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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: OHA11086

Delivered: 16/10/2019

IN THE CROWN COURT SITTING AT BELFAST

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R

-v-

IVOR BELL
—

**Application to Exclude
the Boston Tapes Evidence**
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O'HARA J

[1] The accused, Ivor Bell, was charged with two offences of soliciting the murder in 1972 of Mrs Jean McConville. On the first charge he was accused of encouraging persons not before the court to murder her contrary to Section 4 of the Offences Against Person Act 1861 and common law. On the second charge he was accused of endeavouring to persuade persons not before the court to murder her, again contrary to Section 4 and common law.

[2] The evidence on which the prosecution case relies is what it asserts is a confession made by Mr Bell to Mr Anthony McIntyre in 2004. It is contended by the defence that the circumstances in which Mr Bell confessed to Mr McIntyre are such that the evidence of that confession should be excluded under Article 74(2) and Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

[3] It is necessary to set out the background to this case in order to put the application to exclude the evidence in context.

Background

[4] Mr Bell is now 82 years old and suffers from vascular dementia. He is not fit to stand trial. Accordingly the issue for the jury at the end of this hearing will be whether he did the acts alleged by the Crown, not whether he is guilty of the offences charged. That difference is not something which affects the ruling I have to give. The question of what evidence is admissible is not affected by this being a hearing of the facts.

[5] The evidence before the court is that in or about 2000 Boston College, Massachusetts agreed to develop an oral history project, the Belfast Project. The College entered a contract with a journalist Mr Ed Moloney. Under the terms of that contract it was agreed that he would be the Project Director. As part of this role he was to require interviewers and interviewees to sign a confidentiality agreement forbidding them from disclosing the existence or scope of the project without the permission of the College.

[6] Mr Moloney's agreement with the College also provided that each interviewee was to be given a contract guaranteeing to the extent American law allows the conditions of the interview.

[7] The project employed researchers to interview former members of the IRA and the UVF. One of those researchers, the one who interviewed Mr Bell, was Mr McIntyre.

[8] The interviewees were given contracts to sign called donations agreements. The one signed by Mr Bell, assuming he did in fact sign one, has not been traced but on the evidence available it is clear that it did not comply with the terms of the College's agreement with Mr Moloney. Instead all of the interviewees appear to have agreed to the following:

"Access to the tapes and transcripts shall be restricted until after my death except in those cases where I have provided written approval for their use following consultation with the Burns Librarian Boston College. Due to the sensitivity of content the ultimate power of release shall rest with me. After my death the Burns Librarian of Boston College may exercise such power exclusively."

[9] The terms of this agreement are immediately striking because they omit the critical clause that control or confidentiality is protected but only "to the extent American law allows". In other words the interviewees did not control access to the tapes or transcripts to the exclusion of all others: their control could be overridden by the law of the United States.

[10] On the available evidence that fact was not known to any of the interviewees involved in the Belfast Project including Mr Bell.

[11] The existence of the Belfast Project became public knowledge in a number of ways. In particular it was revealed by the publication in 2010 of a book "Voices from the Grave, Two Men's War in Ireland" by Mr Moloney. That book was based on interviews with Mr Brendan Hughes and Mr David Ervine, one a Republican and the other a Loyalist who had both died. The introduction to the book was written by

professors from Boston College who were involved in the Project, Robert O'Neill and Thomas Hachey.

[12] In addition news reports emerged in which Ms Dolours Price, an interviewee who was still alive, revealed that she had given interviews for a project identifiable as the Belfast Project and that she had admitted to being involved in the murder and subsequent hiding of the bodies of four victims of the IRA. These were reported to have included Mrs Jean McConville.

[13] These revelations triggered applications to compel the College to release tapes and associated documents from interviews with Mr Hughes, Ms Price and any other interviewee with information about the death or abduction of Mrs McConville.

[14] Mr Moloney and Mr McIntyre were joined in court proceedings involving Boston College in the United States and were unable to persuade the relevant courts that the documents and tapes should be withheld from the Police Service of Northern Ireland.

[15] On receipt of the tapes the PSNI interviewed the defendant Ivor Bell. The jury has heard relevant extracts from interviews 11 and 42 in which statements were made which amount to a confession to involvement in Mrs McConville's murder, on the Crown's case.

[16] One issue before the jury is whether the tapes are in fact of conversations with Mr Bell. In the documentation the interviewee is anonymised as Z. For the purposes of this ruling I will assume that it is in fact Mr Bell because:

- (i) An expert witness Mr Hirson has expressed the opinion that it is likely to be Mr Bell speaking.
- (ii) That evidence is supported by multiple additional and strong pointers to Mr Bell including:
 - Z refers to being divorced from his first wife. Mr Bell was divorced in 1985.
 - Z refers to being arrested and held in custody on foot of allegations made by Beano Lean which were then retracted - this happened to Mr Bell in 1983.
 - Z refers to himself and Mr Gerry Adams being in prison - it is agreed that Mr Bell and Mr Adams were in prison together and that they were convicted together in 1975 for Mr Adams escaping from lawful custody with Mr Bell's assistance in 1974.

