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*(subject to editorial corrections)**

R-v-Richard D McCartan & Barry D Skinner

04/50960

RULING

MR JUSTICE DEENY: This is an application by the prosecution under Article 18 of the Criminal Justice Evidence (Northern Ireland) Order 2004 to put in evidence the statements of four witnesses in the trial before Gillen J, sitting without a jury, of Richard David McCartan and Barry David Skinner. Mr David Hunter QC appears with Ciaran Murphy for the prosecution; Mr Terence McDonald QC appears with Mr Dennis Boyd for Barry Skinner, and Mr Dermot Fee QC and Mr Michael Campbell appear for Mr McCartan.

As it appears to be the first application that has been dealt with under the new legislation, it seems appropriate to address it reasonably fully as that might be of assistance to other courts encountering the issues. One begins by looking at Article 18 of the Order under the rubric admissibility of hearsay evidence. Article 18(1)(a) permits "*a statement not made in oral evidence to be admissible as evidence of any matter stated if, but only if, any provision of this part or any other statutory provision makes it admissible*". Article 18(1)(d) is relevant here also - "*the Court is satisfied that it is in the interests of justice for it to be admissible*".

(b) and (c) are not applicable here though important to bear in mind, i.e. (b) is that any rule of law preserved by Article 22 makes it admissible, and Article 22 helpfully summarises the existing common

law rules relating to hearsay. It should be borne in mind, for example, that the option of putting in evidence matters that are considered part of the res gestae still exists.

Article 18(1)(c) also permits that evidence to be admitted "*where all parties agree to it being admissible*". That is also a provision often availed of, very sensibly, in criminal trials.

I turn to Article 18(2) where one finds: "*In deciding whether a statement not made in oral evidence should be admitted under paragraph 1(d), the Court must have regard to the following factors and to any others it considers relevant"*. Nine factors are then set out in Article 18(2). I observe that the key words here are "that the Court must have regard to" the following factors. This does not therefore appear to be a mandatory checklist of boxes, all of which must be ticked correctly before the Court can admit the statement. The Court has to have regard to them. It would therefore seem to me wise for the Court to go through them seriatim with regard to any statement that has to be admitted. In fact, although I did that in the course of argument with Mr Hunter, it does not necessarily have to be done in that way but I think the Court will have to consider each factor separately and have regard to it.

Article 19 deals with the sort of statements which could be admitted, which clearly covers those here, which are statements included in the papers for the trial.

Article 20(1) provides that "*in criminal proceedings the statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if:*

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter; that appears to be fulfilled here.

(b) "*the person who made the statement, "the relevant person" is*

identified to the court's satisfaction". Again that is established here.

(c) "*any of the five conditions mentioned in Paragraph 2 is satisfied*". That is something that the Crown must address here. The conditions in Article 20(2) are

(A) that the relevant person is dead;

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

(C) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;

(D) that the relevant person cannot be found, although such steps as it is reasonably practicable to take to find him have been taken;

(E) that through fear the relevant person does not give (or does not want to give) oral evidence in the proceedings either at all or in connection with the subject matter of the statement, and the Court gives leave for the statement to be given in evidence.

In this case I am concerned with the Crown's application under Article 20(2)(b), with regard to Sharon Honeyman and Article 20(2)(e), with regard to the other three witnesses - Ian Ferguson, Barry Irvine, Jacqueline Gyles. It should be noted that Article 20(2)(e) appears to allow the prosecution to make an application of this sort even when the witness is in the witness box, i.e. if they fail to come up to their proofs in some significant regard.

Under Article 20(3), fear is to be widely construed and, for example, includes fears of the death or injury of another person or financial loss. Clearly, as will emerge, the fear here is to be of death or injury, either to the witnesses or their relatives.

Article 20(4) is important and I quote it: "*Leave may be given under Paragraph 2(e) only if the Court considers that the statement ought to be admitted in the interests of justice*". Pausing there, it

should be noted that Article 20(4) therefore only applies to the issue of witnesses who are in fear. Therefore somebody who is outside the jurisdiction or cannot be found is governed, it would appear, only by Article 18 and not by Article 20(4). Article 20(4) goes on that the statement ought to be admitted in the interests of justice having regard to (a) the statement's contents, (b) to any risk that its admission or exclusion would result in unfairness to any party in the proceedings; (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence); (c) in appropriate cases to the fact that a direction under Article 7 of the Criminal Evidence (Northern Ireland) Order 1999, i.e. special measures could be made in relation to the relevant person, and (d) to any other relevant circumstances.

