) below.
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> (2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies them that the statement was not so obtained, exclude the statement or, if it has been received in evidence, shall either continue the trial disregarding the statement or direct that the trial shall be restarted before a differently constituted court (before whom the statement shall be inadmissible).'

This section governed the admissions in the cases of Brown, Wright and McDonald. The provision was re-enacted as section 8 of the Northern Ireland (Emergency Provisions) Act 1978 which was the provision governing the case of McCaul.

[12] Soon after its enactment Lowry LCJ in R v Corey (December 1973) addressed a submission that there was a discretionary power to exclude a statement apart from the requirement to do so in section 6(2) in the 1973 Act.

> 'I agree with this general proposition since there is always a discretion, unless

> it is expressly removed, to exclude any admissible evidence on the ground that (by reason of any given circumstance) its prejudicial effect outweighs its probative value and that to admit the evidence would not be in the interests of justice.
>
> Section 6, of course, has materially altered the law as to admissibility of statements by singling out torture and inhuman and degrading treatment. This is clear from the fact that such things have always made for the exclusion of an accused's statement since they deprive it of its voluntary character. Accordingly, section 6(2) would merely be a statement of the obvious if it did not, in conjunction with section 6(1) render admissible much that previously must have been excluded. There is no need now to satisfy the judge that a statement is voluntary in the sometimes technical sense which that word has acquired in relation to criminal trials.'

[13] The scope of the discretion was addressed by McGonigal J in R v McCormick [1977] NI 105.

> 'In my opinion the judicial discretion should not be exercised so as to defeat the will of Parliament as expressed in the section. While I do not suggest its exercise should be excluded in a case of maltreatment falling short of section 6 conduct, it should only be exercised in such cases where failure to exercise it might create injustice by admitting a statement which though admissible under the section and relevant on its face was in itself, and I underline the words, suspect by reason of the method by which it was obtained, and by that I do not mean only a method designed and adopted for the purpose of

> obtaining it, but a method as a result of which it was obtained.'

[14] In R v O'Halloran [1979] NI Lord Lowry LCJ made two general comments.

> '(1) This court finds it difficult in practice to envisage any form of physical violence which is relevant to the interrogation of a suspect in custody and which, if it had occurred, could at the same time leave a court satisfied beyond reasonable doubt in relation to the issue for decision under section 6.
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> (2) It may be necessary another time, when considering statements of suspects, to distinguish more explicitly the meaning of the word "voluntary" at common law and "voluntary" as a shorthand expression for "not against the suspect's will or conscience" in the context of cases decided under the European Convention of Human Rights. The mere absence of voluntariness at common law is not by itself a reason for discretionary exclusion of a statement and the absence of voluntariness in the European Convention sense is prima facie relevant to degrading treatment and therefore again is not primarily concerned with the exercise of discretion.'

[15] R v McCaul (12 September 1980) was the only case involving these appellants to be considered by the Court Of Appeal. The court identified the real issue at the trial as whether, having regard to the appellant's mental condition and the fact that he was interviewed without having present a parent or other person to look after his interests, the written statements and the admissions which he made to the police ought to be admitted in evidence and, if so, whether the learned trial judge ought to rely on them to the extent of being satisfied beyond reasonable doubt that he was guilty of the offences which he purported to admit. At the trial the learned trial judge

had found that there was a breach of the Judges' Rules in not providing the appellant with access to his solicitor and a further breach because he was interviewed without anyone present to protect his interest. He concluded, however, that this had not resulted in such unfairness to the appellant that he should exclude the admissions in the exercise of his discretion. The Court of Appeal was satisfied that the learned trial judge's approach was correct and dismissed the appeal.

