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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **09/01/2024**

IN THE CROWN COURT IN NORTHERN IRELAND
SITTING AT LAGANSIDE

THE KING

v

JAMES STEWART SMYTH

Mr C Murphy KC with Mr D Russell and Ms N Pinkerton (instructed by the PPS) for the Prosecution
Mr M Borrelli KC with Mr P Bacon (instructed by Reavey Solicitors) for the Defendant

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RULING ON APPLICATION OF NO CASE TO ANSWER

O'HARA J

Introduction

[1] The defendant faces five charges. They involve events on 17 May 1994 in North Belfast. He is charged with the murder of Mr Convie and Mr Fox on that date, with the attempted murder of Witness A, with possession of a sub-machine gun and ammunition and with being a member of the UVF.

[2] The prosecution has completed the presentation of its evidence, and the defence has applied for a ruling that the defendant has no case to answer because the evidence is so weak that it could not properly sustain a conviction. No distinction is drawn at this stage at least between the different charges. On the defence application all charges should be dismissed, the prosecution contends that the trial should continue on all counts.

Legal principles

[3] Other than on points of emphasis there is no difference between the submissions of the parties on the applicable principles. The defence application is based on the second limb of the test set out by Lord Lane CJ in *R v Galbraith* (1981) 2

AllER 1060, namely that while there is some evidence against the defendant it is of a tenuous character because of inherent weaknesses or vagueness or because it is inconsistent with other evidence. How that test is applied in trials where a judge sits alone without a jury was explained in this jurisdiction in *The Chief Constable v Lo* [2006] NICA 3 and in *R v Courtney* [2007] NI 178. As was stated by the Court of Appeal in *The Chief Constable v Lo* at para [13]:

> "The only basis on which a judge could stop the trial at the direction stage is where he has concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in *Hassan*, that there is no possibility of his being convinced to the requisite standard by the evidence given for the prosecution."

[4] The additional point to make is that at this stage I am to assess the evidence as a whole rather than just specific or isolated aspects of it, and it would be wrong to proceed on the basis that every possible adverse inference which can be drawn must necessarily be drawn against the defendant.

[5] Against that background, the question is whether the present case is one of those exceptional cases in circumstances where it is conceded that there is some evidence against the defendant, but I should nevertheless conclude that there is no possibility that I would be satisfied beyond a reasonable doubt of the defendant's guilt. In order to decide that I have considered the totality of the evidence, but specifically the main aspects which I summarise as follows.

Forensic evidence

[6] The defence concedes at para [22] of its written submission that there is a DNA match between the defendant and cellular material found on the inside of the collar of a Barbour jacket found on 28 May, 11 days after the murders and attempted murder which were committed on 17 May 1994. The jacket was found in a sports bag along with the sten sub-machine gun used in the attack, and it was found in a house beside where an individual named Marsden, who was convicted in connection with the murder, lived.

[7] While the defence accepts Smyth's DNA is on the jacket it contends that the impact of that evidence is limited because of the 11 day gap and because there is no evidence about **when** the defendant wore the jacket. It is in effect contended that it is speculative to connect the defendant's wearing of the jacket with the attack on 17 May.

Eyewitness evidence

[8] It is almost thirty years since the murderous attack at the building site at North Queen Street. That passage of time has inevitably had an impact on the availability of witnesses, some of whom have passed away in the interim. What can safely be said is that no eyewitness at the time identified the defendant as the gunman, that being the role attributed to him by the prosecution. Given that the gunman appears to have disguised his identity by covering up some of his face and head, that is not surprising. It becomes even less surprising when one considers that the eyewitnesses had limited opportunities in terms of time and distance and in shocking and distressing circumstances to take in and remember specific details which would assist with identification.

[9] For the defence, however, it is submitted the eyewitness evidence goes further than that and that it points **away** from the defendant being the gunman. In particular, emphasis is placed on the fact that the defendant is 5'4½" tall, somewhat below average height. However, a number of eyewitnesses suggest the gunman was markedly taller:

- Witness A suggested a tall thin man was the attacker.
- Witness B suggested that the gunman was 5'8" or 5'10" tall.
- Mr Mooney described the gunman as having been 5'10" tall.
- Mr Foster suggested he was 5'8" or 5'9".

[10] There are other arguably less significant matters, for instance, about facial hair, but the height issue is relied on by the defendant as being inconsistent with guilt to a very significant degree.