Although this article in particular and the Order generally recast the provisions of Articles 3, 5, and 6 of the Criminal Justice Evidence etc. Order Northern Ireland 1988, I am inclined to accept the submission of Mr Hunter QC that the law has changed more in form than in substance.

A number of statutory criteria found in Article 20(4) and Article 18 reflect either the earlier legislation or the decisions of the courts on that legislation, for example, with regard to the quality of the evidence to be admitted, see Ward and Davis The Criminal Justice Act 2003, a guide for practitioners to the equivalent English provisions.

It seems to me appropriate to turn now to deal with Article 20(b) with regard to Sharon Honeyman, who is the sister of Jacqueline Gyles, one of the other witnesses. I have already pointed out that Article 20(4) does not apply to her situation but Article 18(2) does. Before turning to Article 18(2) it is necessary to be satisfied under Article 20(2) that she is "*unfit to be a witness because of her*

bodily or mental condition". It is clear that the onus on the party applying to put the statement is to satisfy the Court. This is essentially an issue of fact, i.e. is the person unfit to be a witness. The normal standard of proof for the prosecution in a criminal trial would be to prove a fact beyond reasonable doubt. I consider that rule applies here. See also **R -v- Case 1991 Criminal Law Review 192**,C.A..

It is the application of the Crown that her evidence be read to the court in her absence on the ground of unfitness. I have to ask myself whether Mrs. Honeyman is unfit within the meaning of the statutory provision. Am I satisfied of that beyond reasonable doubt? The evidence offered to the court by the prosecution consists of a letter to the Public Prosecution Service from Messrs. Morrison and Broderick solicitors on behalf of Sharon Anne Honeyman, and attaching a report from a doctor, I S Hamilton, whose professional address is provided. I observe that it is questionable whether this document proves itself, although that point was not taken by the defence expressly.

In any event the document in full reads as follows: "27th October 2005. This is to confirm that Mrs. S A Honeyman is suffering from depression, on medication, and will be unable to attend the Court case for some months. Signed I S Hamilton". The Court readily appreciates that depression can be a serious and indeed dangerous illness. It can be seen, however, that no opinion is expressed by the doctor on the gravity or otherwise of this lady's depression, nor is any opinion expressed on its likely duration, except inflexibly. No indication is given of the frequency or nature of medication that she receives. Should I act on the bald statement of the doctor that she is "unable to attend court for some months" It may be said that her evidence is merely a matter of setting the scene and that it does

not prejudice the defendants. Of course, if that is so then no prejudice is caused to them by admitting the evidence.
The wording of Article 18(2)(c) might suggest that the intention of legislature is that this power be used for evidence of some importance, i.e. and I quote Article 18(2) (c) "*how important the matter of evidence mentioned in subparagraph 8(a) is in the context of the case as a whole*".

The thought behind that might be that time should not be wasted on such applications if the evidence in question is wholly unimportant and peripheral. This lady's statement must certainly be near to the bottom of the scale of importance. It may be dangerous to lay down a general rule as to what the nature of the evidence required for a witness in a criminal trial is to prove unfitness. That is likely to vary depending on a number of factors. Is it an expeditious hearing in the Magistrates Court or is it a hearing on indictment. The latter may require more formal proof than the former. Is the evidence of the witness controversial or otherwise? Is the evidence important and if so, how important. Is the bodily condition one that speaks for itself, for example terminal cancer; is it one that might have a range of disability attached to it? Applying my discretion in this case, I am not satisfied on those materials that this witness is unfit by reason of her mental condition to be a witness, and I refuse the application of the Crown to put her statement of evidence into evidence in her absence.