- There is a reference to Z's brother Billy - Mr Bell has a brother christened William.
- There is a series of references by Z to himself as "Ivor".

In short the evidence that Z is Mr Bell is overwhelming, though if this case goes to the jury that will be a matter for them to decide.

[17] Neither Mr Moloney nor Mr McIntyre assisted with police enquiries nor did they give evidence at this trial. They did not therefore give any explanation for the form of the guarantees provided to the interviewees or any of the other troubling aspects of the Belfast Project.

The application to exclude the tapes and transcript

[18] On the prosecution case the exchanges between Mr McIntyre and Mr Bell during interviews 11 and 42 amount to a confession by Mr Bell. For the purposes of this ruling it is immaterial what offences Mr Bell admits to, if any - the point is that it is a confession, according to the prosecution, which the prosecution want the jury to consider.

[19] The admissibility of confessions is largely governed by Article 74 of the Police and Criminal Evidence (Northern Ireland) Order 1989. Article 74 paragraph (1) provides:

"In any criminal proceedings a confession made by an accused person may be given in evidence against him 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 this Article."

[20] Article 74(2)(b) then provides:

"If, in any criminal proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

- (a) by oppression of the person who made it; or
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.”

[21] For Mr Bell, Mr Macdonald QC with Mr Hutton contends that in this case the false promise of confidentiality was so absolute that Mr Bell wrongly understood that nothing would be revealed of what he said until after he died, unless he consented, and that therefore there would be no consequences to him from what he said. To put this within the statutory wording, what was said or done was that he was given the false guarantee following which and in consequence of which he said what he did about Mrs McConville’s murder and subsequent disappearance.

[22] Mr Macdonald further contends that the false promise which led Mr Bell to talk was likely in the circumstances existing at the time to render unreliable any confession.

[23] In support of this proposition Mr Macdonald highlighted a number of points including:

- On the available evidence Mr McIntyre is hostile to the peace process, to the Good Friday Agreement and personally to Mr Adams.
- Mr Bell shares those views and that hostility.
- This makes it all the more likely that allegations will be made against Mr Adams to damage his reputation.
- The tapes clearly show Mr McIntyre leading Mr Bell to speak against Mr Adams.
- The tapes clearly show Mr Bell’s hostility to Mr Adams
- At some points there is discussion off tape which leads to a version of events being changed on tape to the detriment of Mr Adams. Specifically there is a change of position by Mr Bell on whether Mr Adams approved of or was involved in the decision to “disappear” Mrs McConville after she was murdered.
- As conceded by Detective Chief Inspector Montgomery Mr Bell said some things in his interviews which were at least wrong (in relation to the Four Square Laundry) if not wholly untrue (the suggestion that a brigadier’s daughter had been killed in a Crumlin Road massage parlour).

[24] In this context Mr Macdonald says Mr Bell could speak dishonestly, unreliably, with exaggeration or just incorrectly because there would only be scrutiny of what he had said after he died.

[25] That being so, it is contended that the prosecution simply cannot prove beyond a reasonable doubt that the confession was not obtained as a direct result of the false promise or guarantee notwithstanding that it may be true. On that analysis the tapes should be ruled inadmissible.

[26] For the prosecution Mr Murphy QC with Mr Russell contends that contrary to the defence submission the guarantee of confidentiality would have liberated Mr Bell to tell the truth as his legacy. He challenged the suggestion that the false promise was likely to lead to lies being told by Mr Bell to blacken Mr Adams name even if in doing so he implicated himself in crimes which he had not actually committed.

[27] Mr Murphy strongly submitted that the issues raised under Article 74(2)(b) were more properly for the jury to consider and that when they came to do so all of the arguments and points made for Mr Bell would be considered by the jury. This would include their consideration of the hearsay evidence which I allowed the jury to receive to the effect that Mr Moloney was tainted by being a money grabber and Mr McIntyre by being a dissident.

Discussion

[28] The words in Article 74(2)(b) “likely to render unreliable any confession” do not require the defence to establish a case that the confession was probably unreliable. In this context “likely” means less than that.

[29] And the issue at this stage is not whether the confession was true because the provision states “notwithstanding that it may be true”.

[30] Rather at this point the question is whether any confession made by Mr Bell in consequence of the false guarantee given to him was likely to be rendered unreliable.

