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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE CROWN COURT

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R

-v-

MICHAEL DEVINE

_____

IN THE MATTER OF A STATUTORY REFERRAL BY THE CRIMINAL CASES REVIEW COMMISSION

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Before: Morgan LCJ, Treacy LJ and McCloskey LJ

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Representation
Appellant: Mr Frank O'Donoghue QC and Mr Jonathan Connolly, of counsel, instructed by John J Rice & Co Solicitors
Respondent: Mr Gerald Simpson QC and Mr Robin Steer, of counsel, instructed by the Public Prosecution Service

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McCLOSKEY LJ (delivering the judgment of the court)

Dramatis Personae

Michael Devine: the appellant
Paul Kelly: co-accused
Sean Hughes: the defendant in a related prosecution
Kathleen Trainor: the injured party as regards counts 4–6 (*infra*) and a potential prosecution witness in the case against Sean Hughes
Detective Sergeant Harper and Detective Constable Lumley: the interviewing police officers who recorded the appellant's alleged admissions
Detective Chief Inspector Rawson and Detective Inspector Garvey: other interviewing officers
Police Constable Collins: arresting officer

Introduction

[1] This is the reasoned judgment of the court, having announced at the conclusion of the hearing on 2 December 2020 that its decision was in favour of the appellant.

The appellant's convictions

[2] This is an appeal via the mechanism of a referral by the Criminal Cases Review Commission (the "*Commission")* under Part II of the Criminal Appeal Act 1995. It relates to the convictions of Michael Devine ("the appellant") on 5 February 1981 at Belfast Crown Court. The counts on the Bill of Indictment and the respective outcomes were as follows:

Count	Offence	Outcome	Sentences Imposed (All Concurrent)
1	Hijacking, contrary to s.2(1)(a) of the Criminal Jurisdiction Act 1975	Not Guilty	N/A
2	Possession of a firearm with intent contrary to s. 16(1) of the Firearms Act (NI) 1969	Guilty	10 years' imprisonment
3	Possession of a firearm and ammunition with intent contrary to s. 14 of the Firearms Act (NI) 1969	Guilty	14 years' imprisonment
4	Conspiracy to cause GBH with intent contrary to s.18 of OAPA 1861	Guilty	16 years' imprisonment
5	Causing GBH with intent contrary to s.18 OAPA 1861	Guilty	16 years' imprisonment
6	Conspiracy to pervert the cause of justice, contrary to common law	Guilty	16 years' imprisonment
7	Attempted murder, contrary to common law	Guilty	20 years' imprisonment
8	Wounding with intent, contrary to s.18 OAPA 1861	Guilty	16 years' imprisonment
9	Possession of a firearm and ammunition with intent contrary to s. 14 of the Firearms Act (NI) 1969	Guilty	14 years' imprisonment
10	Possession of a firearm and ammunition with intent contrary to s. 19(a) of the Firearms Act (NI) 1969	Guilty	8 years' imprisonment
11	Belonging to a proscribed organisation, contrary to s.21(1)(a) of the NI (Emergency Provisions) Act 1978	Guilty	8 years' imprisonment
12	Taking and driving away, contrary to s.148 of the Road Traffic Act (NI) 1970	Not Guilty	N/A

Factual Matrix

[3] The appellant was first arrested, in January 1979, for a number of suspected offences arising from an alleged paramilitary meeting at Divis Flats on 8 January 1979 during which he allegedly disposed of a gun by throwing it from a window when the meeting was interrupted by an army raid. The gun had allegedly been used by the appellant on 8 October 1978 to shoot a police officer. He was released without charge due to insufficient evidence (see indictment: counts 7 – 10).

[4] Chronologically, the next material events unfolded in June 1979 when it was alleged that the appellant conspired to inflict grievous bodily harm on one Kathleen Trainor. Ms Trainor was a potential Crown witness in a prosecution arising from the Divis Flats events in January, against one Sean Hughes (see indictment: counts 4 – 6).

[5] Next, on the evening of 29 September 1979 a motorbike was reported as having been hijacked by two men on the Falls Road, Belfast. The appellant (then aged 17 years and 9 months) and another young male were encountered by police at 9.15pm using the motorbike and, following a chase, the appellant (only) was arrested (see indictment: counts 1 – 3 and 12).

[6] The arresting officer was one Constable Collins who, having cautioned the appellant at the police station, recorded an oral response and later made a witness statement.

[7] During three police interviews following his arrest for the alleged offences on 29 September 1979, the appellant was recorded by the interviewing officers (D/S Harper and D/C Lumley) as having made full admissions to all of offences ultimately included on the Bill of Indictment.

[8] Both the appellant and Mr Kelly independently of each other and without any opportunity to confer complained to the police doctor that false admissions were being recorded by the interviewing police. During a fourth interview, the appellant denied having made earlier admissions. Later, when interviewed by two other officers (DCI Rawson and DI Garvey) he alleged that Messrs Harper and Lumley had written things that he had not said.

Prosecution of the appellant

[9] As noted above the indictment comprised 12 counts. The breakdown is as follows:

(i) Counts 1 – 3 and 12: These four counts arose out of the alleged hijacking of the motorcycle on 29 September 1979.

(ii) Counts 4 – 6: alleged conspiracy to cause grievous bodily harm to Kathleen Trainor in June 1979.

(iii) Counts 7 – 10: These four counts related to the alleged shooting of the police officer on 08 October 1978.

(iv) Count 11: This count alleged membership of a proscribed organisation, INLA.

[10] Paul Kelly was jointly prosecuted with the appellant in respect of counts 1, 2 and 12. He was convicted of count 2 only. The verdict for both Defendants on counts 1 and 12 was not guilty.

[11] The Crown case against the appellant was summarised by the trial judge (the "LTJ") in his judgment in these terms:

> "*… on the evening of 29 September 1979 two police land rovers came across a motorcycle in Durham Street …. the driver and pillion passenger of the motorcycle ran off … one, who proved to be Devine, was caught almost immediately. The other man ran off and was not caught …. This man was holding his hand inside his jacket as he ran with the clear inference that he was holding something in his hand …. The Crown case against* [the appellant] *consists of alleged admissions made by him at certain of his interviews together with inferences that may be drawn from the events of 29 September 1979 and Devine's explanations for these events in respect of counts 1, 2, 3 and 12 …*
>
> *The issue in Devine's case is whether the notes of the interview are correct notes of the interview as the police officers allege or whether they are a complete fabrication as Devine alleges.*"

The defence case, as summarised by the judge, was that (a) no admissions of any kind were made and (b) there was no mention of or questioning about the motor cycle, its alleged hijacking, the alleged attempted murder or the alleged attack on Ms Trainor until the very end of the final interview when a summary of the appellant's alleged admissions was read to him.

[12] In convicting the appellant the LTJ made the following central findings and conclusions:

(i) The appellant's claim that he made no admissions and his other claims about the conduct of the police interviews were a lying fabrication.

(ii) The appellant's account of how he came to be in possession of the motorcycle was a lie.

(iii) The notes of the interviews were genuine and accurate.

(iv) Detective Sergeant Harper was "*a most impressive witness who gave his evidence with complete conviction*".

(v) Detective Constable Lumley was equally "*truthful and convincing*" on the central issue of the interviews and the notes thereof.

(vi) The appellant was "*… a most unconvincing witness ... a conceited and facile liar … with a complete disregard for the truth*".

(vii) The complaints made to doctors by the appellant were "*… without foundation and were made for the express purpose of enabling allegations to be made against the interviewing officers*".

[13] It is convenient to interpose three comments at this junction. First, the LTJ convicted the appellant exclusively on the basis of his alleged admissions. In his judgment he does not identify any other supporting evidence. Second, the appellant and Mr Kelly were represented by the same legal team of solicitor, senior counsel and junior counsel. Third, the acquittals in respect of counts 1 and 12 were made on the basis that the prosecution had not adduced any evidence identifying the motorcycle concerned.

Appeals

[14] Both the appellant and Mr Kelly pursued appeals against their convictions, with the same legal representation as at their trials.

Paul Kelly

[15] Mr Kelly's grounds of appeal were:

> *"(1) There was a material irregularity in the trial in that-*
>
> *(a) Prejudicial material was placed before the trial judge in that the statement of Constable Patrick Francis Collins was included in papers provided for the judge for the trial.*
>
> *(b) Prejudicial material was opened to the trial judge in that the said statement of Constable Patrick Francis Collins was opened to the trial judge when counsel for the Crown knew that the said constable, being deceased, would not be called.*
>
> *(c) Prejudicial material was introduced during the evidence of Detective Inspector Paul Patrick Donnelly, called by the Crown, when the said DI gave evidence as to the criminal record of the accused Kelly.*

(2) That the verdict of the Court should be set aside on the ground that under all the circumstances of the case, it is unsafe and unsatisfactory in that-

(a) There was not sufficient evidence on the facts proved by the Crown upon which the learned trial judge could find the accused guilty of the offences charged.

(b) That the learned trial judge erred in law in refusing application by the counsel for the accused that at the end of the Crown evidence the accused should be found not guilty."