I then turn to the application of the Crown in relation to Ferguson, Irvine and Mrs Gyles. The preliminary point that must be addressed here by the court here is that under Article 20(2)(e) and, insofar as relevant, Article 20(3),i.e. is it the situation that the person does not give evidence through fear. Consistent with my ruling a moment ago, I consider that the onus is on the party seeking to

submit the statement here, i.e. the prosecution, and they must satisfy me of this beyond a reasonable doubt.

What form may the evidence of fear take? This has been a matter of some debate over the years. It was considered under earlier legislation by our courts and by the House of Lords in **Neill-v-North Antrim Magistrates Court & Another 1992 4 AER 846**. I refer to the headnote therein. This was a hearing before the Magistrates Court. Two youths were witnesses for the prosecution with regard to the offence. These two witnesses gave written statements to the police identifying the appellant and the other accused as participants in the crime which were tendered to the Magistrate at the preliminary inquiry. The appellant's solicitor requested that the two eye witnesses should attend and give evidence on oath in accordance with Article 34(2) of the Magistrate Courts Northern Ireland Order 1981, but the Magistrates Court, having heard evidence from a police officer on the previous day that the mothers of the two eye witnesses had told them that they were afraid to come to court because of threats made to them, and that the mothers had come to court and confirmed that their sons were afraid to attend court or leave their homes, admitted their evidence under Article 3 of the Criminal Justice Etc. Order 1983.

The appellant and another three accused were all committed for trial. The appellant applied for an order of certiorari, contending that the statements were inadmissible. The Divisional Court upheld that contention but refused to quash the committal. The appellant appealed to the House of Lords, and it was held by the Judicial Committee that although a statement by a witness speaking directly of his fear to give evidence was potentially admissible under Article 3 of the 1988 Order as an exception to the hearsay rule, to enable the Court to receive firsthand hearsay as to the state of mind of the

witness if it was in the interests of justice to admit the statement, a thirdhand account of the witness's apprehensions was not admissible, since the fact that the witness being absent through fear had to be proved by admissible evidence. Accordingly, since the police officers had not given evidence of what the witnesses had said to them directly of their fear but had merely recounted what the mothers had been told by their sons, the witness statements should not have been admitted in evidence.

See also **R-v-Taylor 1996 NIJB 34**, a decision of our Court of Appeal on the same topic. See also Archbold 2006 paragraphs 11, 22, and following dealing with this issue. The learned editors of Archbold note that the court in **R-v-Belmarsh Magistrates Court ex parte Giligan 1998 1 CAR 14** provided authority for the proposition that a written statement by the witness was not admissible for establishing that he was in fear. However, it should be noted that when one reads the judgment of the Court of Appeal in England in that case, that the Court did find acceptable a police officer giving oral evidence of the fear and providing a witness statement of the witness. What seems to have been objected to was the point that the statement did not prove itself. It is relevant to my earlier observation that the medical report perhaps does not prove itself with regard to Mrs Honeyman.

In this case I did hear the firsthand evidence of the police officers as to what the witnesses said themselves and as to their demeanour. It is clear on the authorities that this is an acceptable form of evidence to establish that aspect of the matter.

Also briefly I refer to **R-v-H, W, and M 2001 Criminal Law Review 815**. That was a drugs case. The Court there held that before it could be satisfied that a witness "*does not give oral evidence through fear the Court should be informed of any, and if so, what*

efforts had been made to persuade the witness to attend or to alleviate his fears, by, for example, an offer of witness protection, or of screens at court. The Court should be also informed, if possible by the witness himself giving oral testimony to the judge, or by perhaps videolink or tape recording as to why he was in fear. In this particular case, the date on which the judge considered whether the complainant was absent through fear was not June 29th when he had last been seen, but September 1st when the judge made his ruling the evidence was out of date and that was sufficient to undermine the safety of these convictions".

I observe that these are glosses to some degree on the statute. There is some support in part for the observations of their Lordships in Article 24(c) i.e. that the Court should take into account the fact that a direction for special measures could be made in relation to the relevant person.

That doesn't apply here because the witnesses' names are known, and indeed their addresses in some cases were known also at the very beginning. It would be shutting the stable door after the horse has bolted to try and introduce special measures here.

