**Neutral Citation No. [2006] NICA 30** | *Ref:* **NICC5603**

*Judgment: approved by the Court for handing down* | *Delivered:* **27/06/2006**
*(subject to editorial corrections)*

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

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**THE QUEEN**

**v**

**ROBERT JOHN BENSON YOUNG**

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**Before: Nicholson LJ, Campbell LJ and Sheil LJ**

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**NICHOLSON LJ**

**Introduction**

[1] This is an appeal by Robert John Benson Young against his conviction for the murder of James Herbert Johnston on 8 May 2003 by Higgins J sitting without a jury at Belfast Crown Court on 3 June 2005.

[2] The grounds of appeal are that (a) the Judge found the appellant guilty of the murder against the weight of the evidence; (b) he erred in giving weight to disputed geological evidence as a circumstance corroborating other circumstances in the case; (c) he misdirected himself as to the test to be applied in considering whether a series of circumstances could lead to a finding of guilt. Ground (d) was not pursued on the appeal. Mr Terry McDonald QC and Mr Hill appeared for the appellant and Mr Gordon Kerr QC and Mr Gary McCrudden appeared for the Crown.

[3] The Judge gave a written judgment which is set out at pp3-33 of the Book of Appeal in the course of which he stated that the case against the appellant depended on circumstantial evidence. At paragraphs [60] to [64] of his judgment he set out the principles governing such a case, stating at paragraph [64] that a court or jury should have at the forefront of its mind four matters. "Firstly, it must consider all the evidence; secondly it must guard against distorting the facts or the significance of the facts to fit a certain proposition; thirdly, it must be satisfied that no explanation other than guilt is

reasonably compatible with the circumstances and fourthly, it must remember that any fact proved that is inconsistent with the conclusion is more important than all the other facts put together."

**The arguments for the appellant**

[4] It was contended that the judge had no regard to the warnings contained in the legal authorities and, in particular, "the proneness of the human mind to look for (and often slightly to distort) the facts in order to establish a proposition while forgetting that a single circumstance which is inconsistent with such a conclusion is of more importance then all the rest in as much as it destroyed the hypothesis of guilt". This was a warning which the judge expressly gave himself and, in the opinion of this court, clearly had at the forefront of his mind when he reached his decision.

[5] It was accepted on behalf of the appellant that the deceased who lived at 60 Ballyrobert Road, Crawfordsburn, County Down was shot dead in the grounds of his residence not long after 10.35pm on the night of Thursday 8 May 2003, was struck by eleven bullets fired from two weapons, a 45 ACP pistol and a 9mm pistol and that two men were seen running as fast as they could away from the direction of his house and into the driveway of 50 Ballyrobert Road immediately afterwards. Emergency calls were made to summon the police and ambulance services around 10.40pm and police arrived at the scene not long afterwards. Constable Valerie Kincaid, a dog handler, arrived with her police dog about 11.05pm – 11.10pm.

[6] It was accepted on behalf of the appellant that the judge was entitled to find, as he did find, that her police dog "Otto" was able to follow the trail of human scent and to follow the trail of the last person along a particular route and that the judge applied the proper principles in receiving the evidence of Constable Kincaid as she described the dog's activities on that evening. These activities are set out at paragraphs [10] and [11] of the judgment. Constable Kincaid stayed at the scene with her police dog until daylight. At paragraphs [11] to [14] of his judgment the Judge set out all the findings that were made at the scene and along the route followed by Constable Kincaid and her police dog. These are borne out by the transcript of the evidence of the police officers and other witnesses who gave evidence at the trial. It is apparent that the two men discarded balaclavas, gloves, one of the guns involved in the murder and other clothing as they fled.

[7] It was accepted on behalf of the appellant that the judge was entitled to find that the two men were involved in murdering Mr Johnston and ran into the grounds of 50 Ballyrobert Road, made their way through the garden into a field and through a wooded area until they reached Clandeboye Avenue, crossed it into another wooded area and across a stream reaching points P

and Q which are shown on a map (sheet B) and photographs 28 to 32 of an album of photograph (exhibit 31).

