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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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v

DAVID JAMES FRANCIS SMITH
MICHAEL LAWRENCE SMITH

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Before: Treacy LJ, O'Hara J & Huddleston J

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TREACY LJ ***(delivering the Judgment of the Court)***

Introduction

[1] Neil Connor QC and Michael Chambers BL appeared for the Prosecution; for the Applicant David Smith – Tim Moloney QC and Sean Devine BL; and for the Applicant Michael Smith – Frank O'Donoghue QC and Jon Paul Shields BL. We are grateful to all counsel for their helpful oral and written submissions.

[2] On 8 November 2018, the two applicants, who were jointly charged with the murder of Stephen Carson, were unanimously convicted by jury of the murder. The Single Judge refused their applications for leave to appeal against their convictions and they have renewed that application before this court. David Smith also renewed his application for leave to appeal against his tariff of 20 years.

[3] The grounds of appeal in the case of Michael Smith were essentially twofold: first, that the Trial Judge erred in admitting the identification evidence of Naomi Smyth ['the admissibility challenge'] and secondly, that the verdict of the jury for murder was against the weight of the evidence and that the height of the evidence permitted only a verdict of manslaughter and not murder.

[4] David Smith appealed against conviction for murder on the grounds that the Trial Judge wrongly admitted hearsay evidence.

[5] At the conclusion of the applicants' submissions the court indicated first, in respect of David Smith, that it did not require to hear the Prosecution in respect of David Smith's appeal against conviction or in respect of his appeal against sentence.

[6] In the case of Michael Smith, the court indicated that we did not need to hear the prosecution in respect of the contention that the evidence permitted only a verdict of manslaughter and not murder. We did indicate that we required to hear the Prosecution in relation to the first ground. At the conclusion of the prosecution submissions on the admissibility challenge, we announced our decisions rejecting both appeals against conviction and sentence and indicated that we would give our reasons later, which we now do.

[7] Before turning to the grounds of appeal, we set out the factual background which has been helpfully summarised in the Prosecution Skeleton Argument. No significant issue was taken by the parties in respect of this summary and we are content to adopt it, subject to some small amendments.

Background

[8] On 25 February 2016 Stephen Carson was in his home with his partner Naomi Smyth and his 9 year old child. At that time, Mr Carson resided at 77 Walmer Street, which is located just off the Ormeau Road, adjacent to Sunnyside Street.

[9] At around 10.40pm, three male intruders entered the property. Ms Smyth and the child were seated in the living room, Mr Carson was at the rear of the property. The intruders asked where the "tout" was. They threatened Ms Smyth and the child and one of the men sprayed Ms Smyth's face with some form of pepper spray. One of the men was carrying a hammer and one of the males pulled out a sawn-off shotgun from under his coat.

[10] The gunman moved to the rear of the property and located Mr Carson hiding in the toilet. There was evidence he was holding the door shut. By that stage Mr Carson was on the phone to Police. The male with the gun then shot through the door of the toilet, just above the door handle, and struck Mr Carson directly on the left side of his head killing him.

[11] He was shot at such short range that the plastic wad within the cartridge, which holds the shot together for a short time after firing, was still intact and was subsequently recovered from the head of Stephen Carson. The men then left the property.

[12] The jury heard evidence that there was a long history of bad feeling between Michael Smith and the deceased stemming from an incident in 2010 when Mr Carson was involved in an incident where Michael Smith was seriously assaulted.

[13] The jury also heard evidence that David and Michael Smith had threatened Mr Carson in recent times, contributing to his decision to relocate to the Ormeau Road. Counsel for David Smith at trial introduced that Stephen Carson had blamed the Smiths for previously murdering his friend Ciaran McManus, who was shot dead in 2012.

[14] In the early hours of 27 February 2016, roughly 25 hours after the murder occurred, Police entered a flat on the Springfield Road. This was the home of Francis Smith who was the cousin of David and Michael Smith. Michael Smith, was present and was arrested. In the course of a search of the flat, police located a black holdall at the bottom of a wardrobe in the spare room. Inside the holdall was a brown leather pouch containing a quantity of shotgun cartridges. They also found a rucksack at the same location. This item was searched and found to contain a sawn-off shotgun and a hammer.

[15] The sawn-off shotgun found was examined forensically and test fired. Comparison of the firing marks and striae on the wad recovered from Stephen Carson's head with wads that were test fired allowed a forensic scientist to conclude that it was the same weapon which had been used to kill Stephen Carson.

[16] The shotgun cartridges found along with the sawn-off shotgun were identical in manufacture to the cartridge used to murder Stephen Carson.

[17] David Smith was arrested at his home on Derryveagh Drive, roughly 24 hours after the murder occurred. He had with him the car keys to his Daewoo Kalos vehicle, which had a Limerick registration plate and a missing hubcap at the front off-side.

[18] Police enquiries discovered that Michael Smith purchased a disposable "burner" phone from Castlecourt a short time before the murder. It was accepted by his counsel during the trial that Michael Smith had purchased this phone.

[19] Police carried out an analysis of CCTV on various cameras throughout Belfast. The CCTV evidence showed that at around 6pm on the night of the murder, David Smith got out of his Daewoo Kalos vehicle, having driven to Colinview Street which is beside Francis Smith's flat on the Springfield Road.