It seems to me that the point that the Court is seeking to make is that in exercising its discretion it may be helpful to the Court to know that such special measures, where applicable, had been offered to witnesses, and that some testing of the genuineness of their fear and reluctance to come to court should be made by police officers who interview them.

In this case I did hear from police officers who interviewed the three witnesses. This arose apparently after leading Counsel for the Crown had a consultation immediately before the trial. He had very properly directed that police officers wait upon the witnesses in light of that consultation. I observed that this approach has

had the benefit of ensuring that the evidence before this court with regard to the alleged fear of the witnesses is fresh and current evidence and not merely historic, which might otherwise have provided difficulties.

I now turn to the statements that were made by the witnesses. I think it is appropriate to do so to some degree. I was furnished with the statement of Brian Irvine which had been taken by Detective Constable Kerry McGivern, the original of which was signed by him and had been made available to defence Counsel. In that he says "*I now wish to decline from giving my evidence in the witness box as I am genuinely scared for my life. I have a great fear for any own safety and for my pregnant partner's safety*". He goes on to explain reasons for that; he also fears for his family, they live close to the scene of this shooting, and he is apprehensive because he does not "want to be seen as a tout. I am scared that if I am seen as a tout that my life and my family's life would be in danger. I only saw Alex after the shooting and not the actual incident".

Detective Constable McGivern who gave evidence formed the view which she gave to me in evidence that Mr Irvine seemed of a nervous demeanour as he gave this statement, and that she genuinely believed he was in fear. I also received a statement from Ian Ferguson and he said "I am in fear of the safety and lives of both myself and my family. I know the accused in the area in which I live, I have lived there my whole life". He gives reasons for his fear. He says "*if I stand up and give evidence I will be classed as a tout which could have serious repercussions for my own safety and that of my family. I genuinely believe that I would be seen as a tout and suffer paramilitary reprisals of the type of having my kneecaps shot or worse*".

That statement was taken by Detective Constable Sean Watters, and

he gave evidence that Ferguson appeared to be extremely agitated while the statement was being taken, there was a noticeable tremble in his voice and he was playing or picking at his hand, and gave the genuine impression that he was scared of giving evidence and any possible consequences that would be a result of him doing so.

Those statements were taken four days ago on Friday 9th December 2005, i.e. very proximate to the trial. Following a further direction from senior Crown Counsel, officers attended on Saturday 10th December and spoke to both Irvine and Ferguson and explained to them that special procedure measures could be made available or could be sought from the Court for them, but they still stated that they were in fear for their lives and those of their family. With regard to the witness Jacqueline Gyles, the position was slightly different. There was no written statement from her. However, I did hear the evidence of Detective Constable David Seaton. He had attended at an address where she was present and he introduced himself to her, and I received his oral evidence and a written statement which he made. She started to shake as soon as he began to speak of these matters; she knew him from previous dealings; she looked haggard; she began by saying words to the effect "no, no, please don't make me go to the Court". She also said to him that two letters had been sent to the Court in relation to her medical condition. I observe that that is so, but that on their own they would not again be sufficient for me to permit her statement to be put in evidence, but it is right to say that she was suffering from some nervous condition.

In front of the officer she continued to shake and began to cry and pleaded not to be made to go to court. She was given a glass of water by her sister which she spilled in her nervousness; she appeared to be distressed, and the officers were satisfied that this was genuine on her part. That evidence was put before me. I must

look at it in the light of the relevant circumstances. That includes the very nature of this offence, i.e. a death by gunshot in a public place, which inevitably gives some credibility to the fears of the witnesses. It was not a purely domestic dispute where drink and anger had led to tragedy, nor was it a case of dishonesty. It was a crime, whoever committed it, of sudden and violent murder.

I find the police officers to be honest and convincing witnesses. They were expertly cross-examined by Counsel for the two defendants. There was some attention drawn to some of the language in the statements, such as the use of word "invitation" to come to court. I conclude that this word was originally used by Detective Constable McGivern and then adopted or adapted by the witnesses, but I see nothing sinister in that. She and another officer made it clear that there was some discussion before the written statement was actually taken down.

In the light of all these factors I am satisfied beyond reasonable doubt in the circumstances that these witnesses will not give oral evidence in these proceedings through fear.