[16] The statutory background to the admissibility of statements in the exercise of the discretion was further considered by Hutton J in R v Howell and others (1987) 5 NIJB 10. That was a case in which it was accepted that the statement was admissible under the statute but the issue was whether or not it should be excluded in the exercise of discretion. The learned trial judge noted that the discretion should not be exercised so as to defeat the will of Parliament. He set out the first of Lord Lowry's general comments in O'Halloran and stated that it was the intent of Parliament in enacting section 8 of the 1978 Act that, provided there had not been torture or inhuman or degrading treatment, statements made by a suspect after periods of searching questioning whilst in custody should be admitted in evidence, notwithstanding that at the outset the suspect did not wish to confess and that the interrogation caused him to speak when otherwise he would have stayed silent.

[17] The final case on this issue to which we refer is R v Watson (26 September 1995). That was a case in which the issue was the exercise of the discretion to exclude an admission. By that stage the power to exclude in the exercise of the discretion had become statutory as a result of changes introduced in 1987. Carswell LJ gave some guidance on the approach to its exercise.

> 'This discretion, although it has to be exercised judicially, is a broad one. Like MacDermott J in R v Cowan [1987] NI 338, 352, we decline to define its bounds, which would be to fetter the discretion. The remark of Lord Lowry LCJ,

> however, in R v Mullan [1988] 10 NIJB 36, 41, that the exercise of the discretion is intended to discourage 'bad or doubtful conduct or trickery or dishonesty in conducting an interview or investigation' indicates an important area in which it may operate. It is for the trial judge in any case in which the discretion is invoked to consider the evidence and on the basis of his findings of fact to decide whether the admission of the statement would involve unfairness to the accused or whether it is otherwise appropriate to rule it out in the interests of justice.'

[18] We have spent some time reviewing the law on the admissibility of statements of admission under the emergency provisions legislation because of a suggestion in decisions of this court in R v Mulholland [2006] NICA 32 and R v Fitzpatrick and Shiels [2009] NICA 60 that the test for admissibility was governed by the Judges' Rules. Accordingly it was submitted that any breach of the Judges' Rules indicated a departure from the applicable legal standard at the time. We have no reason to doubt the correctness of the outcome of the appeals in Mulholland and Fitzpatrick and Shiels but in neither case was the case law to which we have referred opened to the court. The cases to which we have referred demonstrate that admissions made in breach of the Judges' Rules were admissible under the emergency provisions legislation unless obtained by torture or inhuman or degrading treatment. The residual discretion to exclude such admissions would not be exercised to render statements obtained in breach of the Judges' Rules inadmissible on that ground only. That was the law at the time of these trials. None of the parties before us contended that this was a change of case law although all parties recognised that the standards of fairness had significantly altered as a result of legislative changes arising from PACE and the Human Rights Act 1998.

[19] In their oral submissions all of the appellants accepted that the statements of admission were

> properly admitted applying the standards of fairness appropriate at the time of these trials. We consider that the question of admissibility has to be judged both now and then against the background of the legislative regime put in place under the emergency provisions legislation."

[3] The 1973 Act was the applicable legislation in respect of the conviction of Roberts. Harte was not tried until December 1988. The relevant provisions of the 1973 Act had been replaced in the same terms by section 8 of the Northern Ireland (Emergency Provisions) Act 1978 and that was further amended by the Northern Ireland (Emergency Provisions) Act 1987 which gave statutory force to the availability of a discretion to exclude an otherwise admissible statement if it appeared to the court that it was appropriate to do so in order to avoid unfairness to the accused or otherwise in the interests of justice. It is clear from Watson, however, that the approach to the discretion was not altered. Carswell LJ set out the principles on which an appellate court should act when considering any failure to exercise the discretion:

> "It is for the trial judge in any case in which the discretion is invoked to consider the evidence and on the basis of his findings of fact to decide whether the admission of the statement would involve unfairness to the accused or whether it is otherwise appropriate to rule it out in the interests of justice. If he comes to a decision within the bounds of his discretion and has not misdirected himself or misapprehended the law or facts in a material respect, it is well established that this court will be very slow to reverse his decision. The principle was stated by Lord Lowry LCJ in R v O'Halloran [1979] NI 45, 47 as follows:
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> > 'An appellate court's approach to the exercise of a judicial discretion must always be to look for indications that the judge misconceived the facts, mis-stated the law or took into or left out of account something which he ought to have disregarded or regarded, as the case may be.'"