[16] Mr Kelly's conviction was quashed by the Court of Appeal on 11 September 1981. No written judgment is available. In the respondent's skeleton argument it is stated:

> *"The RUC report of D/Insp McVicker dated 25 September 1981 contained an account of the appeal hearing in respect of both accused. His report stated that the Court had held that under s.16(1) of the Firearms Act the prosecution had to prove that Kelly intended (a) to commit hijacking or (b) to resist arrest or (c) to prevent the arrest of another. The Court held that the prosecution had failed to prove that Kelly was intending to commit an offence of hijacking, and had not proved the registration number of the hijacked motorbike ...; nor had Kelly used the gun to prevent his arrest; nor was there evidence that he intended to use the weapon to prevent his arrest, or the arrest of another. The appeal was allowed on this ground. There is no reference to any other ground of appeal being discussed."*

The appellant

[17] The original Notice of Appeal lodged on behalf of the appellant is not included in either the Commission's referral or the appeal bundles. In the appellant's skeleton argument it is stated that the original notice contained no grounds of appeal. The Commission suggests that the appellant's original appeal was advanced on grounds differing from those relied upon by Mr Kelly:

> *"Following conviction, it appears that Mr Devine obtained an indication that three witnesses would provide statements relating to the attack on Kathleen Trainor. The witness forms indicate:*
>
> *i. Nora Barr would say Ms Trainor fell by her own act.*
>
> *ii. Ms Trainor would say she injured herself by jumping (being both intoxicated and depressed).*

She would also say that Mr Devine was not present when she fell and did not have any part in her injuries.

iii. *Laurence McGuinness would say he was with Ms Trainor and Ms Barr; that Ms Trainor had been drinking and had threatened to throw herself from the balcony; that he had pulled her away and later he had heard a thud. He had subsequently found Ms Trainor injured under the balcony."*

[18] According to the appellant (per the Commission's referral) on the day his appeal was listed for hearing, his counsel (whom he identifies) advised him to withdraw it and he accepted that advice. It is worthy of note that whereas Mr Kelly's appeal grounds included the contention that the evidence of Constable Collins had improperly been adduced and was prejudicial to him, the appellant's current appeal argues that the statement of Constable Collins **should** have featured in his trial and/or appeal. See [61] – [68] *infra*.

The Commission's referral to this court

[19] The Commission, applying the statutory test, considers that there is a real possibility that the Court of Appeal will have a significant sense of unease about the safety of the appellant's convictions due to the cumulative weight of the following:

"(i) The absence of modern standards of fairness within the interview process: although Mr Devine's interviews were conducted within the regulatory framework of the time, no safeguards were available to Mr Devine.

(ii) The existence of contemporaneous complaints: Mr Devine and Mr Kelly (his co-defendant) both made identical complaints concerning the conduct of the same officers, even though it appears they were held separately and could not communicate with one another.

(iii) The Northern Ireland Court of Appeal's decision in R v Paul Kelly: in which the Court quashed the conviction of Mr Devine's co-defendant.

(iv) The Northern Ireland Court of Appeal's decision in R v Livingstone [2013] NICA 33. This casts doubt on the credibility of at least two officers connected with Mr Devine's case.

(v) The witness statement of PC Collins: this material appears to have been unused at trial (or on appeal). It

provides a potential counter argument to the LTJ's reasoning.

(vi) Expert evidence: in the form of a report by Dr John Olsson, a forensic linguist, expressing some concerns about the disputed statements.

(vii) Evidence to undermine the credibility of DS Harper (the senior of the two officers who interviewed Mr Devine and recorded the disputed statements). In particular:

(viii) The England and Wales Court of Appeal's judgment in R v Santus where the Court quashed a murder conviction based, to a significant degree, on a confession written down by Mr Harper and denied by the alleged offender (Santus). The Court noted that, the confession apart, there was a great accumulation of facts which point away from the guilt of the appellant … [and] make it very difficult, if not possible, [to understand] how he could have done it.

(ix) The findings of Operation Haven in connection with Mr Harper:

- *Making exaggerated and misleading remarks within the context of a major police inquiry. Mr Harper appears to have misled senior colleagues and politicians with significant consequences.*
- *Seeking to exert inappropriate influence over the prosecution (and non-prosecution) of individuals.*

(x) Findings by independent auditors: relating to Mr Harper's expenditure and the contravention of corporate financial and expense policies.

(xi) Remarks in a report by Dr Brian Napier QC: relating to Mr Harper's conduct in Operation Rectangle.

(xii) Remarks in a report by Frances Oldham QC: relating to Mr Harper's conduct in Operation Rectangle.

(xiii) Confidential material: that is contained within a separate Annex to this statement of reasons."

Grounds of Appeal

[20] Counsels' skeleton argument formulates the following grounds of appeal:

> *"(1) The learned trial judge, in determining the reliability of the confession evidence at interview failed to address all relevant matters including, in particular, the fact that the Appellant had admitted to being a person that was not in accordance with the description of that other person according to the Crown evidence.*
>
> *(2) The learned trial judge failed to address and therefore take into account the coincidence of two independent similar complaints being made against the two interviewing officers.*
>
> *(3) The learned trial judge misdirected himself as to the issue to be determined by the Court.*
>
> *(4) Applying the principles set out in R v Brown [2012] NICA 14, by reason of the failure of the Crown to provide disclosure to the defence in accordance with common law principles and further by reason of the failure of the police to permit the Appellant to have access to legal representation and advice during the interview process; these convictions are now clearly unsafe.*
>
> *(5) The learned trial judge, in determining the issue of the internal content of the admissions, concluded that it was not possible for the interviewing officers, in advance of interviewing the Appellant, to know of the Appellant's explanation as to how he came to be in possession of the motorbike on the evening of the 29th September 1979. While this was correct on the evidence as presented at trial, the Appellant gave the same explanation to his arresting officer, PC Collins on the evening of the 29th September 1979 and prior to being interviewed who, in turn, informed CID so that there was, in fact, every possibility that the arresting officers did have knowledge of his explanation. So central was this finding to the learned trial judge's reasoning that the fact that there was such a possibility ought to have been brought to the attention of the trial judge in the immediate aftermath of the delivery of his judgment or, alternatively, to the attention of the Court of Appeal and that obligation rested on both the prosecution and the defence.*

(6) Contrary to the evidence given to the learned trial judge at trial, the statements recorded by interviewing officers and attributed to the Appellant as his verbatim admission are, in the opinion of subsequently obtained expert evidence obtained on behalf of the CCRC and the Crown, unlikely to be the verbatim words of the Appellant.

(7) The learned trial judge, in determining the third of his three stage test, namely the presentation of the witnesses, found DS Harper to be a most impressive witness who gave his evidence with conviction. In light of what is now known of the character traits of DS Harper this Court could not be satisfied that is a finding that can form the basis for the conviction of the Appellant.

(8) That the accumulation of grounds 1 – 7, taken with other concerns identified by the CCRC, should render these convictions unsafe."

[21] In summary, the appellant adopted the grounds formulated by the Commission and augmented these to some extent. This court accepted that it is empowered to permit additional grounds to be canvassed, under section 14(4B) of the Criminal Appeal Act 1995 and exercised its discretion to do so .

The appellant's contentions summarised

Ground 1 – 'description of perpetrator'

[22] By this ground it is contended that the court of trial having received unchallenged testimony that the alleged hijacker had a moustache, *'… the Court was faced with an admission by the Appellant that could only be relied upon if the Court expressly rejected the eye witness testimony … The Court failed to address this …'*. It is submitted that this discrepancy was sufficient to render the purported admissions by the appellant unreliable or, alternatively, the court was obliged to explain its conclusions on the inconsistency.

Ground 2 – 'coincidental complaints'

[23] The thrust of this ground is that this issue was not sufficiently addressed by the LTJ in his judgment and his *'simple'* rejection of the appellant's complaints as an attempt to discredit the officers concerned without further analysis or explanation was a significant failing on the part of the judge.

Ground 3 – 'the judge's description of the issue for his consideration'

[24] This ground complains that the LTJ formulated a flawed three stage test in considering the evidence. Further, the LTJ was incorrect in stating that *'… the issue in Devine's case is whether the notes of the interview are correct notes of the interview as the police officers allege or whether they are a complete fabrication as Devine alleges'*. It is submitted that the staged approach failed to address *'the most important issue – were any of the admissions inconsistent with other evidence known in relation to events that occurred?'*. It is further submitted that the LTJ applied the standard of the balance of probabilities as opposed to the criminal standard.

[25] The LTJ is criticised for:

- Attaching too much weight to the demeanour of older professional police officers in comparison to an unemployed 17 year old;

- Effectively reversing the burden of proof and placing an onus on the appellant in his comment '*To put Devine's evidence in context it is to be noted that he is asking the Court to accept that the first two police officers to interview him following the alleged hijacking of the motorcycle … did not mention either the hijacking or the motor cycle … during any of the three interviews …';*

- Failing to address the issue of the *'impossible reconciliation'* between the appellant's purported admissions and the accepted eye-witness account that the hijacker had a moustache;

- Making a finding that the police could not have made up the interviews, which did not take into account the extent of the knowledge and papers available to the police;

- Attaching disproportionate weight to the evidence of DS Harper in assessing the reliability of the purported admissions.

[26] There is a free-standing contention that the appellant's original legal representatives were in a conflicted position in his trial and appeal in representing both accused.

Ground 4 – 'Disclosure and Legal Representation'

[27] It is submitted that, given that the appellant had made allegations of fabrications of admissions at the police station and maintained this position at trial, the common law principles then applying to disclosure duties would have mandated that the defence be given access to the source information to which the police had access prior to or during the interviews.

[28] In the event, the defence were not provided with any disclosure of such source material. It is argued that this contravened the principles set out in R v Keane [1994] 2 All ER 478 and R v Livingstone [2013] NICA 33.

[29] The appellant in substance adopts the following passage in the Commission's referral:

> *"Although the absence of safeguards is not new evidence, this is a case where the admissions were central to the prosecution case, uncorroborated and disputed from the outset. The CCRC considers that in the circumstances of this case, the absence of safeguards coupled with the evolution of detained persons' rights may contribute to a sense of unease about Mr Devine's convictions."*

[30] It is contended that Messrs Harper and Lumley should have been withdrawn from the interviews following the appellant's complaint to the police doctor. It is further submitted that the evidence establishes that the complaint was logged but not addressed until after the fourth interview.

Ground 5 – 'Disclosure of the Statement of Constable Collins'

[31] The appellant seeks to adduce the statement of PC Collins as fresh evidence on the basis that it is of significant relevance to the question of whether it was possible for the interviewing officers to have known of any claim by the appellant about how he came to be in possession of the motorcycle or for the statement "Run Kelly" prior to interview.

[32] It is submitted, in summary, that had the statement been admitted before the LTJ, it would have formed the basis for additional cross examination of Mr Harper and would have significantly undermined the LTJ's reasoning in finding the appellant guilty.