That, however, according to the statutory provisions, does not end the matter. In the light of that finding I now have to rule on whether the statements of any or all of the three witnesses should be given in evidence pursuant to Article 18 and Article 22(e) of the Order. What is the approach of the Court to this task? I had to consider this issue under the previous legislation in **R-v-Davison, Neeson and Agnew 2005 NICC 28**, a trial for murder with a jury. I did so at paragraphs 18 to 33 of that judgment which I will not repeat.

In that case one of the senior Counsel for the defence submitted that the test was the same for the issue as to whether the witness was in fear, i.e. that I had to be satisfied beyond reasonable doubt

that no injustice would result and that the statement should be admitted. I ruled against him in the light of the relevant authorities in that regard. They include **R-v-Thomas 1998 Cr Law Re 887; R-v-Allen 1998 NI 46; R-v-Patel 1997 CAR 294; and R-v-Raddock 1991 CAR 187**. I would particularly refer to the judgment of Carswell LCJ, as he then was, in **R-v-Singleton 2004 NI 21**. Having considered this matter he concluded at page 54 F of his judgment, actually in Allen which he then quoted in Singleton: "*Having assessed the quality of the evidence from the contents of the statements so far as it was feasible, the Court then had to carry out the balancing process involved in considering whether it was in the interests of justice that the statement should be admitted*".
That was an important pointer to the fact that this was the exercise of a discretion by the court, as it seems clearly to be. It was not appropriate therefore to apply the test of beyond reasonable doubt. I have mentioned the authorities, one or two of which may have suggested that, but on a proper reading of those authorities it did not seem to me that that is what they intended.

Nevertheless, I think it important to read my conclusion on this matter at Paragraph 33 of **R-v-Davidson**. I quote: "*I do not have to be satisfied that there is no risk at all of any unfairness to the accused, but the onus is on the party wishing to adduce the statement in evidence to satisfy the Court that the statement ought to be admitted in the interests of justice. I think it unlikely that any court would do so if the risk of unfairness was such as to lead to a finely balanced decision. Having considered the relevant criteria, the Court would wish to be clearly and firmly of the opinion that the interests of justice required the admission of the statement*".

I have considered that statement in the light of the new legislation and it still seems to me valid. Indeed, anyone reading

the legislation will note the considerable safeguards built in. Indeed, I would concur with the view of Counsel as expressed from the Bar that there is a degree of overlap, to put the matter no higher, between the provisions of this complex piece of legislation. I have already referred to Articles 18, 19, and 20, but it should also be noted that at Article 30 of the Order Parliament has preserved "*the Court's general discretion to exclude evidence*". Under Article 30 in criminal proceedings "*the Court may refuse to admit a statement as evidence of a matter stated if (b) the court is satisfied that the case for excluding the statement taking account of the danger that to admit it results in undue waste of time substantially outweighs the case for admitting it, taking account of the value of the evidence*". It goes on: "*Nothing in this part prejudices any power of a Court to exclude evidence under Article 76 of the Police and Criminal Evidence (NI) Order 1989*". That provision under Article 76 of course applies to the exclusion of unfair evidence, so that provision is still in force, as is the common law duty on the Court to ensure the fairness of the proceedings and avoid any abuse of procedure.

It seems to me that that reinforces the fact that the Court needs to be clearly and firmly of the opinion that it is in the interests of justice to admit a statement before doing so.

There are some aspects of the matters that I think it is necessary to briefly refer to.

I return to **R-v-Singleton 2004 NI 71**, as well as the passage already referred. One should note the passage at page 73 which sets out the facts of that case. That was a case of grievous bodily harm on Samuel Vennard, allegedly by the defendant Singleton. At page 73D, Carswell LCJ noted the evidence of Denise Vennard, then aged 12 years, was contained in two statements which the judge admitted, first made on 7th July 2000. She had been in Sinton Park when the

appellant whom she had known to see for years came into the park and asked for her uncle Sam Vennard. He went to 10 Sinton Park. She heard screaming. The appellant came out the window. She had heard a door slam. "This must have been the back door of the flat".