Extension of time

[4] The principles governing the exercise of the discretion to extend time to apply for leave to appeal were set out in R v Brownlee [2015] NICA 39:

> "(i) Where the defendant misses the deadline by a narrow margin and there appears to be merit in the grounds of appeal an extension will usually be granted. This occurs most frequently when the application to extend time for a conviction appeal is lodged immediately after sentencing.
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> (ii) Where there has been considerable delay substantial grounds must be provided to explain the entire period. Where such an explanation is provided an extension will usually be granted if there appears to be merit in the grounds of appeal.
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> (iii) The fact that another person involved in the crime subsequently receives a more lenient sentence will generally not be a satisfactory explanation for any delay in an appeal against sentence. A defendant should take a view about his attitude to the sentence at the time that it is imposed.
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> (iv) A convicted defendant will usually get advice on any grounds for appeal from his legal representatives at the end of the trial. It will normally not be an adequate explanation for considerable delay that the defendant has sought further advice from alternative legal representatives.
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> (v) Where the application is based upon an application to introduce fresh evidence the court may extend time even where a considerable period has elapsed as long as the evidence has first emerged after the conviction, the circumstances in which the evidence emerged are satisfactorily explained, the applicant has moved expeditiously thereafter to pursue the appeal and the evidence is relevant and cogent.
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> (vi) Even where there has been considerable delay or a defendant had initially taken the decision not to appeal, an extension of time could well be granted where the merits of the appeal were such that it would probably succeed."

[5] In these cases it is clear that there has been very considerable delay. Each of these applicants has pursued these applications as a result of the decisions of this court in Mulholland and Fitzpatrick and Shiels. The test for the extension of time in

each case is, therefore, whether the merits of the appeals are such that they would probably succeed. We will now turn to the individual applications.

Harte

[6] Harte was convicted of throwing a petrol bomb causing damage to premises owned by a builders' merchant between 20 and 23 November 1979, arson of Brownlow House on 28 November 1979, throwing petrol bombs at Lurgan Railway Station on 1 December 1979 and burglary of a property and the theft of a shotgun between 2 and 5 December 1979. He was 16 years old at the time of the alleged offences. He was arrested at 6:35 AM on 4 December 1979 at his home as a suspected terrorist. After his interviews he was remanded to St Patrick's Training School pending a preliminary investigation into the alleged offences. Shortly thereafter he absconded from the training school and went to the Republic of Ireland where he remained for over nine years. He was extradited to Northern Ireland on 23rd August 1988.

The interviews

[7] Harte was interviewed on four occasions by Detective Constable Ritchie and Detective Constable McCausland on 4 December 1979. By the time of the trial the interview notes had been lost but the detectives still had available the typed copies of the statements that they said had been made from the interview notes. The first interview took place between 11:10 and 12:15. The applicant's mother was present for about 10 minutes of that interview. She then apparently returned home to get her husband and both of them at a later stage returned to the police station. The applicant made no admissions during this interview.

[8] The second interview took place between 13:20 and 15:00. During this interview Detective Constable McCausland was called out and provided with the shotgun and cartridge belt filled was shotgun cartridges which was the subject of the burglary count. The applicant was asked if he had seen them before and stated that his fingerprints were on the shotgun. He was asked about the earlier incident again and asked for time to think about it.

[9] The third interview commenced at 15:20. The applicant's parents came into the interview room at 16:13 and stayed for 10 minutes. The evidence before the learned trial judge was that the conversation was calm and casual. Detective Constable Ritchie overheard the applicant informing his parents of his involvement in the petrol bombing and arson matters and in the burglary of the shotgun. He said that he made notes of that conversation but these again had been lost by the time of the trial. These admissions were, however, recorded in the typed statement made by the police officer. During this interview which ended at 16:56 the prosecution case was that the applicant indicated that he wanted to tell the truth about the incidents in which he was involved.

