**Neutral Citation No. [2015] NICA 63**

*Ref:* **MOR9769**

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

*Delivered:* **20/10/2015**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**THE QUEEN**

**-v-**

**MYLES CHRISTOPHER O'HAGAN**

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**Before: Morgan LCJ, Gillen LJ and Weatherup LJ**

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**MORGAN LCJ (giving the judgment of the court)**

[1] This is an appeal by way of reference from the Criminal Cases Review Commission ("CCRC") pursuant to the powers contained in Part II of the Criminal Appeal Act 1995. The appellant was arrested and interviewed on 14 November 1973 under the emergency provisions legislation then in force. He made a statement of admission which was subsequently relied upon at his trial and formed the decisive evidence against him. On 24 May 1974 he was convicted of causing an explosion contrary to section 2 of the Explosive Substances Act 1883. This reference raises some of the issues addressed by this court in R v Brown, Wright, McDonald and McCaul [2012] NICA 14. The appeal is not resisted by the prosecution. Mr Rodgers QC and Mr Reel appear for the appellant and Mr Henry for the PPS. We are grateful to all counsel for their helpful written and oral submissions.

**Background**

[2] On 20 July 1973 at around 3:15 pm two youths walked into Mooney's Optician's shop at 18 Queen Street, Londonderry. One left a cardboard box on the floor inside the entrance. According to an employee in the shop one of the youths stated "there's a bomb, you have 10 minutes to get out." The employee then picked up the box, removed it from the shop and placed it in an alleyway just off Queen Street. The box exploded at around 3:25 pm just before Staff Sgt David Greenaway, the Ammunition Technical Officer ("ATO") from the Explosive Ordnance Disposal Unit, was able to examine it. Sgt Greenaway stated that the wall against which the box had been placed was streaked with diesel oil. He stated that this would be

consistent with a bomb composed of ammonium nitrate mixed with fuel oil. Sgt Greenaway estimated that the bomb weighed 30lbs.

[3] On 14 November 1973 at 3 am the Army carried out an organised search of flats in the Bogside area of Derry and discovered two youths. The soldiers questioned the youths one of whom identified himself as James Jarvis and produced a youth club card to confirm his identity. The youth in question was the appellant, then aged 15, having been born on 20 April 1958. The soldiers received instructions to arrest the two youths. The appellant was taken to the Royal Military Police Operations Room where he arrived at 4:55 am. He was photographed, documented and handed over to the RUC at 5:20 am on the same day.

*The interviews*

[4] He was interviewed by Detective Constable McNulty for 10 min at 9 am on 14 November 1973 ("Interview 1"). There is no record of what occurred at that interview and no complaint about it. There is no reason to think that it is material to this reference. His second interview was with Detective Sgt Galbraith and Detective Constable Stewart and lasted from 9:15 am until 1 pm on the same day ("Interview 2"). It is common case that police had established his true identity by that stage. On neither occasion was he accompanied by a solicitor or an appropriate adult.

[5] The police account of that interview is contained in four pages of handwritten notes. The notes record the appellant's antecedents, his relations, his associates and where he was arrested. There is a note that he refused tea and sandwiches at 9:30 pm but it seems likely that this is a reference to 9:30 am. There is reference to the appellant's arrest for stealing copper along with his associate, McIntyre, who was also convicted of this offence. There is then a description of his clothing and identifying marks and a reference to his doctor. The note then contains a confession that the appellant was responsible for placing the explosive device in Mooney's Opticians. The interview notes record a detailed description of the bomb and an offer by the appellant to draw it. No drawing has been found with the notes. He described the layout of the premises. The appellant claimed that he gave the occupants of the shop 3 minutes to get out. This portion of the notes opens with a reference to his associate Pat McIntyre who had been arrested for this offence on 6 September 1973 and made a written statement of admission. He had been interviewed by different interviewing officers and was convicted on 6 March 1974 of the same offence. At the end of that interview the notes record the appellant admitting that he hijacked a coal lorry by intimidating 2 coalmen on the back of a lorry with a loaded firearm. He said that he instructed the coalmen on the back of the lorry to tell the driver to pull it across the road.

[6] The appellant's account of this interview to the CCRC was that he was threatened that if he did not co-operate with the police he would be returned to the Army who wanted him back. He said that when he was in the cells RUC officers

stood outside arguing with soldiers about sending him back. He claimed police officers grabbed him by his clothing and pushed him around and at one point an officer had grabbed the clothing around his neck and pushed him backwards. He said the conversation in the interview concerned Bloody Sunday and other incidents as well as the bombing of the opticians. He said that during this interview two officers began writing out a statement. One asked the questions and the other answered as though he was the appellant.