There is at least therefore some similarity between the evidence of Miss Vennard and the evidence of Ferguson, to which I will refer in a moment. I quote from 16: "*The provisions of the 1988 Order are so framed that the Court must ensure that the trial will be fair if the statement is admitted. The provisions of Article 6 incorporate the safeguard which appears prominently in the Strasbourg jurisprudence, and the prosecution case must not be founded solely or to a decisive extent upon the statement admitted. In the present case there was other evidence given orally and subject to cross-examination directly implicating the appellant, and Denise Vennard's statement was in our judgment ancillary to that. We therefore consider that the judge was entitled to admit her statement if satisfied that the trial would be fair if it was admitted*".

So the test put forward there is that the prosecution case "*must not be founded solely or to a decisive extent upon the statement admitted*". It is right to say that a recent decision of the Court of Appeal in England has suggested that that may not be an absolute rule, and obviously if it could be shown that the defendant was responsible, whether by threats or conceivably even murder, for removing the principal Crown witness, it might be appropriate to put in evidence a statement of that witness even if it was the sole or decisive evidence against the accused, but that clearly is not this case. There is no evidence before me linking either accused to the fear of the witnesses.

The witnesses do not allege that they have been threatened by the accused or their friends.

I think it is necessary at this point to turn at least briefly to the evidence of Ian Ferguson, which is to be found beginning at page 36 and particularly at page 37 of the statements of evidence, and he explains why he was in Euston Street. At page 37 he says "*I saw someone get out of the front passenger seat of the outside car and jog around the back of his car and the MR2* (which was Mr McKinley's car), *and around the driver's door of the MR2. I could say there was a big fellow about six feet tall, stocky build and wearing all black clothes. He had a black baseball cap and black jacket which was zipped up to his chin. He was also wearing black trousers. The fellow had his head down as he jogged around behind the two cars. I knew it was a fella from his build. The fellow leaned into the driver's door window of the MR2 for about two or three seconds. He appear to have right arm across his chest and left arm leaning against the car. I saw the fella extend his right arm into the car and bring his left arm up as well. As I heard two bangs, not loud, like two pops, and saw a flash inside the MR2. I knew it was gun shots*". He goes on to describe that man running away and the other vehicle driving away. He panicked and then went into the house of his friend and spoke to a number of people there.

It can be seen, as I say, that there are some similarities with Vennard there. He is less important than Vennard in that he doesn't identify the person concerned but he does describe him. It seemed to me therefore perhaps, at one point, that this was not truly identification evidence. However, I accept the submission on Mr McDonald QC for the accused Skinner that I should treat it as akin to identification evidence, because the prosecution seeks to rely, not only on the description fitting his client but also to call Detective Constable Fellis, who saw the accused Barry Skinner very shortly after these events, very nearby. He submits that taken together,

therefore, there is an inferential identification, it is claimed by the Crown.

These are important points and a Crown case based solely on them might offend against the dictum of Lord Carswell, but that is not the case in the contention of the prosecution. They have other evidence, much of it based on an analysis of the use of mobile telephones by the two accused, and indeed the deceased. An elaborate analysis of this creates, the Crown says, a clear pattern of behaviour, pointing to the involvement of the two accused in this murder.

They also wish to rely on certain statements as statements of the accused insofar as they are relevant. This, of course, was all contested by the defence but I must take the prosecution case in this way at this time.

If I may be permitted an analogy from the Roman arena, the prosecution weapon here is not the short stabbing sword but the encircling net of circumstantial evidence.

It is clearly a very different case from that which I had to deal with in **R-v-Davidson, Neeson & Agnew**, when the sole or decisive evidence came from Witness D who was unfit to give evidence. These matters have been considered very recently by the Court of Appeal in England in **R-v-Selleck and Selleck 2004 2 CAR 15**, and I have had an opportunity of considering the full and helpful judgment of Waller LJ in that case.