[10] His fourth interview began at 18:30 and finished at 21:35. During this interview he made three detailed written statements in which he admitted his

involvement in the petrol bombing and arson offences identifying those who had committed the offences with him and the role played by each. The statement was signed by him and by the interviewing police officers and each recorded at the end the following:

> "I have read the above statement and I have been told that I can correct alter or add anything I wish this statement is true I have made it of my own free will."

The judge's conclusions

[11] At the trial the applicant contended that the admissions were not made by him but even if they were made by him that they should be excluded on the basis of the exercise of the judicial discretion. Accordingly the learned trial judge conducted a *voir dire*. The applicant contended that he had been shouted at, squealed at, threatened with assault and generally browbeaten by the two experienced detectives who interviewed him. That had induced him to sign and make the statements which were not voluntary. There were breaches of the Judges' Rules because of the absence of a parent or guardian having regard to his age. He said that he had asked for a solicitor shortly after his arrest but none was ever made available to him. He further stated that the statements had been concocted by the detectives and he had merely signed them.

[12] The learned trial judge rejected those allegations. He noted that the applicant had signed a written statement when he was about to leave the police station on 6 December 1979 stating that he had not been ill-treated while in custody. That statement had been signed after having had a 26 minute visit with his mother and sister or girlfriend. The parents had not apparently made any effort to consult a solicitor about what allegedly had happened to their son nor had they lodged any form of complaint.

[13] The father's evidence was that during the afternoon when he and his wife were admitted to the third interview his son was just talking casually to them. If as had been alleged by the applicant he had been browbeaten for several hours by these detectives beforehand the learned judge could not accept that there would have been such a casual conversation in a relaxed atmosphere.

[14] He further considered that the level of detail contained in the admissions in relation to the petrol bombings countered any suggestion that they had been made up by police. The learned trial judge was satisfied that the applicant had lied about this in the witness box. He further rejected the suggestion that the applicant had asked for a solicitor shortly after his arrival in the police station. If that had been case his parents would have followed it up. Finally the learned trial judge concluded that the production of the shotgun during the second interview caused the applicant to conclude that the police had a damaging piece of evidence against him and that led him to make full admissions.

[15] The learned trial judge concluded that the written statements confirmed the admissions made by the applicant to his father in a relatively casual and relaxed conversation and that the applicant's reaction to the production of the shotgun and his admissions to his parents in relation to it were voluntary statements. No ground existed for excluding them from evidence in the exercise of his discretion. He was satisfied that the admissions were reliable and accordingly convicted the applicant.

The applicant's submissions

[16] In part, the applicant sought to rehearse many of the submissions which had been made on his behalf at the original trial. Those were dealt with by the learned trial judge and we see no reason to interfere with his conclusions in relation to them. Some additional matters were raised. It was contended that the admission of the parents to the third interview effectively suspended that interview. Accordingly it was submitted that the caution which had been administered at the commencement of the interview was no longer in force and that a further caution ought to have been given immediately by Detective Constable Ritchie when it became apparent to him that something of evidential significance was being said. If, however, the interview was indeed suspended as contended that must mean that the questioning of the applicant by police officers was no longer taking place. In those circumstances there was no requirement to administer a caution. Similarly it was contended that neither interviewing police officers sought to have the parents sign the contemporaneous note of this conversation. There was no reason why such a signature was required.

[17] The applicant complained about the disappearance of the interview notes from which the statements were prepared. The learned trial judge dealt with this issue and was satisfied that the statements prepared and typed up by the police officers were taken directly from those notes. As a matter of common sense the fact that the applicant had disappeared from the jurisdiction for nine years was a factor which may have made the recovery of the notes more difficult. Once the learned trial judge admitted the written and oral statements and accepted the evidence of the police officers as to the circumstances in which they were made there was no proper basis upon which he could have exercised his discretion to exclude the statements either in the interests of justice or on the basis of fairness to the applicant in light of the statutory scheme which governed the admission of such statements at the relevant time.