Bad character evidence

[11] I admitted in evidence proof of the fact that in January 1994 the defendant was one of two gunmen responsible for a sectarian murder and attempted murder in Ballymena. In my ruling on 30 October 2023, I decided that those Ballymena convictions establish a propensity to commit sectarian murders. I further held that this propensity made it more likely that the defendant was the gunman in May 1994 in Belfast. Thirdly, I held that it was not unjust or unfair to admit the convictions rejecting a submission that the fact of the Ballymena attack was being used inappropriately to bolster a prosecution case which is extremely weak.

[12] In essence, Mr Borrelli repeated that submission at the end of the prosecution case and relies on the alleged weaknesses in the prosecution case as a basis for his proposition that I should not allow the Ballymena attack in January 1994 to be used to build a case against the defendant when no coherent or persuasive case exists.

Evidence of Gary Haggarty

[13] On the prosecution case Mr Haggarty is the witness who explains how the attack of 17 May 1994 was planned, who was involved it, how it developed and how the murder weapon and the Barbour jacket came to be in the sports bag in a house beside Marsden's immediately after the murder and close to the murder scene. On this evidence the defendant was the gunman. The reason why Haggarty can say all of this and be believed, the Crown says, is that he himself was part of the conspiracy, a major part of it. He purports to be speaking from first hand knowledge and involvement, not from bits and pieces he picked up or put together from other sources.

[14] On any view the difficulty for the prosecution is that it has conceded in a remarkable and possibly unique collection of written documents that Haggarty is an individual whose evidence requires corroboration. That concession is made because in their own words the prosecution has assessed him as a deceptive witness, a dishonest witness, with regard to his motivation in entering the SOCPA process, a flawed witness, and a witness who may well be motivated by getting revenge on his UVF associates and Special Branch handlers.

[15] The prosecution is specific that no case can be made out on Haggarty's evidence in the absence of corroboration from another individual or source. The documents agreed between the parties and put before me are extensive in their analysis of his reliability and credibility, or lack of it. However, they also record that in various aspects his account of events has been consistent and is borne out by other information in the possession of the police.

[16] The defence response to this is that Haggarty's evidence, at least in respect of the defendant Smyth, is simply not credible at all, even with corroboration which it is contended is absent and the point is made strongly that there are contradictions between Haggarty's account of events and independent evidence which fatally undermine the prospect of any fair court relying on Haggarty at all. One example of this is Haggarty denying that on the morning of the murders he was in a car on the Shankill Road with Mark Haddock, another notorious UVF leader. On Haggarty's account he was nowhere near the Shankill, with or without Haddock, yet the evidence of two police officers, Officers Best and Anderson, puts him there.

[17] Other examples were put to Haggarty in his evidence, such as the fact that he had implicated individuals in attacks which they did not play any part in, and that he gave entirely unreliable evidence to the police in his role as a paid informer. In that context the defence referred me to the case of *R v Graham and others* [1984] NICA 24 December 1984 judgment in which Lord Lowry said on page 9:

> "That independent evidence which contradicts a Crown witness even on an irrelevant point has much more

> probative value against the Crown than evidence which supports a witness could have in favour of the Crown."

[18] It is also notable that in that judgment at page 5 Lord Lowry cited with approval Park B in *R v Stubbs* (1855) 1 Dears 555 in which it was said that:

> "An accomplice necessarily knows all the facts of a case and his story, where the question of identity is raised, does not receive any support from its consistency with those facts."

Discussion

[19] Where then does this consideration of the evidence and of the legal principles leave the Crown case? Is this one of those exceptional cases where I can say that there is no possibility that I will be satisfied beyond a reasonable doubt that the defendant is guilty? In my judgment, this is not one of those exceptional cases.

[20] There are most certainly flaws or gaps in the prosecution case. Any case which relies on Haggarty is by definition vulnerable, but the forensic evidence puts him in contact with the jacket which on the evidence may well have been used in the murders and while there is an 11 day gap between the murders and the find of the sports bag with all it contained, it is only 11 days. Furthermore, the location of the find close to the murder scene and adjacent to Marsden's house is potentially significant and to some extent corroborates Haggarty's version of events.

[21] I do not regard the bad character evidence to have been of no significance as was urged upon me. In my judgment, an individual who commits a sectarian murder in January 1994 is more than likely to have been content to commit more sectarian murders and an attempted murder just a few months later.

[22] Whether all of this is ultimately sufficient to prove the case beyond a reasonable doubt is not the question today. That question comes later but at this stage I hold that the defendant has a case to answer. The application for a direction is refused.