[33] There is a further contention that Constable Collins' statement was potentially prejudicial to Mr Kelly but potentially beneficial to the appellant, thereby rendering joint legal representation inappropriate. It is submitted that this issue should have formed a ground of appeal at the time and that an onus also rested on the prosecution to highlight this matter.

Ground 6 – 'Expert Evidence'

[34] Leave is sought to admit the fresh evidence of Dr John Olsson, Forensic Linguist, who prepared a report following a review of the contents of interviews 1-4, the deposition statements and recorded evidence at court. It is submitted that the report of Crown expert Dr Grant should also be admitted.

[35] It is submitted that both experts are agreed that the statements attributed to the Appellant are unlikely (very unlikely, per Dr Olsson) to be his own words. This is said to be highly relevant given the evidence of the officers in which they made repeated assurances that the records were a verbatim account.

Ground 7 – Detective Sergeant Harper

[36] It is contended that the cumulative effect of information now known about DS Harper should result in him no longer being considered as a reliable witness or, in the words of the LTJ, "*a most impressive witness who gave his evidence with complete conviction*". The information upon which the appellant now relies in this submission is drawn from a total of five sources. The first is the decision of the E&W Court of Appeal in *R v Santus* [1991 Unreported]. Mr Harper gave evidence in this trial that the defendant had made unexpected oral admissions to murder (later denied) while being conveyed to a police station. He made notes of the admissions but did not obtain a counter-signature. Two junior colleagues were present in the car and supported Harper's evidence. Santus' ensuing conviction was quashed on appeal on the basis of an accumulation of facts, including an alibi, which pointed away from his guilt. The court did not expressly reject the reliability of the supposed confession to Mr Harper but on the issue commented that '*… it would not be helpful for us to try to reconcile the two diametrically opposed considerations, save perhaps that misinterpretation of words spoken in emotional circumstances is always a possibility*'.

[37] It is contended that although there were no express findings of police misconduct in *R v Santus*, the similarities between the events in that case and the allegations made by the appellant in the instant case are such to give rise to significant unease about the reliability of his admissions.

[38] The second source invoked is **Operation Haven.** This was an independent disciplinary investigation following the suspension of Chief Officer Graham Power of the States of Jersey Police in 2008. By this stage, Mr Harper had been appointed Deputy Chief Officer in Jersey and was SIO in 'Operation Rectangle' – a child abuse investigation, though he retired in 2008. The Executive Summary of the Report makes significant criticisms of Mr Harper, his personality, his actions and his motivations. It is submitted that the criticisms in the report, (particularly at 2.4, 2.6, 2.8 and 2.21) call into question the reliability of the LTJ's assessment of him.

[39] The third source is the **Audit Report by BDO Alto.** This is a report which was commissioned to consider the use of resources during Operation Rectangle. It commented, in part, on the publicly reimbursed expenditure incurred by Mr Harper for activities such as trips to and from London, meals and entertaining. Mr Harper is criticised for unjustified trips and exceeding and breaching the expenses policies, incurring very considerable expense. It is submitted that this is relevant to the assessment of Mr Harper by the LTJ as a '*most impressive witness*'.

[40] The fourth source is the **Report of Brian Napier QC.** Mr Napier was commissioned by the Chief Minister of the States of Jersey to produce a report into the suspension of Mr Power. His report, while not focused on Mr Harper, quotes at paragraph 23 the comments of Sir Christopher Pitcher in ***Attorney General v Aubin, Donnelly & Weybridge*** [2009] JR 240 in relation to him:

> *"… Mr Harper, by constant and dramatic press conferences and informal briefings, whipped up a frenzied interest in the inquiry … in respect of what had turned out to be completely unfounded suggestions of multiple murder and torture in secret cellars under the building..."*

[41] The fifth, and final, source is the **Oldham Enquiry.** This was an inquiry into the childcare provision in Jersey, which reported in 2017. It is submitted that the following comments of Sir Nicholas Griffin are of relevance to the assessment of Mr Harper:

> *"On the basis of the documents I have seen, it would appear that DCO Harper's forthright interventions were significant and unhelpful. He responded angrily to the Law Officers' Department apparently reasonable suggestion that a little more time should be taken to consider charges. The Senior Officer had even instructed his officers to get the Centenier in to charge, notwithstanding the advice of the Law Officers' Department to delay. DCO Harper's approach no doubt contributed to the highly pressured atmosphere in which the other police officers and the lawyers had to operate."*

Ground 8 – 'The Cumulative Effect'

[42] It is contended that the cumulative effect of each of the forgoing grounds generates a significant sense of unease about the appellant's convictions.

The respondent's submissions summarised

Ground 1 – 'Description of Perpetrator'

[43] It is accepted that *'… as a matter of established fact, the appellant could not have been the man described as having a moustache …'* and that the LTJ did not resolve the conflict of evidence regarding the description of the hijacker who was later taken to be the appellant. Indeed, it is stated that *'An examination of the judge's judgment indicates that this inconsistency is not mentioned and the judge did not deal with it in any way…'*.

Ground 2 – Coincidental Complaints'

[44] It is contended that there is no substance in *'the coincidence of complaints'* and that the appellant's remark that he was not making a complaint, but wanted a record made, may support the view that this was *'part of a pre-decided plan'*.

[45] It is further contended that the fact that three detectives, including Messrs Harper and Lumley, had interviewed Kelly prior to his allegation of falsified admissions, coupled with the fact that Kelly did not specifically identify Harper or Lumley as the culprits, undermines this ground.

Ground 3 – 'The judge's description of the issue for his consideration'

[46] It is accepted that the judge's statement "*the issue in Devine's case is whether the notes of the interview are correct notes of the interview as the police officers allege, or whether they are a complete fabrication as Devine alleges*" was a poor articulation of the test. However it is argued that this, of itself '*… does not carry with it the implication that when assessing evidence he was guilty of any incorrect approach …*' and the contention that the judge applied he wrong standard of proof is rejected.

[47] It is argued that the LTJ had the benefit of hearing from the witnesses and was entitled to come to assess them as he did. It is further submitted that the LTJ identified properly where the burden lay and that it was properly discharged.

Ground 4 – 'Disclosure and Legal Representation'

[48] It is accepted that there was no disclosure to the defence of documents which would have revealed the knowledge of the police of the circumstances of each of the alleged offences. Nonetheless it is contended that such information would not at the time of the appellant's trial have generally been the subject of disclosure.

[49] It is accepted as a fact that the appellant, aged 17 years and 9 months, did not have access to a solicitor and that an adult was not present with him during the interviews. However, relying on *R v Brown and others* [2012] NICA 14, it is submitted that this does not inevitably lead to the quashing of a conviction and that the following facts and considerations are material:

- Although the absence of an earlier intervention by the Senior Investigating Officer is criticised and Harper and Lumley were permitted to conduct a fourth interview, no purported admissions emanated therefrom;

- The LTJ may not, on this basis, have considered it necessary to deal with this issue in his judgment;

- The LTJ was satisfied that these complaints '*… were without foundation and were made for the express purpose of enabling allegations to be made against the interviewing officers*';

- The police did not attempt to attribute to the appellant any of the other offences in which the relevant firearm was previously used.

Ground 5 – 'Disclosure of the statement of Constable Collins'

[50] It is accepted that police (Constable Collins, at least) were aware of the explanation given by the appellant as to his possession of the motorcycle. It is also acknowledged that Constable Collins' written statement contained the line *'I then informed CID and started the appropriate prisoner forms and put him in the cell'*. Notwithstanding it is submitted:

> *"There is only a modicum of similarity between what Collins says the Appellant told him and there are material and significant differences between the two: between helmet and helmets; reference to/absence of reference to the keys; reference/absence of reference to gloves; Albert Street/top of Albert Street. In fact the only common feature is Albert Street."*

Ground 6 – 'Expert Evidence'

[51] It is contended that the expert evidence falls significantly short of establishing that the convictions are unsafe. With regard to the proposed expert evidence of Dr Olsen:

- The expert's inferences resulting from the appellant being 'uneducated' do not sit easily with the description of the appellant by his own counsel at trial as being 'a person of considerable intelligence';

- It is recorded in each interview that the officers asked the appellant to 'take it slowly' so that the questions and answers could be written down;

- Olsen's surprise at the lack of police reaction to the appellant's recorded statement that he would have shot the two hijacked men if they had been Protestant can be explained in their evidence where they stated they believed this to be flippant;

- Olsen is '… *forced to conclude that there is no direct evidence of fabrication'*.

[52] The opinion of Professor Timothy Grant, the prosecution expert, is highlighted:

> *"… Whilst it is unlikely that the [police] statement contains a verbatim account of what was said, Dr Olsson has not provided linguistic evidence that the interaction was fabricated, or otherwise maliciously produced or edited. Further to this my own analysis has not produced additional linguistic grounds which cast further doubt on the validity of the statement."*

Ground 7 – DS Harper

[53] It is submitted that there are two strands to the issues relating to Mr Harper:

- The potential relevance of *R v Santus* and the potential factual similarities; and

- Mr Harper's character, as relating to his time in the States of Jersey Police.

[54] With regard to *R v Santus,* the argument is made that there was no judicial finding by the Court of Appeal that Harper was involved in fabricating admissions or that the words allegedly said by Santus were or were not said. As such, it is submitted that the Court of Appeal should attach no weight to the allegation against Harper in that case.

[55] While it is accepted that the evidence of subsequent discreditable behaviour can be taken into account in considering the safety of the appellant's conviction, it is submitted that:

- There is no evidence of reprehensible behaviour on the part of Mr Harper between 1979 and 2008, prior to him joining the States of Jersey Police; and

- In the circumstances, the subsequent matters do not call into question the safety of the convictions.

[56] It is contended that the involvement of DS McVicker and DI Rawson was fairly peripheral and that their involvement was not such as to raise any sense of unease.

Ground 8 – The Cumulative Effect

[57] It is contended that the mere fact that there are several grounds does not, of itself, contribute to the court's decision and that it has to assess the impact of each of the grounds of appeal.