Roberts

[18] This applicant was convicted by Kelly J at Belfast City Commission on 18 March 1977 of the murder of Harry Scott on 11 March 1976. The prosecution case was that the murder was carried out by the Provisional IRA in retaliation for an attack upon premises described as a catholic bar called the Golden Pheasant on 9 March 1976. The first such act of retaliation had been carried out on 10 March 1976 at a public house known as the Homestead. The applicant was 17 years old at the time of the offence. He was arrested on 6 April 1976 at 11:25 during a search by the army of his home which led to the recovery of a .45 Colt pistol which was used in the

murder, found under the mattress in his room. The applicant was handed over by the army to Detective Constable McAdam at Springfield Road RUC station on the day of his arrest.

The interviews

[19] There is no record in the papers now available of any interview with that police officer although it appears from the judgement of the trial judge that the applicant claimed that he had been physically assaulted and ill-treated during that period. The first interview of which there is a record is that between 10:15 and 13:15 on 7 March 1976 conducted by Detective Chief Inspector Caskey and Detective Constable Walsh. It is noted in that interview that the applicant had previously been interviewed by Detective Constable McAdam and had admitted telling him a number of lies about how the weapon had got into his possession and the identity of the person who had provided it to him.

[20] During that interview he gave an account of occasions when the gun in question was removed from his home. He asked for a pencil and paper and wrote out in his own hand during that interview a general account about guns and on one occasion a grenade being stored at his home and moved from time to time by various people. He was returned to his cell and given a pen and paper and asked to write down all he knew about the people connected with the gun.

[21] His next interview commenced at 16:35 at Lisburn RUC station on the same date conducted by Detective Constable Walsh and Detective Constable Gamble. He handed the interviewers a note in his own hand indicating that the night after the incident at the Golden Pheasant a named woman called at this home and collected the gun which was found at about 18:00. The gun was returned later that night. The following night, which would have been the night of the murder, the same woman came and collected the gun and brought it back the next night at about 18:15. He also identified a number of people with whom he had seen that woman associating and indicated that as far as he knew those were the people who had carried out murders on 10 and 11 March 1976. The interview was interrupted at 16:50 to enable the applicant to be medically examined and continued from 17:00 until 17:40 during which time the applicant denied any involvement in the murders on 10 and 11 March 1976.

[22] The applicant had a further interview with the same two officers at the same police station between 20:20 and 23:30. He denied membership of the IRA but it was put to him that it was highly unlikely that someone who was not a member would have been given custody of the gun. He was asked to explain what actual part he played in the murders of Mr Scott and the attack on the Homestead. At one point he said "Alright I drove the cars". He then described driving a car to the Lisburn Road but it was pointed out to him that neither attack occurred on the Lisburn Road. Detective Chief Inspector Caskey replaced Detective Constable Gamble and the interview continued from 23:30 to 01:05. The applicant was encouraged to tell the

truth and made a written statement under caution beginning at 23:45 which was signed by him.

[23] In that statement he indicated that there had been a meeting in his house on the evening the Golden Pheasant was blown up on 9 March 1976. The meeting discussed retaliation by way of an attack on a public house believed to be frequented by Protestants. The applicant indicated that all those at the meeting were in the Provisional IRA. He said that he was in it but was not sworn in. He explained that his house had been used as a safe house for the storage of guns and on one occasion a grenade.

[24] On the evening of the attack on the Homestead the woman he had named called to his house and said she wanted the gun. He went upstairs and brought it down to her. That was the same gun which had been found by the army. He saw this woman go to the front of his house to a car in which two people who had been at the meeting were sitting. He assumed that she provided them with the gun. She returned later that night with one of those people and handed him the gun.

[25] On the night that Mr Scott was murdered he said that he was alone in the house when the girl came in for the gun. She went upstairs and got it from under the mattress in his bedroom. He knew that they were going to do another killing because she asked if he was going out with his girlfriend. That was apparently a reference to whether he was able to go on the operation. He saw her approach two men standing at the house facing the shops after she left. One of those was a person who had been at the meeting in this house to discuss retaliation. She returned the gun at 6:15 PM on the following evening. He explained that the gun was subsequently taken from time to time. He had two further interviews on 8 March 1976 concerned with his involvement with the IRA.

