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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

PASCHAL JOHN MULHOLLAND

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an appeal against conviction by way of referral by the Criminal Cases Review Commission (CCRC) in the exercise of its powers under Part II of the Criminal Appeal Act 1995. At the conclusion of the hearing of the appeal, we stated that we had concluded that the conviction was unsafe and gave a brief summary of our reasons for that conclusion. We indicated that we would provide a more extensive judgment and this we now do.

Factual Background

[2] Paschal Mulholland, the appellant, was born on 29 November 1959. He was arrested on 18 October 1976 when he was sixteen years old and detained at Portadown Police Station until 20 October 1976 on suspicion of involvement in a gun and petrol bomb attack on an RUC patrol.

[3] The custody log recorded that, on 18 October 1976, the appellant was interviewed for over seven hours in total. On 19 October 1976, he was interviewed for nine hours in total, including one interview that lasted for five hours between 7.00 pm and midnight. During the last hour of this

interview, the custody log recorded that he had made a statement of admission. The statement consisted of an admission of membership of a proscribed organisation (Fianna na hEireann) contrary to Section 19(1) (a) of the Northern Ireland (Emergency Provisions) Act 1973 and an admission of involvement in a petrol bomb attack contrary to Section 3 of the Protection of the Person and Property Act (Northern Ireland) 1969.

[4] The appellant spent both nights of 18 October 1976 and 19 October 1976 on a couch in the medical room at the police station. He had been in police custody for some forty hours before he made the statement of admission. During the period of 18 October 1976 to 20 October 1976 he was interviewed for approximately sixteen hours. Throughout all interviews, the only persons in attendance were the appellant and police officers. According to the custody record he arrived at Portadown RUC station at 7.40 am on 18 October 1976 and was not granted access to either his parents or a solicitor or any other appropriate adult until after he had made a statement of admission on 20 October 1976. He first received access to legal advice when he saw a solicitor at 4.45 p.m. on 20 October 1976 after he had been charged at a special court.

[5] On 1 March 1977, following a non jury trial at Belfast City Commission, before Lowry LCJ the appellant was convicted of the offence of membership of a proscribed organisation. The prosecution case rested on the admission statement made by the appellant on 19 October 1976 while he was in police custody with the relevant portion of the admission being as follows: -

> "Near the end of August of this year it was a Wednesday but I am not sure of the date, I was coming out of the Garvaghy Park Community Centre when I was approached by a man whom I don't know. This man asked me to join the Fianna na hÉireann. I laughed at him at first but then I thought for a minute. I thought that I might as well do something for the people. I told him that I would be willing to be part of the organisation and that I wanted to be a volunteer only … He also told me that I would have to do look-out. I told him at that time that I would do it."

[6] At the trial the appellant retracted his written admission and contended that it was involuntary and untrue. In his examination-in-chief he claimed that he had been mistreated while interviewed in custody; that he had asked to see a solicitor but this was refused; and that he made admissions because he was frightened. He claimed that he had an alibi for his movements on the night of the petrol bombing. It was submitted that the appellant's oral and written admissions should not be admitted in evidence on the ground that the

prosecution had not established their admissibility under Section 6(2) of the Northern Ireland (Emergency Provisions) Act 1973 and on the further ground that the admissions should be excluded in the exercise of the court's discretion.

[7] Lord Lowry LCJ made the following ruling on the admissibility of the confession evidence: -

> "I am satisfied beyond reasonable doubt after taking Section 6 of the 1973 Act into account that the evidence is admissible and the written statement and also all the oral admissions alleged to have been made immediately before that written statement was given. I am also satisfied that this is not a case in which I ought to exercise my discretion to exclude the written oral statements or any part thereof. …"

[8] In an *ex tempore* judgment the learned trial judge acquitted the appellant of the petrol bombing charge but convicted him of membership of a proscribed organisation and sentenced him to a period of borstal training. He said this: -

> "I am satisfied beyond reasonable doubt that the accused was a member of the Fianna na hÉireann between 1 September 1976 and 20 October 1976 as alleged. Therefore, I find him guilty on count 2. Count 1 concerns the activity as lookout while someone else threw a petrol bomb ……. on 26th September 1976. …..
>
> I have the feeling that he is probably guilty of that offence, but I am not satisfied beyond a reasonable doubt that he is. One might then ask why make a distinction between one offence admitted in the written statement and another offence admitted in the same statement made in the same circumstances. That poses a difficulty which I propose to resolve in favour of the accused because it is possible that he admitted a minor part in what is of course a very serious offence, but less serious than some offences which are being committed these days, perhaps in order to avoid the risk of being further harried and questioned and possibly involved, it may be quite wrongly, in the nail bomb incident about which he was being questioned intensively on the 18 and 19

> October. Therefore, I am not prepared to say that I am satisfied beyond all reasonable doubt that the accused is guilty on count 1. Accordingly I find him not guilty on that count, but guilty on the second count."