Governing Principles

[58] In ***R v Pollock*** [2004] NICA 34, Kerr LCJ set out the following well-known principles to be applied by the Court of Appeal when considering criminal appeals (which includes Commission referrals), at [32]:

> *"1. The Court of Appeal should concentrate on the single and simple question 'does it think that the verdict is unsafe'.*

2. This exercise does not involve trying the case again. Rather it requires the court, where a conviction has followed trial and no fresh evidence has been introduced on the appeal, to examine the evidence given at trial and to gauge the safety of the verdict against that background.

3. The court should eschew speculation as to what may have influenced the jury to its verdict.

4. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence, it should allow the appeal."

[59] The decision of this court ***in R v Brown & Ors*** [2012] NICA, another Commission referral, resonates in the context of the present case, as the following passages demonstrate:

"The legal principles governing the admissibility of confessions at the time of trial

[6] A confession is only admissible at common law if it is free and voluntary. The common law position was encapsulated in the Judges' Rules which were designed to secure that only answers and statements which were voluntary were admitted in evidence against their makers. The introduction to the 1964 edition which came into force in this jurisdiction on 8 October 1976 noted that the Judges' Rules did 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 by the administration of justice by his doing so;

..(e) that it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of

advantage, exercised or held out by a person in authority, or by oppression.'

The principle set out in paragraph (e) above is overriding and applicable in all cases."

[7] Oppressive questioning was described by Lord MacDermott in an address to the Bentham Club in 1968 as:

'questioning which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent.'

[8] Administrative Directions on Interrogation and the Taking of Statements were published by the Home Office at the same time. Paragraph 4 of these directions related to the interrogation of children and young persons.

'As far as practicable children (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian or, in their absence, some person who is not a police officer and is of the same sex as the child.'

This is replicated in the RUC Code (1974) Edition at paragraph 127 and is supplemented by section 52(2) of the Children and Young Persons Act (Northern Ireland) 1968 which states that a person whose attendance may be required must be informed where a child or young person is arrested. The Home Office subsequently published guidance in 1968 indicating that the reference to children in the Administrative Directions included reference to young persons.

[9] 1972 was the worst year of civil unrest in Northern Ireland. In that year there were 467 people killed, 10,628 shooting incidents and 1853 bomb explosions or devices defused. The government convened a Commission chaired by Lord Diplock to consider what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book individuals involved in

terrorist activities. The Diplock Commission reported in December 1972. It concluded that witnesses were subject to intimidation by terrorist organisations and were thereby deterred from giving evidence. That also applied to jurors although not to the same extent. The Commission also noted that the detailed, technical common law rules and practice as to the admissibility of inculpatory statements were hampering the course of justice in the case of terrorist crimes.

[10] The Commission concluded that trial by judge alone should take the place of trial by jury for the duration of the emergency. It also recommended a departure from the common law test for the admissibility of confession statements. It concluded that a confession made by an accused should be admissible as evidence in cases involving scheduled offences unless it was obtained by torture or inhuman or degrading treatment; if admissible it would then be for the court to determine its reliability on the basis of evidence given from either side as to the circumstances in which the confession had been obtained. It recommended that the technical rules, practice and judicial discretions as to the admissibility of confessions ought to be suspended for the duration of the emergency in respect of scheduled offences.

[11] Some but not all of the Commission's recommendations were implemented in the Northern Ireland (Emergency Provisions) Act 1973 (the 1973 Act). Section 6 of the 1973 Act provided for the admissibility of statements of admission.

> *'(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 subjected to torture or 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 or, if it has been received in evidence, shall either continue the trial disregarding the statement or direct that the trial shall be restarted before a differently constituted court (before whom the statement shall be inadmissible).'*

This section governed the admissions in the cases of Brown, Wright and McDonald. The provision was re-enacted as section 8 of the Northern Ireland (Emergency Provisions) Act 1978 which was the provision governing the case of McCaul.

[12] Soon after its enactment Lowry LCJ in R v Corey (December 1973) addressed a submission that there was a discretionary power to exclude a statement apart from the requirement to do so in section 6(2) in the 1973 Act.

> *'I agree with this general proposition since there is always a discretion, unless it is expressly removed, to exclude any admissible evidence on the ground that (by reason of any given circumstance) its prejudicial effect outweighs its probative value and that to admit the evidence would not be in the interests of justice.*
>
> *Section 6, of course, has materially altered the law as to admissibility of statements by singling out torture and inhuman and degrading treatment. This is clear from the fact that such things have always made for the exclusion of an accused's statement since they deprive it of its voluntary character. Accordingly, section 6(2) would merely be a statement of the obvious if it did not, in conjunction with section 6(1) render admissible much that previously must have been excluded. There is no need now to satisfy the judge that a statement is voluntary in the sometimes technical sense which that word has acquired in relation to criminal trials.'*

[13] The scope of the discretion was addressed by McGonigal J in R v McCormick [1977] NI 105.

> *'In my opinion the judicial discretion should not be exercised so as to defeat the will of Parliament as expressed in the section. While I do not suggest its exercise should be excluded in a case of maltreatment falling short of section 6 conduct, it should only be exercised in such cases where failure to exercise it might create injustice by admitting a statement which though admissible under the section and relevant on its face was in itself, and I underline the words, suspect by reason of the method by which it was obtained, and by that I do not mean only a method designed and adopted for the purpose of obtaining it, but a method as a result of which it was obtained.'*

[14] In R v O'Halloran [1979] NI Lord Lowry LCJ made two general comments.

> *'(1) This court finds it difficult in practice to envisage any form of physical violence which is relevant to the interrogation of a suspect in custody and which, if it had occurred, could at the same time leave a court satisfied beyond reasonable doubt in relation to the issue for decision under section 6.*
>
> *(2) It may be necessary another time, when considering statements of suspects, to distinguish more explicitly the meaning of the word "voluntary" at common law and "voluntary" as a shorthand expression for "not against the suspect's will or conscience" in the context of cases decided under the European Convention of Human Rights. The mere absence of voluntariness at common law is not by itself a reason for discretionary exclusion of a statement and the absence of voluntariness in the European Convention sense is prima facie relevant to degrading treatment and therefore again is not primarily concerned with the exercise of discretion.'*

[15] R v McCaul (12 September 1980) was the only case involving these appellants to be considered by the Court Of

Appeal. The court identified the real issue at the trial as whether, having regard to the appellant's mental condition and the fact that he was interviewed without having present a parent or other person to look after his interests, the written statements and the admissions which he made to the police ought to be admitted in evidence and, if so, whether the learned trial judge ought to rely on them to the extent of being satisfied beyond reasonable doubt that he was guilty of the offences which he purported to admit. At the trial the learned trial judge had found that there was a breach of the Judges' Rules in not providing the appellant with access to his solicitor and a further breach because he was interviewed without anyone present to protect his interest. He concluded, however, that this had not resulted in such unfairness to the appellant that he should exclude the admissions in the exercise of his discretion. The Court of Appeal was satisfied that the learned trial judge's approach was correct and dismissed the appeal.

[16] The statutory background to the admissibility of statements in the exercise of the discretion was further considered by Hutton J in R v Howell and others (1987) 5 NIJB 10. That was a case in which it was accepted that the statement was admissible under the statute but the issue was whether or not it should be excluded in the exercise of discretion. The learned trial judge noted that the discretion should not be exercised so as to defeat the will of Parliament. He set out the first of Lord Lowry's general comments in O'Halloran and stated that it was the intent of Parliament in enacting section 8 of the 1978 Act that, provided there had not been torture or inhuman or degrading treatment, statements made by a suspect after periods of searching questioning whilst in custody should be admitted in evidence, notwithstanding that at the outset the suspect did not wish to confess and that the interrogation caused him to speak when otherwise he would have stayed silent.

[17] The final case on this issue to which we refer is R v Watson (26 September 1995). That was a case in which the issue was the exercise of the discretion to exclude an admission. By that stage the power to exclude in the exercise of the discretion had become statutory as a result of changes introduced in 1987. Carswell LJ gave some guidance on the approach to its exercise.

> *'This discretion, although it has to be exercised judicially, is a broad one. Like*

> *MacDermott J in R v Cowan [1987] NI 338, 352, we decline to define its bounds, which would be to fetter the discretion. The remark of Lord Lowry LCJ, however, in R v Mullan [1988] 10 NIJB 36, 41, that the exercise of the discretion is intended to discourage 'bad or doubtful conduct or trickery or dishonesty in conducting an interview or investigation' indicates an important area in which it may operate. It is for the trial judge in any case in which the discretion is invoked to consider the evidence and on the basis of his findings of fact to decide whether the admission of the statement would involve unfairness to the accused or whether it is otherwise appropriate to rule it out in the interests of justice.'*

[18] We have spent some time reviewing the law on the admissibility of statements of admission under the emergency provisions legislation because of a suggestion in decisions of this court in R v Mulholland [2006] NICA 32 and R v Fitzpatrick and Shiels [2009] NICA 60 that the test for admissibility was governed by the Judges' Rules. Accordingly it was submitted that any breach of the Judges' Rules indicated a departure from the applicable legal standard at the time. We have no reason to doubt the correctness of the outcome of the appeals in Mulholland and Fitzpatrick and Shiels but in neither case was the case law to which we have referred opened to the court. The cases to which we have referred demonstrate that admissions made in breach of the Judges' Rules were admissible under the emergency provisions legislation unless obtained by torture or inhuman or degrading treatment. The residual discretion to exclude such admissions would not be exercised to render statements obtained in breach of the Judges' Rules inadmissible on that ground only. That was the law at the time of these trials. None of the parties before us contended that this was a change of case law although all parties recognised that the standards of fairness had significantly altered as a result of legislative changes arising from PACE and the Human Rights Act 1998.

[19] In their oral submissions all of the appellants accepted that the statements of admission were properly admitted applying the standards of fairness appropriate at the time of these trials. We consider that the question of

admissibility has to be judged both now and then against the background of the legislative regime put in place under the emergency provisions legislation. We will now consider how a change in the standards of fairness and procedural safeguards may be material to the issues of admissibility and reliability. That will inform our decision on the safety of these convictions.