[7] The appellant had a five-minute visit from his father at 3:45 pm. His next interview began at 4:40 pm on the same day in the presence of his father (“Interview 3”). The interview was conducted by the same officers and during that interview it is common case that the appellant signed a detailed confession amplifying some of what was contained in the earlier interview notes. The appellant's father countersigned the caution and the statement. The depositions of the police officers at the trial indicated that the appellant had dictated the statement.

[8] Although the custody record has an entry indicating that the appellant's father had a five-minute conversation with him the appellant’s account to the CCRC was that he could not remember being left alone with his father but said that he was allowed to speak to him for a short while in front of the RUC officers. The appellant said that his father was drunk when he came into the interview. He maintained that the officers said that it would be better for the appellant to sort this out rather than go back to the Army. No one had been injured and it was a "Mickey Mouse" charge so that it was best to get it over and done with. If he did not sign the statement they would have to send them back to the Army. The appellant said that he was scared of being sent back to the Army and his father said that it would be better for him to sign the statement because if he did so he could go home and come back to sort it out in the morning. It was for that reason that he signed the statement.

[9] The custody record has an entry that the applicant was visited by his mother and sister-in-law at 5:35 pm that day and supplied with a fish supper tea and sandwiches. The visit lasted 20 minutes. The applicant's mother has no recollection of that visit. He was then examined by the police doctor who recorded that the applicant stated that he was not ill treated or abused in any way. The custody record notes that he accepted an evening meal and was then visited by his parish priest, Father Bradley, for 5 minutes at 7 pm. A further visit with the applicant's mother is recorded at 7:20 pm for 10 minutes.

[10] At 7:55 pm he began his last interview with the same interviewers which lasted until 9:20 pm (“Interview 4”).The interview notes held by police in relation to that interview record that the appellant said that he did two robberies on the same night. One was a "darkie” driving a minivan in Hamilton Street and later on that night he held up an insurance collector, obtaining money on both occasions. The note also records an accidental shooting at the Bogside Inn and his proximity to the shooting during Bloody Sunday. There is a reference to the shooting of a 17-year-old

girl who was paralysed as a result. The final part of the note claims that the appellant said "informers should be shot". He said that he knew Patsy McIntyre well and that he would not recognise the court because it would be letting everybody down.

[11] The appellant has no recollection of that interview and said in a statement to the CCRC that he was astonished that the note should record him admitting to two robberies. He had never been charged with any such offences or possession of the firearm which was allegedly used in the hijacking. He denied that he said that informers should be shot or that he would not recognise the court. The only offence with which he was charged was that relating to the bombing at Mooneys.

*The trial*

[12] After he was charged the appellant was transferred to Lisnevin Training School. He met another boy who lived close to him and decided to join a group who escaped. He was rearrested the same day and transferred to prison where he was put on the republican wing. In his statement to the CCRC he said that he was told on the wing that he should refuse to recognise the court. He does not remember any contact with the solicitor or a lawyer at all. On the day of his trial the charge was read out and he refused to recognise the court. A plea of not guilty was entered on the record. He stated that he was not given an opportunity to say anything. He was sentenced at the end of the hearing.

[13] The deposition papers were recovered by the CCRC. These consisted of statements from two opticians who worked in Mooneys, the arresting soldier, the constable to whom he was transferred by the Army and the interviewing officers. The statements of the interviewing officers referred only to the interview commencing at 4:40 pm on 14 November 1973 and included reference to the presence of the applicant’s father. One of the interviewing officers said that he informed the appellant that he was making enquiries into an explosion near an opticians in Queen Street and that he thought the appellant could help with the enquiries. After caution the appellant replied, "Yes, I did it". The police officer then invited him to make a written statement which the appellant then dictated.

[14] It is common case that the learned trial judge would have been unaware of the fact that there had been an earlier interview that morning for a period of 3 hours 45 minutes in which the appellant was not accompanied by his father but allegedly made the same admissions that were then recorded in his police statement.

[15] It is also common case that the appellant and McIntyre were tried separately. McIntyre had been arrested over two months before the applicant. It appears that he was returned for trial five days after the applicant's arrest and was convicted on 6 March 1974. In his admission statement McIntyre alleged that the bomb was a gelignite bomb with a clock fuse containing 10lbs of explosives in a plastic bag inside

a paper shopping bag. The bomb was actually in a cardboard box and the weight was estimated to be 30lbs. The applicant's confession statement described the explosives as gelignite and diesel oil mixed into six plastic bags of 5lbs of explosives.

**The applicable legal principles**

[16] This court has recently reviewed the applicable legal principles in a case of this kind in R v Brown and others [2012] NICA 14 (paragraphs 6 to 19 inclusive). The task of the court is to consider whether the conviction is unsafe (R v King [2000] 2 Cr App R 391). Secondly, by virtue of section 6 of the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act") a statement given by an accused was admissible in evidence but excluded if the court was not satisfied that the accused was subject to torture or to inhuman or degrading treatment in order to induce him to make the statement.