The Court there was considering the appeal of Carlos Selleck and his brother from a conviction for murder in the Crown Court where the trial judge had admitted in evidence statements of two of their associates who were in fear. Among other things, the Court considered the European jurisprudence. I consider it helpful to set out very briefly the conclusions of Waller LJ at paragraph 50;

(i) "*the admissibility of evidence is primarily for the national law;*

(ii) evidence must normally be produced at a public hearing and, as a general rule, Articles 6(1) and (3)(d) require a defendant to be given a proper and adequate opportunity to challenge and question witnesses;

(iii) it is not necessarily incompatible with Article 6(1) and (3)(d) for the depositions to be read and that can be so even if there has been no opportunity to question the witness at any stage of the proceedings. Article 6(3)(d) is simply an illustration of matters to be taken into account when considering whether a fair trial has been held. The reasons for the courts holding it, they say that the statements should be read and the procedures to counterbalance any handicap to the defence will all be relevant to the issue whether where statements have been read the trial was fair; (iv) The quality of the evidence and its inherent reliability, plus the degree of caution exercised in relation to the reliance upon it will be relevant to whether the trial was fair". They then ventured on a fifth proposition, but that is not applicable here as the fear of the witnesses here is not said to stem from any action of the defendants.

It is therefore appropriate to turn to Article 20(4) of the Order in the light of those authorities and Article 20(4)(a) requires me to consider and have regard to the statement's contents. It was submitted that this was a comprehensible and coherent account of a shocking event. No inconsistencies with other evidence have been demonstrated, although Mr Fee pointed out that a different case had been put to his client in interviews. I accept that submission so far as I can consider the matter. There was nothing to suggest any infirmity on the part of the witness. If he had any criminal or

relevant medical records those ought to have been disclosed to the defence. There is no suggestion that any such disclosure has undermined the reliability of the witness. I say witness singular, but this applies in the plural as well. I have read out part of the statement which in my opinion is part of a longer wholly convincing statement of what the young man saw on this occasion.

At one point in his submissions Mr Hunter contemplated that the Court would admit the scene setting of Mr Ferguson's statements but edit the key point describing a man consistent with Mr Skinner actually carrying out the shooting, but Mr Dermot Fee QC for the defendant Richard McCartan convincingly made an argument against that. He had described his position as somewhat neutral, and one could see why. Against him is the fact that Ferguson does put two people at the scene, the second of whom could of course possibly be his client, but on the other hand Ferguson clearly gives a description of the gunman which was not the defendant McCartan, although the defendant McCartan had been cross-examined by police officers in his interviews on the basis that he was the gunman. I accept that submission by Mr Fee. If the statement goes in all of it must be admitted in evidence to be fair to his client.

Article 20(4)(b) relates to any risk that the admission or exclusion of a statement will result in unfairness to any party in the proceedings. The risk of unfairness from exclusion of the statement is clear - the Crown would lose an important part of their case. The risk from admission of the statement stems from the fact that defence Counsel will be unable to cross-examine the witness Ferguson and the Court will not see him. I think it fair to say that this was not pressed unduly by Counsel for, I think, the obvious reason that they were conscious that (A) they would be able to comment on the circumstances such as lighting in which the witness

had seen the man carrying out the shooting; (B) their clients could give evidence about what they were doing at the time of the offence; and (C) their clients could call evidence to contradict Ferguson if such was available to them.

I note that this all took place in a residential street with many people in the houses nearby. I am supported in these views by the decision in **R-v-Cole 1992 AER 108**. One then proceeds to Article 20(4)(c) which relates to special measures, but I have pointed out this is not applicable here. Article 20(4)(d) requires me to have regard to any relevant circumstances. I do so and I take into account all of Counsels' submissions in that regard. Clearly there is a significant overlap with Article 18.

I now turn to Article 18(2). As I mentioned that sets out no less than nine factors which the Court must have regard to, if admitting a statement under Article 18(1)(d). I address them here as indicators of relevant circumstances under Article 20(4)(d). The first of these is how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings or how valuable for the understanding of other evidence in the case. Mr Hunter contended and it wasn't disputed that it would have considerable value in this case.