[8] The judge in his detailed analysis of the route taken by the two men which is set out at paragraph [65] of his judgment, made a finding that one of them cut himself on the barbed wire between points P and Q and left blood on the wire and the fence posts at these points. This blood was noticed by Constable Kincaid and by other police officers and a forensic scientist. All the evidence supported the view that the blood found there was recently deposited and was reasonably fresh when first observed, changing colour as time passed with oxidisation. It was accepted on behalf of the appellant that this was the blood of the appellant but it was disputed that the blood was left there by him after the murder. The appellant was later interviewed by the police and gave evidence before the judge. He had no explanation for the presence of his blood at P and Q. In the opinion of this court, having studied the maps and photographs and read the transcripts of the evidence of those who found the blood and of the evidence of the appellant and the medical evidence to which we will come, there can be no doubt but that the blood was deposited by the appellant there as he climbed over or attempted to climb over the barbed wire in his escape from the scene of the murder. If he had cut himself there on some other occasion he could not have failed to remember it.

[9] Mr McDonald QC sought to rely on the evidence of the forensic scientist called on behalf of the Crown, Lawrence Marshall. He conducted an experiment with bloodstains at the area marked P and Q on the map (sheet B) and said that the colour of blood would change from red to brown within a day and a half to two days. He also accepted that the dating of the blood was not precise. He did not think that the blood could have been on the barbed wire for more than a day or two. If this were so, the failure of the appellant to account for the blood was explicable on only one basis, that it was left on the barbed wire and the posts at the time of the escape.

[10] Constable Kincaid, who at daylight went over the route which she had traversed in the dark, saw what she described as a droplet of blood which "looked reasonably fresh. It had not dried to the browny colour that you get with older blood that dries". Dr Kissock described the blood as "red staining" at 7.00am. He was with Constable Kincaid. The red colour changed later to red/brown, he said. Detective Inspector Feeny described the finding of the blood and an indication of wet muddy marks on the grass at Q as if somebody had climbed over the barbed wire fence at that point. There was also the evidence of another Scenes of Crime Officer and the meteorological observer to which the judge referred. All the evidence pointed to the fact that the appellant had cut himself in the course of his escape.

[11] Mr MacDonald QC sought to rely on the evidence of the police doctor, Dr Kapur, who examined the appellant on 23 May 2003 after he had been

arrested. He took a history from him in the course of which he said that he had no injuries. He recorded the finding of a number of injuries which were photographed: when Dr Kapur drew the appellant's attention to the injuries, he said that he was involved in a fight about three or four weeks previously and he gave other explanations for other injuries. In his initial report Dr Kapur said that the injuries could be consistent with the history given by the appellant but in evidence he said that the injuries would not have been consistent with this history and he explained why. Multiple scratches and abrasions were found which were usually due to a sharp surface such as a hedge or bush or other foliage. He had followed up his initial report with a more detailed report before trial, in which he had corrected his initial report.

[12] The judge had the advantage of seeing photographs of the injuries as did this court. He stated that the appellant "was covered in minor injuries consistent with scrambling over rough terrain and through thick and sharp vegetation. He also had a long laceration to his right wrist consistent with contact with a sharp object. Whatever views the doctor formed about those injuries initially, the photographs of them in Exhibit 29, are, to a layman, consistent with injuries sustained in the way I have described. His evidence that he sustained these injuries in fights or when drunk or when moving bricks was neither credible nor consistent with or evident from the photographs." We have also examined the photographs and entirely agree with the judge.

[13] The judge stated that "it is not a reasonable possibility in the circumstances that the blood was deposited recently and innocently at what was a significant point on the escape route …. It was submitted by Mr McDonald that the finding of the blood on its own could not support guilt beyond reasonable doubt. I doubt very much whether that be so in the circumstances of this case. However I do not need to state a final conclusion on that point …."

[14] We will proceed to examine the other circumstances on which the judge relied. But we are sure that the finding of the blood in the circumstances described renders the conviction safe.