[17] Thirdly, Section 52 of the Children and Young Persons Act 1968 provided that where a child or young person was charged with any offence or brought before the court any person who was a parent or guardian might be required to attend at the court before which the case was heard. Section 52 (2) provided that where a child or young person was arrested such steps had to be taken as may be practicable to inform at least one person whose attendance might be required.

[18] Fourthly, the applicable Judges Rules were the 1930 edition and they did not contain any specific provisions in relation to children or young persons. There was, however, a direction issued in March 1961 by the Inspector General indicating that children should be interviewed where at all possible in the presence of a parent, guardian or other adult friend and that the venue selected for the interview should not be one which could be calculated to intimidate, unduly embarrass, or frighten the person interviewed. Further there was a force order dated June 1971 referring to the obligation on the police to take such steps as were practicable to inform the parent or guardian when a juvenile was arrested. It was noted, however, in a circular dated December 1971 that in the conditions then prevailing and in particular areas every detail of these arrangements may not be practicable in all cases. It is clear that there was a subsequent deterioration in the position on the streets after the promulgation of the circular as indicated at paragraph 9 of our judgement in R v Brown.

[19] Finally, the court retained a residual discretion under the 1973 Act to exclude an otherwise admissible statement (see R v Corey 6 December 1973). The discretion was not to be exercised, however, to defeat the will of Parliament as expressed in the 1973 Act (see R v McCormick 1977] NI 105). A failure to comply with administrative guidance in relation to the presence of an appropriate adult would not lead to the exercise of the discretion to exclude (see R v McCaul [1980] 9 NIJB and R v Watson 26 September 1995).

**The issues in the appeal**

[20] It was not in dispute that the statement of admission signed by the appellant and his father was admissible under the 1973 Act. It was not suggested that the statement would have been or ought to have been excluded in the exercise of discretion. Rather it was submitted that there were a series of small factors each of which might in isolation be dismissed as causing no real concern but which taken cumulatively led to a significant sense of unease about the safety of the conviction. In the course of submissions it was accepted that any such unease would need to be based on some concern about the reliability of the statements of admission.

[21] In order to undermine the reliability of the statement of admission the appellant submitted that there were four main areas which cumulatively gave rise to a sense of unease:

(a) Matters connected with the taking and content of the statement;

(b) Issues relating to the circumstances surrounding the taking of the statement;

(c) Inconsistencies with the statement taken by co-accused McIntyre; and

(d) Omissions in the evidence before the learned trial judge.

[22] Dealing first with those matters concerned with the taking and content of the statement, the appellant's account to the CCRC was that in interview 2 the police officers concocted an account with one officer asking questions and the other answering them and writing them down. This allegation appears to have been made for the first time in a statement made on 26 January 2009 to the CCRC. It is not contended by the appellant that he made such a complaint to his father to whom he spoke before he made his written statement and during the recording of that statement. The custody record also indicates that he saw his mother on two occasions on the evening after making his written statement but he did not make any complaint of that kind to her nor does she indicate anything in her statement to support that account. He saw the forensic medical officer at 6 pm on the day on which he made the statement and said that he had not been ill-treated or abused in any way. That disposed of the allegation of rough treatment. Finally he saw his parish priest at 7 pm that evening and again it appears that no such complaint was made to him. In light of the absence of contemporaneous evidence of any such conduct a complaint first made 35 years after the event for which there is no corroborating evidence does not give rise to any sense of unease.

[23] The second aspect of the content of the statement relates to the fact that the statement contained admissions of hijacking and two robberies. The appellant was not charged with either offence. There is no indication that either of these offences

was reported to police. It is submitted that this is some indication of invention on the part of the police officers. Given the circumstances of the time there is nothing unusual about the fact that such matters were not reported to police and in the absence of such report we consider that a prosecution would not have been appropriate. That does not suggest that there was any inaccuracy or impropriety in the interviews. The appellant's case that these counts were made up is also inherently unlikely. If the applicant is right the police made these accounts up without any information that such events had occurred and presumably in the expectation that no prosecutions would, therefore, result. There would have been no purpose to be served by such conduct.

[24] The final issue concerns the portion of the notes in interview 2 where the applicant offered to draw a diagram of the bomb. No such diagram was found by the CCRC within the papers. There is no indication in the interview notes that the applicant did in fact draw the diagram. It is perfectly understandable that the interviewers may have wished to continue with the flow of the admissions rather than interrupt it to have the diagram completed but at this stage it is impossible to be sure whether the diagram was completed or if not why not. What is clear from the papers is that the descriptions of the bomb contained within the interview notes and the signed admission correspond with the findings of the ATO who examined the remains of the bomb after it exploded.