The second, (b), is what other evidence can be given on the matter. In the case of Ferguson describing the gunman, Mr McDonald would say without actually identifying him there is no other evidence. There is some other evidence touching on the other circumstances, such as from the police and ambulance who arrived at the scene or from Mr Irvine and Ms. Gyles, but not relating to a description of the gunman. (c) "*how important the matter or evidence mentioned in subparagraph (a) is in the context of the case as a whole*". Clearly it is important, indeed very important to the prosecution here. (d)

the circumstances in which the statement was made. It was taken by the police. I note that it was not made until 18th October in the year in question, some time after the killing, but that is something that can be discussed with the trial judge in the event of my admitting the statement. (e) How reliable the maker of the statement appears to be. I have touched on that. There is no attack on his character or his ability to give evidence; he is neither very elderly nor a child, nor unwell, and Mr Hunter pointed out that there is nothing otherwise to suggest that he is interested in these matters. (f) How reliable the person making the statement appears to be: That appears to overlap (d) above, but in any event it was taken by the experienced detective constables, it would appear. (g) Whether oral evidence of the matter stated can be given, and if not why it cannot. As I have referred to above, there is nobody else who saw the actual shooting except Ferguson. (h) The amount of difficulty involved in challenging the statement. That, further to my earlier remarks, overlaps with 20(4)(b), in my opinion, i.e. that the defence can't cross-examine Mr Ferguson but do have other ways in which they can challenge the statement.

Finally, the extent to which that difficulty would be likely to prejudice the party facing it. I accept it is a difficulty but it seems to me the degree of prejudice is relatively modest when dealing with a witness who appears to be an honest young man whose credibility is not otherwise attacked, who is unfortunate enough, one might say, from his own point of view to observe this traumatic event. It is not a case of a potentially dishonest witness, it is not a case of a witness whose evidence has been shown by comparison with other statements to have significant flaws within it. I therefore feel that there would be very little prejudice in this case.

I observed that Mr Fee QC accused Mr Hunter at one point of riding two horses, i.e. that Ian Ferguson was a very important witness to the prosecution but that he was not really important at the same time so as not to be "sole or decisive evidence". The answer, I think, to that proposition is that the evidence should be important enough to justify the application to the Court in the first place. Secondly, justice would demand that important evidence be taken into account by the court, if possible, if it could be done without significant unfairness, but save in exceptional circumstances it should not be so important as to be the sole or decisive evidence for the prosecution. I am satisfied, clearly and firmly satisfied, that Ian Ferguson's statement falls into this middle ground. It is important but not to the extent of offending against the dictum of Carswell LJ, or in causing in my opinion any significant injustice or unfairness. I therefore admit the statement in whole against both accused.

I can deal much more expeditiously with the remaining witnesses. Barry Irvine was the tenant or owner of the house to which Mr Ferguson went immediately after the statement. His statement is not very important but it does corroborate Ferguson to some degree in what he has said as well as helping to set the scene. That weight may be of assistance to the Crown, although that is entirely a matter for the trial judge. Once more there has been no attack on the contents of his statement or any suggestion about inconsistencies in it, nor has anything been disclosed to the defence apparently which would lead to him being viewed as an unreliable witness.

In his case also I have gone through seriatim the various factors set out at Article 20. It does not seem to me that it is necessary to go through them in this judgment seriatim but I have had regard to them all. I have reached the conclusion that I should admit the

statement of Barry Irvine in evidence in the interests of justice, having had regard to the various matters set out in counsel.

Finally I turn to Jacqueline Gyles. In part her evidence is scene-setting inasmuch as she was also a nearby resident. She heard two shots; she heard what was presumably the second assailant's car driving off at speed; she phoned the police and she then nursed Mr Alexander McKinley, the dying man. I observe without putting it too far that it must never be forgotten in proceedings of this kind that we are dealing with the death of a human being, and it would certainly seem appropriate that the evidence of his own words after the shooting should be heard by the court. As it happens, of course, they don't implicate either accused in any way. It would appear because of the very grave injury that Mr McKinley had suffered that he did not realise that he had been shot.

Her evidence, it seems to me, is slightly more important than Mr Irvine's but less than Mr Ferguson. Once more I have considered seriatim the factors set out in Article 20 in her case, and I have had regard to those and I have reached the conclusion that her statement ought to be admitted in evidence in the interests of justice against both accused and I so direct.

I direct that copies be made of this ruling in due course for Counsel for each of the parties but not for the trial judge, and I also direct consistent with the Criminal Procedure Order that this ruling be not published until after the conclusion of the trial.

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