Our approach to the safety of these convictions

[20] The leading case on the approach which a court should take in a case where there has been substantial delay between the trial and appeal resulting in a change of law or standards of fairness and procedural safeguards is ***R v King*** *[2000] 2 Cr App R 391. …*

[23] Lord Bingham considered the general approach the court should take in such cases.

> *'We were invited by counsel at the outset to consider as a general question what the approach of the Court should be in a situation such as this where a crime is investigated and a suspect interrogated and detained at a time when the statutory framework governing investigation, interrogation and detention was different from that now in force. We remind ourselves that our task is to consider whether this conviction is unsafe. If we do so consider it, section 2(1)(a) of the Criminal Appeal Act 1968 obliges us to allow the appeal. We should not (other things being equal) consider a conviction 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. In looking at 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 and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy. But this Court is concerned, and concerned only, with the safety of the conviction. That is a question to be determined in the light of all the material*

before it, which will include the record of all the evidence in the case and not just an isolated part. 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 – a very different thing from concluding that a defendant was necessarily innocent.'

The thrust of this part of the judgment was approved by this court in ***R v Gordon*** *[2001] NIJB 50 and followed in* ***R v Mulholland*** *[2006] NICA 32. We consider that it is the approach which we should follow."*

[60] ***R v Livingstone*** [2013] NICA 33 provides guidance on common law disclosure duties at paragraphs 19–21:

"Disclosure at common law

[19] The obligation on the prosecution to make pre-trial disclosure is now the subject of a careful statutory regime. No such regime was in place, however, at the time of this trial or the subsequent appeal. The obligation to make pre-trial disclosure at common law was considered by the Court of Appeal in R v Foxford [1974] NI 181. That was a case dealing with the production of previous statements made by Crown witnesses. The court considered that if the facts relating to the making of the statements were unusual that would justify the trial judge in directing the prosecution to furnish the statements to the defence although it remained a matter of discretion for him and the Court of Appeal would rarely interfere. Otherwise the trial judge had to rely on the Crown's discretion and propriety.

[20] Pre-trial disclosure obligations at common law developed further culminating in a number of cases in England during the early 1990s. Those cases established that in order to secure a fair trial pre-trial disclosure should be made of material that was relevant. In ***R v Keane*** *[1994] 1 WLR 746 Lord Taylor considered that this included any material which could be seen on a sensible appraisal by the prosecution:*

(1) to be relevant or possibly relevant to an issue in the case;

(2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or

(3) to hold out a real as opposed fanciful prospect of providing a lead on evidence which goes to (1) or (2).

[21] Although it appears that the practice in relation to pre-trial disclosure at common law at the time of the hearing of this trial and appeal was materially different from that which was required by Keane we consider that we should apply the Keane standard. We have previously approved in R v Brown and others [2012] NICA 14 a passage from Lord Bingham's judgment in R v King [2000] 2 Cr App R 391 where he said:

> *`In looking at 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 and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy.'"*

Livingstone was a case involving a change of law on disclosure between the trial and the appeal. In such cases it is now necessary to take into consideration the approach of the Supreme Court at paragraph [100] of ***R v Jogee*** [2016] UKSC 8. The determination of that issue was not required in this case and we did not hear full argument on the point, so will express no view on it. *Livingstone* involved two police officers – Rawson and McVicker - who were also involved in the appellant's interviews and trial. Livingstone was convicted of murder on the basis of admissions said to have been made by him during interviews with these officers and one other, which he disputed having made at trial. The suggestion in the appellant's skeleton appears to be that it may be considered that these officers had a pattern of behaviour in recording admissions.

Police Misconduct

[61] The issue of misconduct, or discreditable conduct, on the part of police officers was addressed in ***R v O'Toole*** [2006] EWCA Crim 951:

> *"38. We turn to the law. What approach does the law prescribe to the use of such material as this arising in other and, as it happens, much later cases, but which, if available at the time of trial, might have had some impact on the jury's verdict? The starting point is the decision of this*

court in Edwards (1991) 93 Cr App R 48. The court held that there was no hard and fast rule as to what cross-examination might be allowed, or, if later events were relied on, what notional cross-examination might be contemplated.

> *'The objective must be to present to the jury as far as possible a fair, balanced picture of the witnesses' reliability ...' (see page 56)*

39. Taking the matter shortly, the CCRC was, in our judgment, right (see the reasons in Murphy paragraph 33) in distilling from the decision in Edwards the following three categories in which the evidence of a police officer's conduct might be canvassed in another case:

> *'(i) Convictions for a relevant criminal offence;*
>
> *(ii) Disciplinary charges found proved against the officers;*
>
> *(iii) Cases where the only logical explanation for a defendant's acquittal (in a different case) was that the officer's evidence must have been disbelieved.'*

40. In addition, however, the appellants draw attention to Zomparelli No 2, 23rd March 2000, in which Lord Bingham CJ strongly endorsed the approach in Edwards, but stressed two additional points. This is what he said:

> *'The first is that the judge's overall and paramount duty is to ensure the fairness of the trial. The trial process must be fair to the prosecution; the scales of justice are not balanced if heavily over-weighted in favour of the defendant. But it must be fair also to the defendant. He is entitled to a fair trial as a matter of constitutional right. No rule of law can restrict the duty of the court to ensure a fair trial.*
>
> *35. The second point we would make is this. The court in R v Edwards was at pains to make clear that it was not seeking to lay down any hard-edged rule of law to be applied inflexibly in any case of this kind. The court recognised that the discretion of the trial judge cannot be so*

> *circumscribed as to restrict his power to do whatever justice demands in the circumstances of the individual case.'*

41. Next, we should notice the decision of this court in Williams and Smith [1995] 1 Cr App R 74, to the effect that where such matters are admissible they are no less admissible on appeal merely because on the facts they involve events later in time than the events in question in the particular case. However, the length of time between the misconduct relied on and the convictions sought to be impugned can be a relevant factor in assessing the impact of a putative attack on an officer's credibility and the safety of the conviction.

42. In Deans [2004] EWCA Crim 2123 this was said by Maurice Kay LJ at paragraph 37:

> *'We deprecate the subsequent misconduct of the officers, particularly Detective Constable Robotham. However in the final analysis we are satisfied that the convictions were and are safe. We certainly accept that police misconduct after the events in issue and after the trial in question can render a conviction unsafe. We also accept that corruption and other reprehensible behaviour by one or more officers may infect a whole investigation notwithstanding the presence of officers against who nothing has been alleged or established. In the present case, however, we attach particular importance to the lapse of time between the events of 1988 and the trial in 1989 on the one hand and the appalling behaviour of Detective Constable Robotham, and to a lesser extent Detective Constable Davis, on the other hand. There is nothing to suggest that either of them acted otherwise than with propriety between 1988 and 1997. We consider it inappropriate to doubt convictions which occurred almost a decade before any known or alleged misbehaviour on the part of these officers.'*

43. There is also authority for the proposition -- though, with great respect, we have some doubt whether it is really a point of law rather than one of good common sense -- that

> *misconduct by police officers may be fatal to a conviction even though their tainted evidence is supported by officers of whom there is no criticism whatever: see Guney [1998] 2 Cr App R 242, [1998] EWCA Crim 719. That is particularly relevant here because the Crown say that the evidence of Hornby of the interview of Murphy on 8th April 1977 was supported by that of the then DS Robinson, who eventually retired in the rank of detective chief inspector after over 32 years of service with a record of no less than 14 commendations or awards.*
>
> *44. In the light of all this learning the officers Lloyd, Matthews, Hornby and McClelland in our judgment could, as the CCRC opined, properly have been cross-examined on the matters to their discredit which have emerged and which we have summarised."*

While *O'Toole* is not binding on this court, we propose to follow it.

Our conclusions

[62] It is appropriate to address firstly a matter which the court identified at the hearing as one of some substance, namely the witness statement of Constable Collins and the issues arising there from. As already noted, Constable Collins is the officer who arrested the appellant on 29 September 1979. The impetus for this arrest was a police encounter with the appellant and another male person (alleged to have been Mr Kelly) in the context of a report that a motorcycle had been hijacked. The material passages in the statement of Constable Collins are these:

> "*I … approached these* [two male] *persons. As I did so the youth who was astride the bike shouted to his mate 'run Kelly'. ….*
>
> [Following a chase] ...
>
> *I arrested* [the appellant] *… and brought him to Hastings Street* [police station] …
>
> *I cautioned him and asked him about the motor bike and he replied that he had found it in Albert Street and that the key, gloves and helmet were with it. I then informed CID ….*"

[63] It is common case that the appellant's lawyers were in possession of Constable Collins' witness statement at the trial. The constable did not give evidence, being by then deceased. Neither prosecution nor defence sought to adduce in evidence his statement. As the excerpts reproduced above confirm, the constable

reported to CID in the wake of the arrest of the appellant. The court readily assumes that the interviewing detectives received a briefing before the interviews of the appellant commenced. It is clear from the evidence of the interviews that certain of the questions posed by the officers must have been based on the material content of what later became Constable Collins' written statement. Furthermore if confirmation of this were required it is readily provided in the transcript of the cross examination of Detective Sergeant Harper who agreed that prior to the commencement of the first interview he had "*certain information*" about the appellant and his associates and either "*had*" an intelligence file or "*had seen*" such a file containing such information. He further confirmed his pre-interview knowledge of the circumstances of and reasons for the appellant's earlier arrest in January 1979.

[64] It is also clear from the trial transcript that certain answers made by Detective Sergeant Harper in examination in chief and cross examination must have been based on the passage in the statement of Constable Collins relating to what the appellant said in response to the caution.