[31] In my judgement Mr Bell may well have said what he did as a direct result of the false guarantee of protection. More than that, this so-called guarantee came from someone who was not in any way a professional or neutral interviewer. Mr McIntyre had his own agenda against Mr Adams, the peace process and the Good Friday Agreement. That is clear from the tapes. He is also someone whose work was not being properly scrutinised or verified. The Oversight Committee which was supposed to review and supervise the Belfast Project was never established. Another Professor O’Neill, Professor Kevin O’Neill, who raised concerns in or about 2001 about the manner of interviewing was in his words “frozen out” of further involvement.

[32] Among the various authorities I was helpfully referred to by counsel is *R v Proulx* [2001] 1 AER 57. In his judgment at paragraph [47] dealing with the equivalent provisions in the legislation applicable in England and Wales Lord Justice Mance stated:

“Section 78 of PACE calls for the exercise of overall judgment or discretion. Section 76 of PACE although it includes some judgmental elements involves an essentially fixed scheme. Once it is represented to the court that the confession was or may have been obtained as stated in Section 76 then it is for the prosecution to prove if it can that it was not so stated. And if the prosecution fails to prove this then the confession must be excluded.”

[33] I agree entirely with Mr Murphy’s submission that what Mr Bell said in the interviews might be true. I also agree that he might have felt liberated and free to tell the truth and to leave as his legacy his version of the Troubles. The difficulty is that he might also have felt free to settle scores with his former colleagues who he believed had betrayed their cause. He may have felt free to lie, to distort, to exaggerate, to blame and to mislead. The prosecution simply cannot prove beyond a reasonable doubt that whether it is true or not the confession was not the consequence of the false guarantee. I find that the confession is likely to be unreliable in the sense that it may well be unreliable as a direct result of the circumstances in which it was improperly and dishonestly induced by Mr McIntyre working under the auspices of the Project Director Mr Moloney in conjunction with Boston College. In the circumstances I rule that the tapes and transcripts are inadmissible.

Article 76

[34] In case I am wrong in my finding under Article 74(2)(b) I turn to consider whether the confession evidence should be excluded under Article 76 which provides as follows:

“In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

[35] This provision requires a broader consideration of fairness than the specific narrower terms of Article 74. For the prosecution Mr Murphy relied by analogy on *R v Mawhinney* [2012] NICA 27 in which the Court of Appeal dismissed an appeal against a conviction by a jury of murder. In that trial Lord Justice Weir had declined to exercise his discretion under Article 74 or under Article 76 to exclude evidence of interviews with the police or a confession by the defendant to his second wife that he

had murdered his first wife. The confession to the second wife was made, allegedly, when he was under the influence of alcohol.

[36] I appreciate that I was referred to this authority in the context of a submission that like Lord Justice Weir I should leave all the multiple issues about the confession on the Boston tapes to the jury.

[37] However, this present case could not be further removed from that scenario. The factual scenario here is almost certainly without precedent. Mr Bell was guaranteed that whatever he said would remain confidential. As I have already indicated above this gave him freedom to speak the truth but it also gave him freedom to lie, to distort, to exaggerate, to blame and to mislead. The person interviewing him had a clear bias and was “out to get” Mr Adams and others. Mr Bell shared that perspective on recent Republican history and its leaders.

[38] In these circumstances I am satisfied that the only proper course is to exclude the tapes and transcripts under Article 76 because having regard to all the circumstances which I have set out above the admission of this tainted evidence would have an incurable adverse effect on the fairness of the proceedings.

[39] In conclusion I want to add the following short comments. The McConville family suffered the murder of their mother and the hiding of her body which was not discovered for 30 years. For more than 25 years the IRA falsely denied any involvement in her murder. That lie greatly aggravated the already huge loss which the family suffered. It is entirely natural that they, perhaps more than most victims of violence here, want the perpetrators to be held to account no matter how long that takes.

[40] However, people cannot be held to account and held to be responsible in a criminal court without reliable evidence being gathered and put before that court, admitted in evidence and then accepted by a judge or jury as proving the facts beyond a reasonable doubt.

[41] When Professor Kevin O’Neill gave his evidence he said that even though the tapes he listened to in 2001 were flawed they were still valuable. Their value lay in explaining how young people in Northern Ireland got caught up in violence and did what they went on to do. However he believed that the Z tapes 11 and 42 which are relevant to this case and which he only heard in the context of this case were much more compromised than that. This was due to the clear bias shown by the interviewer Mr McIntyre as he led and encouraged Mr Bell. Even though Mr Bell did not inevitably follow that lead the invitation was there to do so. The Professor’s analysis seems persuasive to me. When he uses the word compromised he is really questioning the reliability of what Mr Bell said.

[42] The tapes will become public with the end of this trial. Everyone who reads about them can form their own view, informed or otherwise, on the many issues

they raise. But in the context of a criminal trial they are just not reliable or fairly obtained evidence.