[9] Lord Lowry also delivered a written judgment in which he said this about the alibi evidence given by the appellant's mother: -

> "So far as the petrol bombing charge was concerned, a further defence was provided by the evidence of the accused who stated that he was in his own house at the time of the bombing and of the accused's mother who corroborated his evidence that he was in his own house at the relevant time. I took the latter evidence into account for the additional purpose of the admissibility question, since the truth or falsity of the accused's admission that he had acted as look out in the bombing incident was relevant to the question whether his oral and written admissions had been improperly obtained."

[10] In respect of the appellant's allegations of mistreatment, Lowry LCJ stated: -

> "The accused in relation to the interview between 7.00 pm and 11.45 pm on 19 October made a number of allegations of assault and intimidating conduct against his interviewers all of which allegations were denied and, as I am satisfied beyond reasonable doubt, were groundless."

[11] In Lowry LCJ's written judgment he accepted that the appellant first confessed to membership of the relevant proscribed organisation and later spontaneously confessed to the petrol bombing offence. He observed: -

> "His admission about the petrol bombing was made spontaneously by the accused when being questioned about other incidents and was not sought by the police, who were not at that time inquiring into a petrol bombing incident.
>
> ……
>
> I consider that there is a reasonable possibility that the accused decided to confess to the relatively

> minor crime of keeping a lookout on the occasion of the petrol bomb attack because he was afraid that he might be associated in some way with the landmine attack concerning which the police were pursuing their main enquiries and therefore I am not satisfied beyond reasonable doubt that he is guilty on count one."

[12] In neither the oral *ex tempore* judgment nor the written judgment did Lowry LCJ deal with the fact that the appellant had been interviewed in the absence of an independent person. He did not refer to the appellant's assertion that his request to see a solicitor had been refused.

[13] On 21 March 1977 the appellant submitted a Notice of Appeal but on 12 May 1977 the appeal was abandoned, without legal advice. On 1 June 1977 the appellant's solicitor lodged a fresh Notice of Appeal and on 24 June 1977 having received legal advice, the appellant again abandoned his appeal. He was released in or about March 1978 having served 12 months in borstal training. On 19 October 2000 the appellant applied to have his case considered by CCRC and on 18 August 2003 the matter was referred by CCRC to the Court of Appeal.

[14] The CCRC investigation uncovered new evidence (set out in paragraphs 9.13 and 9.14 of the Statement of Reasons) which suggested that Detective Sergeant Lawther and Detective Constable McConville, two of the officers who interviewed the appellant, had assaulted another prisoner in April 1978.

[15] In advancing his appeal the appellant relies on the grounds on which the CCRC considered that the conviction was liable to be overturned. These can be summarised as follows: -

1. The circumstances of the detention and interview of the appellant were oppressive by today's standards;

2. The interview of the appellant without an independent person or solicitor constituted a significant breach of the Judge's Rules as applicable at the time of the interview;

3. New evidence about the interviewing officers, Detective Sergeant Lawther and Detective Constable McConville undermined their credibility in the present case;

4. The appellant's confession statement ought to have been excluded under the common law; and

5. Had the trial judge adverted to the breach of the judges' rules and the evidence in relation to the detective officers he could not have been satisfied beyond reasonable doubt that the statement was reliable.

New evidence and medical reports

[16] The new evidence related to the treatment of a person (referred to as 'G') by Detective Constable McConville and Detective Sergeant Lawther during interviews in another case. We shall set out the statements of the two officers about their interview of G as they appeared in the reference by CCRC: -