The judge's conclusions

[26] At his trial the applicant challenged the admissibility of his oral and written statements on the ground that he was subjected to torture or inhuman or degrading treatment by the police in order to induce him to make them. Alternatively it was submitted that they should be excluded because they were induced by threats, promises, oppression and in breach of the Judges' Rules. The applicant's evidence on the *voir dire* was that he had been physically assaulted and ill-treated by police at the police station. He claimed that he wrote out the statements in his own hand because of fear and because of this misconduct. The contents were not his own and they were composed by him from suggestions made earlier by the police.

[27] He claimed that he was induced to sign the first statement because of police brutality earlier and because of fear that it would continue. In particular he was led to believe that his mother was still in police custody and would be charged with murder he did not confess. He also maintained that promises were made to him that he would not be charged with murder but merely with possession of firearms. He said that he signed the statements although the contents came almost entirely from

Detective Chief Inspector Caskey. The verbal admissions he said were really statements and questions made by the police themselves and some were invented by him.

[28] The learned trial judge rejected his evidence. He noted in particular that the forensic medical officer, Dr Mary Gregg, was a truthful, careful and accurate witness. He found that the applicant had lied when he said that he had complained to her of ill-treatment at Springfield Road police station and lied when he said that her enquiry was limited to ill-treatment at Lisburn police station. He also found that the applicant had lied when he said that Dr Gregg told him that she could do nothing about his ill-treatment at Springfield Road because it was out of her jurisdiction. He was satisfied that the interviewing police officers were impressive witnesses and he had no material reservations about their evidence. Accordingly he admitted the oral and written statements.

[29] The statement having been admitted, the applicant elected not to give evidence in the main trial. Counsel submitted on his behalf that the contents of the statements did not contain sufficient facts to constitute proof beyond a reasonable doubt that the applicant was an accessory before the fact of murder. Having considered the submissions of the learned trial judge concluded first, that at all material times the applicant was a member of the Provisional IRA. Secondly, on foot of the statements he concluded that a small group of its members held a meeting at the applicant's house at which he was present. Thirdly, they there and then decided to murder Protestants by way of retaliation for the murder of Catholics earlier on that day and the applicant was a fully consenting party to this plan. Fourthly, he gave the .45 Colt pistol to a girl member of this group on the evening of 10 March and he knew at the time that it would be used to carry out this plan to murder persons believed or assumed to be Protestants.

[30] The pistol was returned to him that night and further conversations between the same girl and the male member of the group confirmed that it had been so used. He returned it to its hiding place under the mattress. On the following evening, 11 March 1976, the same girl called for the gun approximately an hour before Mr Scott was murdered. The applicant was then alone in his house and consented to her coming in and going up to his bedroom to collect the gun and take it away. At that time he knew that it would be used to murder persons believed or assumed by the conspirators to be Protestants and that this would be done in further execution of the plan. The gun was used to murder Mr Scott and the gunmen believed or assumed that Mr Scott was a Protestant.

The applicant's submissions

[31] It was submitted on behalf of the applicant that the account of the first interview disclosed that there had been an earlier interview between Detective Constable McAdam and the applicant. It does not appear that Detective Constable

McAdam was called in the *voir dire*. Although the applicant alleges that he was ill-treated in that initial encounter, that allegation was specifically rejected by the learned trial judge relying on the evidence of Dr Gregg.

[32] Secondly, the applicant made disclosures about the circumstances in which the weapon was taken away from his home in the written statements he made in his own hand which were consistent with the forensic evidence about the use of the weapon. He did not make any specific reference to the meeting at which the retaliation plan was discussed until after 23:30 on the 7 April 1976. Earlier in that interview he had suggested that he had driven a car to Lisburn Road where the attacks were carried out. The interviewing officers plainly recognised the inaccuracy of the statement and asked him to tell the truth. Even at that earlier stage he stated in interview that he knew that the murders were going to be done although he had no actual part in the shootings.