[65] In his judgment the LTJ stated at pp 6 – 7:

> "*Devine, it is alleged, gave an account of how he found the motorcycle at the top of Albert Street with two helmets lying on it. He alleged that there was a wee lad who he did not know standing near it and he asked the wee lad if he wanted to go for a spin and he agreed.* ***It is clear beyond peradventure that the interviewing officers would have had no knowledge at the first or any interview of the circumstances in which Devine was going to allege that he came into possession of the motor cycle. In evidence, Devine gave an account of how he took the motor cycle which was to all practical purposes absolutely identical with the account recorded by Detective Sergeant Harper and Detective Constable Lumley at the first interview. There can be no possible conclusion other than that Devine gave this account to the two officers and I so hold. It follows that Devine's evidence that neither the hijacking nor the motor cycle were mentioned as a substantive matter at any interview is false and untrue and establishes that he was prepared to lie in the witness box about a matter which settled his case and that he did so lie.***"
>
> [Emphasis supplied]

The judge continued:

> "*I comment also that the account which Devine gave in the witness box as to the circumstances under which he came into possession of the motor cycle is so inherently improbable that no reasonable person could accept it as a truthful explanation …* "

[66] In this passage the judge made two conclusions, each manifestly unfavourable to the appellant. The first of these conclusions arose out of an analytical exercise which is demonstrably erroneous. The error lies in the judge's assessment that it was "*clear beyond peradventure*" that prior to the relevant interview Messrs Harper and Lumley knew nothing about the account which the appellant proceeded to give of how he came to be in possession of the motor cycle. This error is exposed by those aspects of the evidence highlighted above. The judge failed to engage with this evidence. Furthermore there was no engagement with the statement of Constable Collins. It follows that one significant aspect of the judge's reasoning in finding Messrs Harper and Lumley to be "*truthful and convincing witnesses*" is unsustainable. Turning to the second conclusion, the judge's withering condemnation of the appellant's veracity omitted the essential exercise of considering what (per Constable Collins' statement) the appellant had said about securing possession of the motor cycle when cautioned and the consistency between what he said then (on the one hand) and said later in interview and in evidence (on the other).

[67] The fact of joint legal representation of the appellant and Mr Kelly must also be evaluated in this context. The "*Run Kelly*" passage in the statement of Constable Collins was, on any showing, prejudicial to Mr Kelly. In contrast, those passages in the same statement highlighted above had the potential to undermine the prosecution case and fortify the appellant's defence. Notwithstanding, the statement of Constable Collins was not deployed on behalf of the appellant either at his trial or as part of his ultimately aborted appeal. This court is concerned only with the fact that this was so and not the reasons why this occurred.

[68] We consider that the exercise conducted in [61] – [67] above must give rise to significant concern about the safety of the appellant's convictions.

[69] The next matter to be addressed arises out of what both the appellant and Mr Kelly recounted to medical practitioners who examined them in custody. The appellant underwent two medical examinations, conducted by different medical practitioners. In the record of the first, the doctor recorded the appellant's claim that during his three interviews (to date) "*… things have been written down as having been said by him, but he says he hasn't ….*" Notably, according to the record, this interaction between the doctor and the appellant was stimulated by the appellant's request to see the doctor for the specific purpose of communicating this concern. The second of the medical examinations was carried out at around midday the following day, following further interviews. It records:

> "*Told me that interviewers were writing down things that he had not said and that this am they said that he was denying things that he was supposed to have said yesterday. Says he is refusing to talk to interviewers until he sees a solicitor.*"

[70] In his judgment the LTJ did not engage with any of the foregoing evidence. Nor did he engage with the evidence that Mr Kelly had made, in substance, the same complaint about the conduct of the same interviewing officers, namely Messrs Harper and Lumley. Furthermore the judge did not consider the fact that these complaints were made independently of each other, without any communication between the two arrested persons. In this way the judge failed to engage with evidence which clearly bore on his assessment of the veracity of the testimony of Messrs Harper and Lumley and the evidence of the appellant. This serves to exacerbate the concern which we have expressed in [68] above.

[71] We turn to consider a third issue of substance. The prosecution adduced eyewitness evidence that the person who hijacked the motorcycle had a moustache. It is common case that this could not be a description of the appellant. There was therefore a direct conflict between the eyewitness description of the hijacker and the alleged admissions of the appellant that he was that person. The LTJ did not address this issue in his judgment. We consider that it was incumbent upon him to do so. This gives rise to a third area of concern about the safety of the appellant's convictions.

[72] There is yet another issue of substance of concern to the court. In [35]-[40] above we have summarised the post-conviction evidence relating to the professional conduct of Detective Sergeant Harper. It is no function of this court to make any finding adverse to Mr Harper. Indeed, as emphasised by Mr Simpson QC, none of the evidence upon which this ground of appeal is constructed contains any such finding. It is common case that in assessing the safety of the appellant's convictions this court may properly consider this evidence. We find it impossible to overlook the strong similarities between the conduct attributed by the appellant to Detective Sergeant Harper in compiling interview notes containing fabricated admissions and the conduct alleged against him in *R v Santus*. This gives rise to a concern which is aggravated by the other post-conviction evidence relating to the professional conduct of Mr Harper which we have summarised. Cumulatively these sources of evidence serve to lengthen the shadow over the reliability of the admissions attributed to the appellant and fortify our reservations about the safety of his convictions.

[73] To summarise, there are four issues of substance which, cumulatively, generate irresistible unease about the safety of the appellant's convictions. It is unnecessary to give consideration to any of the other grounds of appeal. Our clear conclusion is that the convictions of Mr Devine must be regarded as unsafe. It follows that the appeal is allowed.

Commission Referrals: Disclosure

[74] The referral which the Commission made in the present case was contained in its customarily detailed report. From the terms of the report the existence of a so-called "Confidential Annex" was discernible. This was entitled:

> "*Annex 5 – Overview of confidential material in CCRC reference 00111/204 – R v Michael Devine*."

This formed part of the materials sent to the court by the Commission originally. Furthermore, the prosecution's skeleton argument included, in an appendix, a brief outline (in less than 200 words) of some of the contents. Mr Simpson QC confirmed to the court that consideration had not been given to the question of whether any of these "confidential" materials should be disclosed to the appellant.

[75] The Commission's powers and duties relating to the acquisition and disclosure of documents and other materials are governed by a tailor-made statutory regime, contained in sections 17 – 25 of the Criminal Appeal Act 1995 (the "*1995 Act")*. Section 17 gives the Commission a wide ranging power to require the production by public bodies (as defined) of "*documents or other materials"*. Section 18 dis-applies section 17 with regard to a "*Government department*" if certain conditions are satisfied. By section 18A the Commission may apply to the Crown Court for an order against a person other than those serving in public bodies requiring access to specified documents or other materials. Section 19 empowers the Commission to require a public body to appoint an investigating officer to carry out specified enquiries on the Commission's behalf. Such others may be directed to a chief officer of police in specified circumstances. Section 20 elaborates on section 19. Section 21 provides that sections 17 – 20 are without prejudice to the Commission taking other steps, which may include obtaining statements, opinions and reports. By section 23 it is an offence for a present or former employee of the Commission to disclose any information obtained in the exercise of the organisation's functions unless permitted to do so by section 24.

[76] Section 24 makes provision for an exception to the aforementioned general bar:

> "*(1) The disclosure of information, or the authorisation of the disclosure of information, is excepted from section 23 by this section if the information is disclosed, or is authorised to be disclosed –*
>
> *(a) for the purposes of any criminal, disciplinary or civil proceedings,*

(b) in order to assist in dealing with an application made to the Secretary of State or the Department of Justice in Northern Ireland for compensation for a miscarriage of justice,

(c) by a person who is a member or an employee of the Commission either to another person who is a member or an employee of the Commission or to an investigating officer,

(d) by an investigating officer to a member or an employee of the Commission,

(e) in any statement or report required by this Act,

(f) in or in connection with the exercise of any function under this Act, or

(g) in any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State.

(2) The disclosure of information is also excepted from section 23 by this section if the information is disclosed by an employee of the Commission, or an investigating officer, who is authorised to disclose the information by a member of the Commission.

(3) The disclosure of information, or the authorisation of the disclosure of information, is also excepted from section 23 by this section if the information is disclosed, or is authorised to be disclosed, for the purposes of—

(a) the investigation of an offence, or

(b) deciding whether to prosecute a person for an offence,

unless the disclosure is or would be prevented by an obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise than under that section.

(4) Where the disclosure of information is excepted from section 23 by subsection (1) or (2), the disclosure of the information is not prevented by any obligation of

> *secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise than under that section.*
>
> *(5) The power to make an order under subsection (1)(g) is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament."*

Section 24(1)(e) & (f) are especially noteworthy.

[77] One striking feature of the statutory provisions noted above is that their focus is very much on the investigative and other activities of the Commission undertaken with a view to deciding whether to refer a given case to the Court of Appeal. The statute is silent on the matter of the Commission's powers and duties of disclosure at the stage of making a referral or subsequently. It says nothing about making disclosure of information and other materials to those persons and agencies who will thereafter be directly involved: the PPS, prosecuting counsel, the defendant, the defendant's legal representatives and the court. Furthermore, the Commission is not subject to the disclosure obligations of prosecutors imposed by the Criminal Investigations and Procedure Act 1996 (the "*1996 Act").* In addition there is nothing relevant to the Commission in either the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases or the Attorney General's Guidelines on Disclosure 2020.

[78] There can be no doubt that in matters of disclosure the Commission is subject to relevant common law principles. This specific issue was considered by the Divisional Court in *R v Secretary of State for the home department, ex parte Hickey (No 2)* [1995] 1 All ER 490. This was a judicial review application in which the backdrop was a refusal of the Secretary of State, made in the context of the predecessor referral statutory regime (section 17 of the Criminal Appeal Act 1968), to disclose police statements, reports and other materials generated by an enquiry into fresh evidence submitted by certain convicted prisoners in petitioning the Home Secretary to make a statutory referral of their convictions to the Court of Appeal. The Divisional Court held that the Home Secretary was subject to a duty of disclosure which it formulated in the following terms (per Simon Brown LJ), at 501:

> "*The guiding principle should always be that sufficient disclosure should be given to enable the petitioner properly to present his best case. That can only be done if he adequately appreciates the nature and extent of the evidence elicited from by the Secretary of State's enquiries*".