> "*Statement of Detective Constable McConville on 24 May 1978*: -
>
> On the 10 April 1978 I interviewed [G] at Armagh Police Office. The first on that date was between 11.30am and 2.25 pm and I was accompanied by D/Constable [ ] …D/Sergeant Lawther also joined this interview at 4.40pm. D/Chief Inspector [ ] supervised the interviews. On the 11 April 1978 I again interviewed [G] from 11.50am to 5.25pm accompanied by D/Constable [ ] until 2pm. We were then joined by D/Sergeant Lawther. During this interview near the end while D/Sergeant Lawther was taking a statement from [G] I threw him a cigarette over the shoulder of D/Chief Inspector [ ] who sitting opposite [G] at the interview room table. The cigarette rolled off the edge of the table and [G] tried to catch hold of it before it hit the floor and in doing so he hit his face of the edge of the table. When he lifted his head up after a few seconds a small trace of blood was coming from his nose. D/Chief Inspector [ ] told [G] the doctor would look at his nose after the statement was taken. At the termination of the interview at 5.25pm D/Chief Inspector [ ] directed that I make an entry in the Occurrence Book at Armagh Police Office about the injury sustained. The Duty Inspector at the Police Office was informed and requested to contact the doctor to have [G] examined. I have been made aware of the allegations made by [G] and at no time was he assaulted or ill treated in any way by me or by anyone else in my presence."

"*Statement of Detective Sergeant Lawther on 24 May 1978*: -

> "On the 10 April 1978 I interviewed [G] at Armagh Police Office from 4.40pm to 5.15pm, 6.55pm to 9.30pm…….On the 11 April 1978 I interviewed [G] from 11.08am to 1.30pm…….On the 10 April 1978 D/Sergeant [ ] joined my interview at 7.40pm and remained until 9.30pm. At no time during any of these interviews was [G] assaulted, ill treated or abused in any way by me or anyone else in my presence. During the interview in the afternoon of the 11 April 1978 I was recording a statement from [G[when D/Constable McConville threw him a cigarette across the table. The cigarette rolled to the floor and [G] bent down to pick it up and in doing so skinned the side of his nose on the side of the table. This injury was recorded after we finished the statement in the Occurrence Book."

[17] A number of medical reports on G's condition were also obtained and these were referred to as part of the new evidence. The medical report of Dr Elliott dated 18 April 1978 contained the following passage: -

> "Following a request from the police who stated that 'he had a scratch on the nose' [G] was examined by Dr J.D. Adams (Deputy Medical Officer) at 17.57 hrs on 11 April 1978. [G] stated that he had received the injury when he 'fell against the edge of a table' at the end of an interview on the same afternoon."

[18] Dr Elliott's report listed the injuries of G including that he was 'tense, very agitated and weeping at times': -

> "During the above examination [G] refused to state whether he wished to make a complaint but requested a visit by his General Practitioner……. [G] complained that on the day before during interrogation: -
>
> (1) He had been hit on the nose with "something" by a policeman causing the injury noted on that organ. He further stated that he had been told to

> say that this injury had been caused accidentally against the table.
>
> (2)He had been struck repeatedly on the back of the neck, ears etc.
>
> (3) He had been threatened that 'things would get worse' if he made a complaint; as a result of this he had been afraid to do so until seen by his own doctor."

[19] In the notes section of Dr Elliott's report the following appears: -

> "…. (3) The accidental explanations given for [G's] injuries are not considered to be medically acceptable.
> (4) The injuries are consistent with the complaints made."

[20] Under the heading of 'Opinion' in Dr Elliott's report the following statement was made: -

> "That [G] suffered significant physical abuse whilst resident at this establishment."

[21] The medical report of Dr Adams on 19 April 1978 listed G's injuries noted on examination and stated: -

> "The prisoner made no allegation of ill treatment, and agreed that he had scratched his nose while bending over or falling over……I have read the medical report by SMO and I am independently in agreement with the conclusions drawn, concerning this case."

[22] The report of Dr McKeown, the Principal Medical Officer, on 2 May 1978 recorded: -

> "…(5) He was struck a severe blow with the closed fist (right) to the left side of the nose – the force of this knocked the right cheek area against the table. His nose was by now bleeding from an abrasion and one officer dipped a tissue in cold water and cleaned up the wound."

Statutory Background

The Criminal Appeal Act 1995

[23] This case has been referred by CCRC to the Court of Appeal pursuant to Part II of the Criminal Appeal Act 1995. The conditions for making such a reference are provided for in section 13(1), which provides that CCRC shall not refer a case unless: -

> "(a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made,
>
> (b) the Commission so consider –
>
> (i) in the case of a conviction … because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal ….., or
>
> (ii) ……
>
> (c) an appeal against the conviction … has been determined or leave to appeal against it has been refused."