[15] The appellant was arrested on 23 May 2003, In the course of interviews he said that he drove a Ford Fiesta owned by his brother. This had the registration number FLZ 4336. He said that he always used this car as his brother was working mostly outside Northern Ireland. He said that he had worked as a bricklayer but not recently. He remained in custody after 23 May 2003. On 13 August 2003 police seized the Ford Fiesta and a scenes of crime officer removed from the driver's footwell the floor mat (exhibit 61) which was taken to the Forensic Science Laboratory.

[16] At paragraphs [31] to [52] the judge thoroughly analysed the evidence of Dr A Ruffel, a lecturer in geology at Queen's University, Belfast and of Dr Duncan Pirrie, a reader in geology at the University of Exeter, on behalf of the Crown and the evidence of Dr Hodgkinson, a Higher Scientific Officer employed by the British Geological survey for the defence. Their evidence was directed to comparisons between samples taken from the floor mat of the Ford Fiesta and samples taken from the yard of 50 Ballyrobert Road. He found at paragraph [65] that the floor mat had on it material similar to plasterboard found in the yard of 50 Ballyrobert Road on 9 December 2003. He also found that it had on it material similar to the soil sample removed from the yard. He held that these findings separately showed an association between the Ford Fiesta and the yard and in combination the association was strengthened. He found further support from the fact that "the car from which the floor mat was removed was driven by the person whose blood was deposited on the escape route."

[17] Mr McDonald QC attacked the geological evidence, taking the court to the relevant parts of his cross-examination of Dr Ruffel and Dr Pirrie and to the evidence of Dr Hodgkinson. He strongly criticised the methodology involved in the gathering of samples and their sending for examination and in that context argued that one could not attach any evidential value to the testimony of Dr Ruffel. We do not accept this sweeping criticism.

[18] We are not in as good a position as the judge to assess the strength of the Crown evidence on this aspect of the case. We were not supplied, for example, with a transcript of the evidence-in-chief of Dr Pirrie and must rely on the judge's synopsis of it. But we bear in mind a number of matters. The plasterboard in the driveway and yard of 50 Ballyrobert Road was, it seems, commonplace. There was certainly no evidence that it was rare. We do not know whether the condition of the driveway and yard was the same in December 2003 as it was in May 2003. We do not know what length of time the material recovered from the floor mat regarded as significant by Dr Pirrie would remain or build up. It could be in the order of years, months, weeks or days. In order to link the appellant with 50 Ballyrobert Road by reference to the floor mat he would have had to wear the same footwear after the killing of Mr Johnston as before. There is no evidence that the Ford Fiesta was used as a "get away" car. We do not know who used the Ford Fiesta between the date of the appellant's arrest and its seizure. There are in our opinion differences in the findings of Dr Pirrie and Dr Hodgkinson which could be significant and are difficult to assess.

The judge's conclusions at paragraph [52] of his judgment may be justified but we would be more hesitant than he was and regard the evidence about the plasterboard and soil as weak evidence of association between 50 Ballyrobert Road, the Ford Fiesta and the crime.

[19] However, whether the judge was justified or not in his conclusions, carefully reached at paragraph [52] of his judgment, we remain convinced that the finding of the appellant's blood on the barbed wire and the wooden posts makes the appellant's conviction safe.

[20] In R v Gibson and Lewis [1986] 17 NIJB 1 it was stated:

> "Where the judgment of a trial judge in a Diplock Court convicting the accused contains defective and erroneous findings, the test in determining whether the conviction is safe and satisfactory is whether the judge would inevitably have convicted the accused if his judgment had not contained the erroneous findings." See also R v William Joseph McManus [1993] NIJB 11.

In R v Gamble [1980] NIJB 1 it was stated:

> "The appellate court has to decide if such a misdirection of itself undermines the judgment and consequent verdict. It often happens that the remainder of the evidence would be quite sufficient to sustain the conviction despite the existence of a misdirection in relation to some particular matter. But this is not enough. The appellate court requires to be satisfied that on the remaining evidence, the tribunal of fact must inevitably have reached a conclusion adverse to the appellant."

[21] We would not have placed as much significance on the plasterboard or soil as the judge did but the remainder of the evidence is sufficient to sustain the conviction. The tribunal of fact must inevitably have reached a conclusion adverse to the appellant on the remaining evidence.

[22] Accordingly the appeal is dismissed.