In the same passage, the court emphasised the case sensitive nature of the question of the specific level of disclosure to be made. Notably, the court derived its guiding

principle from the *Doody* principles (*Doody v Secretary of State for the Home Department*) [1994] 1 AC 531).

[79] There are two reported cases in which this court has specifically addressed the issue of "*Confidential Annexes*" attached to the report forming the Commission's referral. In the first, *R v Morrison and Others* [2009] NICA 1, both the context and the approach adopted by the court are apparent from [1] of the judgment of Kerr LCJ:

> *"This matter was referred to the Court of Appeal by the Criminal Cases Review Commission under section 10 of the Criminal Appeal Act 1995. The report of the Commission contained what were described as 'confidential annexures'. We declined to read these materials until we had heard submissions from counsel for the appellants and the Crown. In the event, all counsel were unanimous in requesting the court to consider the materials. We concluded that each member of the court should read the annexures separately. Having done so, each of us came independently to the conclusion that the convictions of the appellants could not be regarded as safe and the court duly quashed the convictions."*

The second main issue addressed by the court was whether, in its published judgment, it should disclose the contents of the confidential material. Having considered (a) representations from prosecution and defence *inter-partes* and (b) further submissions from the prosecution *ex parte*, the court steered a course between an open and closed judgment. See [2]:

> "*… we have concluded that it is not possible for us to disclose all of the reasons that led to the quashing of the convictions. The judgment which follows contains as much information as we feel able to give in light of the constraints that we now recognise ourselves to be under in consequence of the information that we have received in the course of the private hearings*".

[80] The sole issue decided by the judgment of this court in *R v Holden* [2011] NICA 35 was the disclosure to be made to the Defendant in the context of the referral by the Commission of his murder conviction to this court. The appellant was seeking disclosure of 15 items of sensitive information which had been made available to the Commission on a confidential basis. This gave rise to limited disclosure by the prosecution, in two stages. This court held, firstly, that the test for disclosure in any criminal appeal, whether heard before or after the commencement of the 1996 Act, is that set out in *R v H and C* [2004] UKHL 3. There the House of Lords decided that fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant should be disclosed to the defence. An expansive, rather than restrictive, approach was

exhorted. Disclosure was an aspect of the cardinal rule that the trial process as a whole must be fair. The prosecutor's duty of disclosure does not extend to material which is either neutral or damaging to the defence. Viewed through the lens of Article 6 ECHR, this court further held that there is no absolute right to disclosure of all relevant evidence since in some cases a balancing exercise weighing competing interests such as national security, the need to protect witnesses or the protection of police methods of investigation of crime may be required.

[81] This court held, thirdly, that the *H&C* test should be applied before proceeding to consider any PII issues. Finally, the court's determination of the disclosure application was twofold. First, it concluded that the disclosure which the prosecution had already made satisfied the *H&C* test. Its second conclusion was that the first 28 paragraphs of the Commission's Confidential Annex, comprising the reasoning underpinning its referral determination, should be disclosed. These conclusions were made after the court had considered the confidential material in its entirety.

[82] Brief consideration of disclosure under the 1996 Act is appropriate. Under the regime of the 1996 Act, the prosecutor's disclosure obligations arise at two stages. At the first, or preliminary, stage, the materials to be disclosed are those, not previously disclosed, which in the prosecutor's opinion might undermine the case for the prosecution against the accused. The second stage materialises upon receipt of the defence statement. The duty at this stage is to disclose any materials, not previously disclosed, which might reasonably be expected to assist the defence of the accused person as disclosed by the defence statement. By virtue of section 9 the prosecutor's disclosure obligations continued thereafter. There is a specific duty to "*keep under review*" the possibility of disclosing further materials (a) which in the prosecutor's opinion might undermine the case for the prosecution or (b) which might reasonably be expected to assist the accused's defence as disclosed in the defence statement.

[83] It is appropriate to consider whether there are differing approaches to disclosure by the prosecution (a) in an appeal against conviction to this court and (b) in a statutory referral of a conviction to this court by the Commission, bearing in mind that the 1996 Act does not apply to either species of challenge and, further, a Commission referral equates to an appeal under section 1 of the Criminal Appeal (NI) Act 1980 *"for all purposes"*, per section 10(2) of the 1995 Act. We consider that the answer is "No." However it is appropriate to add that CCRC referrals can frequently feature material which did not play a part in the prosecution and trial under scrutiny.

[84] The Supreme Court has held that in appeals against conviction there is a common law duty of disclosure which it described as "*limited.*" Notably it so decided in the context of a Commission referral. See *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, per Lord Hughes JSC at [25]:

"…. In the same way, while an appeal is pending, a limited common law duty of disclosure remains. Its extent has not been analysed in English cases, but plainly it extends in principle to any material which is relevant to an identified ground of appeal and which might assist the appellant. Ordinarily this will arise only in relation to material which comes into the possession of the Crown after trial, for anything else relevant should have been disclosed beforehand under the Act. But if there has been a failure, for whatever reason, of disclosure at trial then the duty after trial will extend to pre-existing material which is relevant to the appeal. This was the case, for example in R v Makin [2004] EWCA Crim 1607, to which Mr Southey referred the court, where the complaint was of a failure of disclosure at trial, and disclosure pending appeal was necessary to enable the complaint to be investigated by the court, albeit on examination the court rejected it. A similar result was reached in McDonald v HM Advocate [2008] UKPC 46; 2010 SC (PC) 1 in relation to Scottish law (where the content of the duty of disclosure was then in a transitional state). The Judicial Committee of the Privy Council accepted that if there had been a failure of disclosure at trial, the duty on appeal was to make available what should have been provided at trial as well as material relevant to existing grounds of appeal. However, it roundly rejected the contention that at the appellate stage there arose a duty on the prosecution to re-perform the entire disclosure exercise, so that the appellant could see whether anything might emerge which could be used to devise some additional ground of appeal. Lord Rodger observed at para 71 that that was "an extravagant proposition". He went on to explain why, at para 74:

> *'Not only would such an obligation be unduly burdensome, but it would often be quite inappropriate at the appeal stage. By then, the real issues in contention between the parties will have been focused at the trial. In this new situation material which might have seemed to be of potential significance for the defence before the trial (for instance as weakening the identification evidence of a witness to a murder) may now be seen to have actually been irrelevant (because for instance the accused admitted that he killed the deceased but pleaded self-defence).'*

In other words, what fairness requires varies according to the stage of the proceedings under consideration."

At [30] Lord Hughes noted the Attorney General's Guidelines and, in particular, the requirement (in paragraph 72) to make disclosure of any material coming to light post-conviction casting doubt upon the safety of the conviction in the absence of any good reason to the contrary.

[85] The elaboration provided by Lord Hughes at [32] contrasts the differing situations of a defendant at trial and a defendant on appeal, while acknowledging the engagement of two public interests namely (a) the exposure of any flaw in the conviction rendering it unsafe and (b) the finality of criminal proceedings. Finally, at [42] – [43], Lord Hughes formulated the test of a *"real prospect"* that the post – conviction disclosure pursued pursuit *"… may reveal something affecting the safety of the conviction."* Ultimately the Supreme Court agreed with the Divisional Court's conclusion that the convicted defendant's request for disclosure did not "… *go beyond the simply speculative …"*

> *"In the same way, while an appeal is pending, a limited common law duty of disclosure remains. Its extent has not been analysed in English cases, but plainly it extends in principle to any material which is relevant to an identified ground of appeal and which might assist the appellant. Ordinarily this will arise only in relation to material which comes into the possession of the Crown after trial, for anything else relevant should have been disclosed beforehand under the Act. But if there has been a failure, for whatever reason, of disclosure at trial then the duty after trial will extend to pre-existing material which is relevant to the appeal."*

[86] *Nunn* is binding on this court**.** It draws attention to the distinction between cases referred to the Court of Appeal by the Commission and cases where the convicted defendant attempts to pursue a significantly out of time appeal. As noted in [83] above, where the Commission exercises its statutory power of referral it will usually have deployed its extensive powers to gather fresh material which this court must take into account on the issue of safety applying the applicable legal principles. Where a defendant who has not appealed and is significantly out of time fails to convince the Commission to pursue his case he will invariably face significant hurdles in persuading the court to engage in an investigative exercise on disclosure. This emphasises the critical role of the Commission in dealing with suggested miscarriages of justice.

[87] Finally, we draw attention to the Commission's tailor-made policy on disclosure. This is a published document, available in the public domain. Since we apprehend that there may be limited awareness of the existence of this document we have reproduced in the Appendix to this judgment some of its salient contents. While no issue regarding this policy arises in the present case practitioners should be aware of it and it should inform their interaction with the Commission in

appropriate circumstances. It suffices for this court to highlight that the policy is not law and, in the event of any conflict, it must yield to relevant statutory provisions and common law principles. It also has the potential to feature in judicial review proceedings and clearly has a role to play in the activities and decision making of the Commission.

[88] The review which the court has conducted in [73] – [87] above, coupled with the experiences of the court in the present case and others, recognises that unlike the usual procedure at trial and appeal the court has a separate responsibility to consider the disclosure of confidential material as a result of its receipt from the Commission. It also highlights the desirability of a procedural framework to be applied in every case where a referral by the Commission to this court features a confidential annex or annexes or anything kindred. We consider that henceforth in every such case:

(i) The PPS should, within a period of not more than ten weeks from receipt of the referral, determine which of the confidential materials should be disclosed to the appellant and proceed to do so. A period of these dimensions should provide adequate time and opportunity for any necessary communication between the PPS and the Commission.

(ii) Within a further period of ten weeks the appellant should make any appropriate representations about disclosure to the PPS and a comprehensive response should be made.

(iii) If the processes outlined above do not yield a consensual outcome the appellant should, within a further period of four weeks, make a disclosure application to this court (as in *Holden*).

(iv) If any such disclosure application fails to generate a consensual outcome or the court considers it necessary having reviewed the confidential annex there will be a combined *ex parte* and *inter-partes* listing before this court, with the two elements to proceed sequentially. In any case where the PPS does not seek the *ex parte* element, this should be communicated well in advance.