The Criminal Appeal (Northern Ireland) Act 1980

[24] Section 10(2) of the 1995 Act provides that where CCRC refers a conviction to the Court of Appeal the reference shall be treated as an appeal by the person under Section 1 of the Criminal Appeal (Northern Ireland) Act 1980 against the conviction. The statutory test for safety of convictions is set out in section 12(2) of the Criminal Appeal (Northern Ireland) Act 1980 as amended by section 2(4) of the 1995 Act as follows: -

> "…..the Court –
>
> (a) shall allow an appeal under this section if it thinks that the finding is unsafe; and
>
> (b) shall dismiss such an appeal in any other case."

[25] Sections 25(1) and (2) of the Criminal Appeal (Northern Ireland) Act 1980, as amended by the 1995 Act, govern the reception of fresh evidence. They are in the following terms: -

"(1) For the purposes of an appeal under this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice -

(a) ……..

(b) order any witness who would have been a compellable witness at the trial to attend and be examined before the Court, whether or not he was called at the trial; and

(c) receive any evidence which was not adduced at the trial.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to -

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

Northern Ireland (Emergency Provisions) Act 1973

[26] Section 6 of the Northern Ireland (Emergency Provisions) Act 1973 governed the admissibility of confession evidence at the time of the appellant's trial. The relevant portions of this section are as follows: -

"6.-(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.

> (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 subject to torture or to 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 …"

Children and Young Persons Act (Northern Ireland) 1968

[27] Section 52(2) of the Children and Young Persons Act (Northern Ireland) 1968 imposes a requirement to take practical steps to inform a child or young person's parents that a child or young person is detained: -

> "Where a child or young person is arrested or taken to a place of safety, such steps shall be taken as may be practicable to inform at least one person whose attendance may be required under this Section."

The Judges' Rules

[28] The following passages from the Judges' Rules were applicable at the time of the appellant's arrest and conviction: -

> "These Rules do not affect the principles
>
> …….
>
> (c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so;"

The RUC Code 1974

[29] The police code that was operative at the time of the appellant's arrest contained the following provision: -

> "127. Police pursuing enquiries involving Children and Young Persons must bear in mind that where at all possible children and young persons should be interviewed 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."

Principles to be applied

[30] There was no dispute between the parties as to the principles to be applied in the review of old convictions. These may be summarised in the following four propositions: -

1. If there was a material irregularity, the conviction may be set aside even if the evidence of the appellant's guilt is clear but not every irregularity will cause a conviction to be set aside. There is room for the application of a test similar in effect to that of the former proviso, *viz*., whether the irregularity was so serious that a miscarriage of justice has actually occurred - *R v Gordon* [2002] NIJB 50.

2. 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, it should allow the appeal - *R v Pollock* [2004] NICA 34.

3. While the court must apply the statute law in force at time of the trial it must apply current standards of fairness and a current understanding of the common law - *R v King* [2000] Crim LR 835.

4. If the only evidence against a defendant was his confession which he had later retracted and 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 – *R v King*.

The appeal

[31] Counsel for the appellant, Mr Barry Macdonald QC, submitted that the distinction made by Lowry LCJ between the two offences admitted in the appellant's written statement (as set out in the passages from the trial judge's *ex tempore* and written judgments quoted above) was difficult to sustain. He suggested that while it was possible the appellant was making a false

admission to avoid being prosecuted for more serious offences it was equally possible that he was making a false admission in relation to the charge of membership of a proscribed organisation. The difficulty posed by the distinction made by the trial judge was not resolved by finding the appellant not guilty of one offence. It was notable, Mr Macdonald said, that in his written judgment Lowry LCJ did not repeat the finding (made in his *ex tempore* judgment) that the admission had been made by the appellant to avoid being further harried. It was further argued that if the mother's alibi evidence was sufficient to create a reasonable doubt in respect of the petrol bombing offence it should, also, logically raise reasonable doubt regarding the other parts of the admission statement in respect of membership of a proscribed organisation. It was submitted that the alibi evidence of the appellant's mother was clearly relevant to the question as to whether the appellant's admissions were reliable and voluntary.

[32] Mr Macdonald submitted that the court ought to exclude the appellant's statement in accordance with Section 6(2) of the 1973 Act. He claimed that, as *prima facie* evidence had been adduced by the appellant that he was subjected to ill-treatment, the onus was on the prosecution to prove beyond reasonable doubt that this was not so. In light of the new evidence casting doubt on the veracity of the evidence given by Detective Sergeant Lawther and Detective Constable McConville, the prosecution would now be unable to satisfy the court that the appellant was not subject to degrading treatment and, therefore, would be unable to discharge the burden of proof posed by Section 6(2) of the 1973Act.