[25] The next area concerned the circumstances surrounding the taking of the statement. The appellant was arrested at 4 am on 14 November 1973. He was handed over to police by the Army at 5:20 am that morning. His first interview commenced at 9 am so the total period available for arrest was three hours and 40 minutes. His first two interviews extended over the next four hours. That raises the question of whether he was unduly tired or exhausted in the course of the interviews. Although the solicitors acting on behalf of the appellant in their submission record that he had little sleep there is no suggestion in either of the statements made to the CCRC on 26 January 2009 and 23 April 2009 that tiredness played any part in the conduct of the interview. There is, therefore, no evidential base for the suggestion that any admissions at interview were affected by lack of sleep.

[26] The second aspect of this area concerned the absence of a parent or guardian during interview two. The Children and Young Persons Act 1968 placed an obligation on the police to take such steps as may be practicable to alert parents to the fact that a child had been arrested. The position in relation to the appellant remained somewhat confused. The general civil disorder would of itself have created difficulties. Communication in the 1970s was quite different from today. Secondly, the appellant gave a false name when arrested and a subsequent report prepared by Detective Sgt Galbraith stated that the appellant’s mother had attended at the police station enquiring about "James Jarvis" but refused to give her name. Mrs O'Hagan cannot remember using that name and thinks that she asked for the appellant by his own name. She says that she was aware of the applicant's arrest

around 10 or 11 am that morning. It is clear that the appellant's father was aware of his arrest by the afternoon after the first two interviews had taken place. The custody record records him having a conversation with the appellant at 3:45 pm. Mr Rogers submitted that it would have been open to the police to delay conducting the interview until a parent had been located but there was no suggestion that the decision to proceed with the interview in these circumstances was other than in accordance with normal practice at the time.

[27] A related question concerns the condition of the appellant's father when he attended at the police station. It seems to be common case that the appellant's father, who is now deceased, had a drink problem. The appellant's mother said that on hearing of the appellant's arrest the father started drinking although he was not drunk. She said it would have been noticeable that he had been drinking that day. The appellant said in his statement of 26 January 2009 that his father was drunk and told him that it would be better for him to sign the statement. The appellant's mother spoke to his father when he returned from the police station but in her statement to the CCRC did not support the suggestion that he was drunk. She did say, however, that the appellant's father expected the appellant to get out that night and that he had nothing to do with the explosion. The appellant's mother, however, has no recollection of the two visits recorded on the custody record that she made to the appellant when he was in custody on the evening of his admissions. If there had been any complaint about the taking of the statement one would have expected her to remember.

[28] The third area concerned inconsistencies between the statement made by the appellant and that made by McIntyre. McIntyre's statement suggested that the bomb consisted of 10lbs of explosives in a plastic by inside a paper shopping bag. The bomb was estimated by the ATO to consist of 30lbs of ammonium nitrate and diesel oil in a cardboard box. That suggested an inconsistency with the ATO in McIntyre's statement. The appellant's admissions in interview two and his confession statement, however, both refer to a cardboard box containing 5 or 6 bags connected to a battery and clock weighing approximately 30lbs. There was no material inconsistency with the evidence of the ATO.

[29] McIntyre's statement was not made available at the trial. The statement was not taken by the police officers who interviewed the appellant. If there was any discrepancy between the description of the bomb given by McIntyre and that by the ATO it did not in any way reflect on the reliability of the confession statement made by the appellant.

[30] The final area of concern related to the trial. The deposition papers only referred to the third interview. The learned trial judge was not informed that there had been a lengthy earlier interview in which the appellant had made effectively the same admissions without the benefit of the presence of his father. The preparation of papers for trial was quite different in the early 1970s and not all interviews were as a

matter of course included in the deposition papers. If the learned trial judge had been aware of the earlier interview he would have established the circumstances in which it had occurred and the content of what was said. The circumstances were far from unusual in 1973 and the absence of any discrepancy between the admissions contained in interview 2 and the written statement of admission in interview 3 could only have reinforced the learned trial judge's view that he should rely upon the statement of admission.

**Conclusion**

[31] The principles which the court should follow were set out by this court in R v Pollock [2004] NICA 34 at paragraph 32:

> "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."

[32] We accept the submission that the manner in which the evidence was adduced in this case would have given the learned trial judge the impression that the admission statement was made at the start of the first interview. We also agree that the learned trial judge would have been unaware of the limited rest period available to the appellant before he commenced the first interview in which the interviewing officers recorded his verbal admissions. For the reasons given, however, we do not consider that these matters either individually or cumulatively with the other matters raised create any sense of unease about the reliability of the admissions and the safety of the verdict.

[33] The appeal is dismissed.