[89] Finally, we take this opportunity to emphasise that this court will in all cases be the ultimate arbiter of any contentious disclosure issues. Furthermore, the power of the court to determine disclosure issues, proactively or otherwise, is exercisable at any stage of the proceedings.

Conclusion

[90] For the reasons given we conclude that there is merit in the Commission's referral of the appellant's convictions to this court and we allow the appeal accordingly.

APPENDIX –THE COMMISSION'S POLICY ON DISCLOSURE [Extracts]

"…

2. There are strict statutory controls on disclosure by the CCRC, which are set out in sections 23-25 of the Criminal Appeal Act 1995. Parallel to those statutory

controls is the requirement established in *Hickey & Others* [1995] 1 All ER 489 that the CCRC must disclose information acquired in the course of its functions "if it would assist the applicant to make his best possible case". These two factors create the need for a careful assessment of disclosure during every review. The statutory framework is considered in Part I and the general principles relevant to disclosure are considered in Part II of this policy.

3. As a general rule, full disclosure to an applicant and relevant third parties will be made when the CCRC makes a decision about whether or not to refer. All such decisions are taken by a Commissioner, or a committee of Commissioners. Disclosure to applicants and third parties will generally be assessed and authorised at the same time. There are some exceptions to this general rule, which are set out in Part II.

…

Part II: Disclosure The decision in Hickey

34. Although the Criminal Appeal Act 1995 makes provision for the CCRC to disclose, it does not specify what should be disclosed. There is guidance in case law, however. The starting point is *R v Secretary of State for the Home Department ex parte Hickey & Ors (No.2)* [1995] 1 All ER 489: (CCRC: 971478). *Hickey* established a general principle about the level of disclosure to be provided:

> "The guiding principle should always be that sufficient disclosure should be given to enable the petitioner properly to present his best case. That can only be done if he adequately appreciates the nature and extent of the evidence elicited by the [CCRC's] inquiries." (Emphasis added.)

35. In relation to the level of disclosure required, the Court referred to:

> "... the altogether more difficult question of the precise requirements of just disclosure in this area of decision-making. … Does fairness demand that experts' reports, police statements, further statements from central witnesses and so forth be disclosed verbatim or will the gist do? What does the gist, the substance, really consist of? Should disclosure be made only of adverse material or is it necessary to disclose favourable fresh evidence too?"

Redaction, summaries and "the gist"

36. The CCRC will approach each exercise of disclosure on the facts of the particular case, and for that reason it would be extremely difficult to lay down

anything other than general guidelines. As a general rule, all material which supports the decision for referral or non-referral together with any further information that may assist the applicant in making his best case will be disclosed.

37. Redaction, summarising or disclosure of the gist of a document may be undertaken for the practical purpose of simplifying the material to be disclosed. All key points will normally remain, and no information relevant to the applicant's case will be excluded. Such material may be appear in summary form within the Statement of Reasons, or in its amended form within a separate document, depending on which method will best assist full understanding of the reasons for the CCRC's decision and the material to be disclosed.

38. The CCRC may decide to excise material which might assist the applicant's case, but which clearly should not be disclosed on public interest immunity principles: for example, information relating to the identity of a police informant, if to do so would lead to a risk to the informant's safety. This type of situation is examined further in Part III, which considers the circumstances in which disclosure may be withheld.

…

To whom should disclosure be made?

49. Disclosure will normally be made to the applicant or his/her legal representative or both. Much will depend on how the relationship between the CCRC, the applicant and/or his legal representative has developed during the course of the review.

50. The CCRC must be satisfied that any person requesting disclosure is authorised by the applicant to act for him. If disclosure is to be made to anyone other than the applicant or his nominated legal representative, the written authority of the applicant must be obtained.

51. On referral, the CCRC will make disclosure to:

(i) The relevant appeal court; and

(ii) The Crown, e.g. the Crown Prosecution Service (in England and Wales); the Director of Public Prosecutions (in Northern Ireland); or any other relevant prosecuting authority (e.g. HM Revenue & Customs Prosecutions Office); and

(iii) The applicant (and/or legal representative, if relevant).

52. As a general rule, the same information will be provided to all. The exception to this rule arises when sensitive information falls to be disclosed.

53. It may be necessary and appropriate for sensitive material to be provided to the appeal court and Crown only (or, in exceptional cases, only to the appeal court), in a confidential annexe. The court will subsequently decide the issue of disclosure to the applicant (and, if relevant, the Crown).

…

Part III: Non-disclosure General

63. *Hickey* confirms that information may be withheld where the public interest requires it.

64. The decision to withhold any information which is Hickey disclosable will always be made by a Commissioner or a committee of Commissioners.

65. Such a decision will be made clear to the applicant unless there is a compelling reason not to do so. Decision-making Commissioners will record (in the case record or case committee minutes) their reasons for not making disclosure to the applicant.

…

Public interest immunity

68. It is in the public interest that the courts should have full access to all relevant material in a criminal trial. Where the public interest in disclosure is outweighed by the public interest in non-disclosure, however, material can be withheld from court proceedings on the basis that it attracts "public interest immunity" (PII).

69. In *D v NSPCC* [1978] AC 171 HL at 230 Lord Hailsham observed that "the categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop". The CCRC's approach to the usual categories of PII material is as follows.

The identity of informants

70. The rationale behind protecting the anonymity of persons who provide assistance to the police without wishing their identity to be known lies in the public interest of such sources of information and co-operation continuing.

71. If the CCRC has been made aware of the identity of an informant, and it would endanger his safety if he were to be named, the usual duty of disclosure will be overridden by the principles of public interest immunity.

72. Even confirmation of the mere fact that there was an informant could put an informant's safety at risk. In such cases particular care will be exercised to ensure

that nothing is disclosed by the CCRC that might lead indirectly to the conclusion that there was an informant, or to the identity of that informant. (ii) Police reports, manuals and methods

73. The reports of investigating officers into complaints against the police are generally withheld in litigation. The rationale is that disclosure would have an "undesirably inhibiting" effect on investigating officers' reports.

74. Details of police observation posts will generally be withheld. The rationale is that this may identify a person who has allowed his premises to be used for surveillance, creating a risk to his safety; and if the location is compromised it cannot be used again.

75. Details of police investigative or surveillance methods will generally be withheld on the basis that it would be contrary to the public interest for such information to go into the public domain. If such information became known, counter measures could be developed.

Files held by Social Services departments in child care proceedings

76. It is well established that various categories of documents and records maintained by Social Services and organisations such as the NSPCC in relation to children are subject to PII. This is justified on the basis that those who record in such files may be inhibited if disclosure were to be routinely made, and this could have an adverse effect on the welfare of children. (iv) PII information created in the exercise of the CCRC's functions

77. The CCRC may withhold disclosure of its own material on the basis of PII. Requests are sometimes made of the CCRC for items such as the full reports of investigating officers, case committee minutes, internal memoranda and case records which may contain sensitive material. Each situation will be considered individually, and the CCRC's consideration will include application of the following principles:

(i) The public interest in full disclosure will be weighed against the public interest in non-disclosure;

(ii) The CCRC will only claim PII very sparingly;

(iii) PII will not be claimed solely on the basis of any potential embarrassment to the CCRC.

Further examples of PII material

78. Information pertaining to national security, diplomatic relations and international comity; and communications to and from ministers and high level government officials regarding the formulation of government policy. The reasons

why such information is generally subject to PII and withheld in the public interest are self-evident. When can PII material be disclosed by the CCRC?

79. The fact that information may be protected from disclosure by PII by a Court or another authority does not mean that it cannot be disclosed by the CCRC. First, PII material might assist an applicant in making his best case, in which case disclosure must be considered. Second, relevant PII material may need to be disclosed on referral. Extreme caution should be exercised, however, in any situation where PII material may need to be disclosed. Two particular situations fall to be considered:

(i) Information or material already certified as PII by a Court.

(ii) Information or material obtained in the course of a CCRC review which is sufficiently sensitive to justify withholding disclosure on a PII basis.

80. In the event of a referral, the CCRC will disclose PII material to the appeal court in a confidential annexe. It then becomes a matter for the court as to how the material is handled. In this situation it will not generally be necessary to seek the view or consent of the "owner" of the material or the judge who made the original PII order.

81. In the event of a non-referral, the situation becomes more complex due to the need to put the applicant in a position where he can make his best case in response to a provisional decision not to refer.

82. Strictly speaking, a PII ruling applies to the proceedings in which it is made, and only binds the parties to those proceedings. As time goes by the factors which made it contrary to the public interest for particular evidence to be disclosed might change. If the body which originally asserted PII no longer wishes to assert it, and if the public interest is not in jeopardy, it may not be necessary to revert to the judge who originally made the order.

83. An initial approach will need to be made to the "owner" of the material to ascertain whether the material is still regarded as sensitive. This will generally remove the need to approach the judge who made the original order, although the question of whether the judge should be approached (or notified as a matter of courtesy) will always be considered.

84. Where it is clear that the material is still sensitive, or consent from the "owner" is not forthcoming, it may be necessary and appropriate to make an approach to the court which made the original order before PII material can be disclosed.

85. Where the CCRC considers that disclosure should not take place but nonetheless concludes that the material supports an argument that there has been a

miscarriage of justice the CCRC may decide to seek the advice of the Court of Appeal under section 14(3) of the Act.

86. If the CCRC obtains sensitive information in the course of its review other than from a public body, for example from a witness or from a private body providing information on a voluntary basis, public interest considerations still apply. A witness may assert that another person has acted (formally or informally) as an informant to the police. Such allegations may be made anonymously. Such information may be true or it may be untrue, but particular consideration will be given to the effect the information might have if it were to be disclosed. It may be appropriate to seek to discuss the matter with the person who has provided the information, but it is the public interest and not the desire of the provider which prevails.

87. If a statute provides that material should not be disclosed, the CCRC is bound to have regard to any such restrictions.