[33] It was further submitted that the absence of any reference in either of the learned trial judge's judgments to the Judge's Rules indicated that the breach of those rules had not been taken into account. Relying on *R v King* Mr Macdonald argued that while this court must apply the substantive criminal law that was in force at the time of the trial, it must judge the conduct of the investigation of the case, the conduct of the trial and the reliability of the evidence in accordance with the standards that the court now applies. He submitted that, in light of the breaches of the relevant sections of the Judge's Rules and section 127 of the RUC Code, applying current standards of fairness, the common law discretion to exclude the admissions should be exercised in favour of the appellant.

[34] Mr Macdonald also referred to various recommendations made by the Royal Commission on Criminal Procedure as summarised, in particular, in paragraph 9.72 of the Statement of Reasons as follows: -

> "With particular regard to the interview of juveniles the RCCP remarked that:

> 'It is in our view essential that the juvenile should have an adult present other than the police when he is interviewed and it is highly desirable that the adult should be someone in whom the juvenile has confidence, his parent or guardian, or someone else he knows, a social worker or school teacher…….The presence is however no substitute for having access to legal advice and the right to that applies equally to a juvenile.'"

[35] A further argument advanced by Mr Macdonald was that denial of access to legal advice was in itself a violation of article 6 of the European Convention on Human Rights and this alone should lead to the conclusion the conviction is unsafe. Relying on decisions in *R v Magee* [2001] NI 217, *R v Davis* [2000] Crim LR 1012, *R v Francom* [2000] Crim LR 1018 and *R v Togher* [2000] All ER (E) 1752, he argued that even if the Human Rights Act 1998 was not retrospective for the present purposes, this court should nevertheless recognise that a violation of the appellant's convention right was a strong indicator of the unsafeness of the conviction.

[36] Counsel for the respondent, Mr McCloskey QC, accepted that the decision in *R v Gordon* was clear authority for the proposition that one must apply contemporaneous standards and principles of fairness. In his judgment in that case, Carswell LCJ had adopted a passage from the judgment of Lord Bingham in *Regina v Bentley* [1999] CLR 330 as follows: -

> "We must judge the safety of the conviction according to the standards which we would now apply in any other appeal under Section 1 of the 1968 Act … Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time."

[37] As Mr McCloskey pointed out, the decision in *Gordon* had also espoused the principles outlined by Lord Bingham in *King*, from which the following propositions can be derived: -

> "1.4.1 A conviction should not be automatically deemed 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."

1.4.2 In adjudging 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 …"

1.4.3 Simultaneously, it is relevant to consider "….whether and to what extent he may have lacked protections which it was later thought right that he should enjoy."

1.4.4 The safety of the conviction is "…to be determined in the light of all the material before [the Court of Appeal] which will include the record of all the evidence in the case *and not just an isolated part.*" (Emphasis added).

[38] Although he suggested that the judgment of Lord Bingham in *R v King* made clear that a conviction is not automatically unsafe where there has been a violation of some statutory requirement or standard, Mr McCloskey acknowledged the importance of the following passage from *King*: -

> "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*" (emphasis added).

[39] In relation to the Judge's Rules Mr McCloskey submitted that these merely operated as a guide to police officers. They did not have statutory force, nor were they obligatory in effect. The correct approach to the significance of the failure to adhere to those rules was to recognise that the breach might be a contributing factor in the debate as to the safety of the conviction but this must be considered together with all the other evidence before the trial judge rather than as an isolated part. In this instance it was relevant that there was no evidence of injury on medical examination, no complaint of ill treatment and that the challenge to the confession and the allegations of misconduct of officers did not surface until the trial.

[40] It was claimed that the *ex tempore* and reserved judgments of Lowry LCJ demonstrated that he was alert to the residual discretion available to him to refuse to admit the statement of the appellant and that he had applied his mind both to the statutory tests under Section 6 of the 1973 Act and the common law discretion. It was submitted that this court should conclude that Lowry LCJ must have taken into account the circumstances of the appellant's detention such as the dates of detention, the uncomfortable sleeping conditions, the duration of the interviews and the absence of legal advice and any appropriate adult as these factors had formed the centre piece of the challenge to the admissibility of the confession.