[33] The applicant argued that the account of the meeting referred to attacks on bars in Lisburn Road by way of retaliation. In fact the account given by the applicant demonstrated that there was a concern that such attacks would simply lead to further attacks in the same area on bars believed to be frequented by Catholics. There was no inconsistency, therefore, in the reference to the Lisburn Road in the account he gave about the meeting and the fact that the attacks were carried out elsewhere.

[34] The learned trial judge specifically referred to the arguments on inducement by threats and promises, oppression and breach of the Judges' rules. It is clear, therefore, that he specifically considered the issue of exclusion of the statements in the exercise of his discretion. Having heard the applicant's evidence and the basis upon which he put forward his case about the making of the statements he was clearly satisfied that they were admissible. There is no error disclosed in his approach.

[35] In this case there is a clear account by the applicant setting out the basis upon which he was aware of the plan to carry out retaliatory attacks resulting in the murder of Protestants. Prior to making that written statement he had indicated in an interview that although he had no part in the actual murders he knew that they were to be done. There is, therefore, no reason to doubt the conclusion of the learned trial judge that the applicant maintained this gun so as to make it available to those who wished to use it for the purpose of carrying out that plan.

[36] The final point raised on behalf of the applicant concerned his knowledge of the nature of the attack. The conclusions reached by the learned trial judge were plainly sufficient to show that the applicant maintained the gun in position so as to ensure that it would be available for the execution of the plan. The learned trial judge also referred to the conversation between the lady taking the gun and the applicant when she asked if he was going out with his girlfriend that night. That was related to an earlier conversation in which he had given that reason for his refusal to participate in the carrying out of the attack the previous night. In all the

circumstances the judge was perfectly entitled to conclude that this was further confirmatory evidence that an attack was intended that evening.

[37] The learned trial judge recognised that there was no evidence that the applicant knew who the intended victim was to be. The plan had discussed random attacks on public houses. The intended victim had plainly been selected at a particular public house but this was an attack on a person perceived to be a Protestant on such premises. It did not represent any material departure from the basis of the original plan. Finally it was suggested that because the applicant did not actually collect a gun and hand it over to the lady on the evening in question that there was not a sufficient actus reus in respect of the offence. We reject that submission. The actus reus of the applicant was maintaining the gun in position so that it would be available for the execution of the plan.

Conclusion

[38] In Brown we adopted the approach set out by Lord Bingham in R v King [2000] 2 Cr App R 391 to historic appeals of this kind:

> "We were invited by counsel at the outset to consider as a general question what the approach of the Court should be in a situation such as this where a crime is investigated and a suspect interrogated and detained at a time when the statutory framework governing investigation, interrogation and detention was different from that now in force. We remind ourselves that our task is to consider whether this conviction is unsafe. If we do so consider it, section 2(1)(a) of the Criminal Appeal Act 1968 obliges us to allow the appeal. We should not (other things being equal) consider a conviction unsafe simply because of a failure to comply with a statute governing police detention, interrogation and investigation, which was not in force at the time. In looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy. But this Court is concerned, and concerned only, with the safety of the conviction. That is a question to be determined in the light of all the material before it, which will include the record of all the evidence in the case and not just an isolated part. If, in a case where the only evidence against a defendant was his oral confession which he had later retracted, it appeared that such confession

> was obtained in breach of the rules prevailing at the time and in circumstances which denied the defendant important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would be at least prima facie grounds for doubting the safety of the conviction—a very different thing from concluding that a defendant was necessarily innocent. "

[39] In each case we consider that the confessions were obtained in accordance with the rules prevailing at the time. We accept that since that time protections for accused persons including in particular those who are children have been considered necessary and we have scrutinised these cases to identify factors which might impinge on the safety of the convictions. We have to carry that task out bearing in mind the statutory framework applicable at the time. The question is whether there is any unease about the reliability of these admissions. In our view the courts at the time gave careful consideration to that very issue and we do not consider that the matters advanced on behalf of the applicants suggest that the convictions are unsafe. Accordingly leave is refused in each case.