[41] As to the new evidence regarding Detective Sergeant Lawther and Detective Constable McConville, Mr McCloskey referred to the following judgment of Leggatt LJ in the case of *Regina v Williams and Smith* (1995) 1 CAR 74 in which the issue of evidence in a subsequent trial of misconduct by interviewing officers was considered by the English Court of Appeal: -

> "It is true that the reason why the relevant questions could not have been put to the officers concerned in this case was that the other cases which ended discreditably for them had not yet taken place. This court will not shut its eyes to the discreditable cases merely because they took place afterwards. The criteria for admissibility remain the same … This court deeply regrets that these two appellants were convicted on account of the evidence of police officers whose conduct has only been discredited in the later cases to which we have been referred. In the particular circumstances of this case, we have come unhesitatingly to the conclusion that the convictions of these appellants, based as they were on the evidence given by these six police officers, were palpably unsafe."

[42] While accepting that the approach suggested in *Williams and Smith* had general application, Mr McCloskey pointed out that there had been no later finding by a court that the conduct of the interviewing officers concerned was unlawful on some other occasion. It was submitted that three features of G's complaint distinguished it clearly from the *Williams and Smith* case: -

1. G did not complain about the conduct of any particular police officer. Rather, this seems to have been a general, unparticularised complaint that he was assaulted during interviews at Armagh Police Office on 10 and 11 April 1978.

2. Notwithstanding numerous requests, the suspect refused to co-operate in the complaints and discipline investigation.

3. There were no criminal or disciplinary proceedings against either of the officers concerned. In due course, the DPP directed no prosecution in relation to the complaint. (It is to be noted, however, that the suspect later pursued a claim for damages against the Chief Constable and that this was settled for £4,000).

[43] Mr McCloskey submitted that when applying "the judicially devised test of *lurking doubt*," the question became one of sufficiency: Were the factors adumbrated by CCRC sufficient to cast real doubt on the safety of the appellant's conviction? He argued that every case must be approached on its particular facts with no preconceptions, and that this reference, while it raised some questions about the safety of the conviction, was insufficient to establish unsafeness.

Conclusions

[44] In *R v King*, Lord Bingham stated that breach of the rules prevailing at the time would constitute *prima facie* grounds for concluding that the conviction was unsafe and that absent any countervailing factors that displaced that preliminary conclusion, the conviction must be quashed. We respectfully agree with Lord Bingham's analysis in *King* and apply it to the present case.

[45] At the relevant time, the Judges' Rules provided that normally a child or a young person should be accompanied by an adult unless there were practical reasons why that could not be arranged. This issue was not even addressed in the course of the prosecution of the appellant. It does not appear that the matter was raised by counsel for the appellant. Certainly there is no evidence that there were practical reasons which superseded the requirement of the Judge's Rules. It is of course conceivable that if the trial judge had been presented with pertinent material he might have concluded that, notwithstanding the failure to comply with the Judge's Rules, the appellant's statement should be admitted but we must now deal with the issue on the basis that this was a subject that did not exercise any of the participants in the trial and that no attempt was made to engage, much less exercise, the judicial discretion in relation to the breach.

[46] There is no evidence available to explain the failure to abide the requirement of the Judges' Rules. We are therefore bound to find that there are *prima facie* grounds for doubting the safety of the conviction. We agree with Mr McCloskey that all the known circumstances must be taken into account but such other circumstances as are known reinforced rather than diminished the sense of unease that we had about the conviction. Relying on a confession to ground conviction on one charge, while rejecting it as

sufficient to establish guilt on another, is not an easy exercise. We have little doubt that if Lowry LCJ had been conscious that the statement had been obtained in contravention of the Judges' Rules and the relevant RUC code, he would have been much more reluctant to regard the confession as efficacious to sustain the charge on which he convicted the appellant.

[47] Quite apart from these considerations, the evidence about the mistreatment of G raised considerable doubt in our minds as to the safety of this conviction. Again, we considered that, had Lowry LCJ been aware of the nature of the allegations against the two detective officers in that case, he would have been slow to conclude beyond reasonable doubt that the appellant's allegations about mistreatment were untrue. It is of course right that no finding of unlawful conduct on the part of the detectives was made by a court but the evidence of the medical officers who examined G is both compelling and damning. We concluded that this evidence (had it been given at the trial) is virtually certain to have resulted in a finding that the confession was inadmissible.

[48] In these circumstances we were driven inexorably to the conclusion that the conviction was unsafe and for the reasons that we have given, we quashed it. We do not find it necessary to address the arguments based on article 6 of the convention.