[20] CCTV showed that Michael Smith and David Smith were together, along with their cousin Francis, at Francis's property on the Springfield Road at 6.40pm on the evening of the murder and all three men left the flat and walked into Colinview Street. At 7.03pm, the Kalos vehicle was picked up on CCTV located on the Springfield Road travelling country bound on the Springfield Road.

[21] The Daewoo Kalos was then shown at 9.53pm to be on Sunnyside Street (roughly 200 yards from the scene of the murder), just off the Ormeau Road heading towards the scene of the murder.

[22] At 10.44pm, 3 or 4 minutes after the murder had taken place, the Kalos was picked up on the same CCTV on Sunnyside Street, this time heading away from the scene of the murder. It was then picked up at Stranmillis roundabout and Dunmurry Lane heading in the direction of West Belfast.

[23] The Kalos vehicle was also picked up by Automatic Number Plate Recognition (ANPR) technology on the Stranmillis Embankment (roughly 500 yards from the scene of the murder) at 9.51pm heading in the general direction of the murder and at 10.44pm heading away from the general direction of the murder.

[24] At midnight, the Daewoo Kalos pulled up at Colinview Street and David Smith exited from the driver's side door. He was wearing completely different clothes from those he had been wearing when at the same location at 6.40pm. He entered the Kashmir Bar and left a few minutes later having purchased alcohol.

[25] Cell site analysis on the burner phone purchased by Michael Smith showed that the movement of that phone was consistent with the movement of the Daewoo Kalos car, from the Springfield Road area at 6.40pm to vicinity of the murder where, at 10.03pm and 10.04pm it was using cell sites located on the Ormeau Road and Stranmillis embankment.

[26] Between 10.05pm and 10.53pm the phone was inactive and the explanation of the expert witness for this was that the phone was most likely turned off. At 10.53pm the phone was switched back on and was utilizing cell sites in West Belfast, again consistent with the movement of the vehicle.

[27] VIPER identification procedures were carried out with Naomi Smyth. She positively identified Michael Smith as the gunman and David Smith as the man armed with a hammer who sprayed her face.

[28] The defendants were interviewed by police in February 2016. Michael Smith refused to answer police questions. David Smith mainly refused to answer police questions but denied involvement in the offence and disputed his identification by Naomi Smyth.

[29] In April 2018 (26 months after his PACE interview), David Smith lodged a Defence statement in which he claimed to have an alibi for the murder. He said he had been drinking heavily and taking drugs on the night of 24 February 2016 and had woken up in his house on the morning of 25 February 2016.

[30] He named three other individuals who were in his house with him. He said he went to the Springfield Road area and met his cousin Michael Smith. He stated that he then went to a house in Cavendish Street where he got into a fight with a man called Jimmy O'Neill. He then had an argument with Michael Smith and left and returned to his home at Derryveagh Drive.

[31] He stated that he only left to go to the Kashmir Bar to pick up alcohol. He stated that the people present in the house with him were Tony Richmond, Rachel Halliday and Mark McCrudden.

[32] This account was provided over 2 years after the murder and interview of David Smith.

[33] At trial, David Smith gave evidence broadly in accordance with this account though he claimed that up to 8 people would be able to vouch for his whereabouts. Mr Smith was asked why he had not given this account to the Police when he was interviewed and he claimed that he had been advised by his solicitor to make no comment to all questions even though he had an alibi. He also said that he had not given the account because he was too hungover at the interview.

[34] No other witnesses were called on behalf of David Smith. When asked if he was going to call any of his alibi witnesses he claimed that he did not know. None of these alibi witnesses were called.

[35] Michael Smith did not give evidence.

Evidence against the Applicants

[36] The evidence against the Applicants was compelling and the contention that the height of the evidence in the case of Michael Smith permitted only a verdict of manslaughter is untenable. In summary the evidence included that:

(i) David and Michael Smith were identified by Naomi Smyth as two of the three murderers/intruders;
(ii) Both David and Michael Smith had threatened Stephen Carson in the past and bore him ill will. Counsel for David Smith introduced that Stephen Carson had blamed the Smiths for previously murdering his friend Ciaran McManus, who was shot dead in 2012;
(iii) Michael Smith was found in possession of the murder weapon 25 hours after the murder occurred;
(iv) Michael Smith was found in possession of ammunition, identical to that used in the murder, and a hammer 25 hours after the murder;
(v) Michael Smith's burner mobile phone was in the vicinity of the murder 35 minutes before it occurred and was turned off while the murder was committed;

(vi) David Smith's vehicle travelled from West Belfast to the scene of the murder and he was in the company of his cousin Michael Smith at 6.40pm;

(vii) David Smith's vehicle was observed leaving the scene of the murder 3-4 minutes after it occurred;

(viii) The movement of David Smith's vehicle mirrored the movement of Michael Smith's phone suggesting they were travelling together;

(ix) David Smith was observed driving his vehicle on the Springfield Road, one hour and twenty minutes after the murder occurred, wearing completely different clothing than he had been wearing earlier in the evening;

(x) David Smith put forward an alibi over two years after the murder occurred, he then did not call any evidence in support of his alibi. For David Smith's account to be correct it would mean that someone else must have used his car to commit the murder, then returned his car to his house immediately after the murder so that David Smith could drive it to the Springfield Road at midnight. It would then mean that Naomi Smyth's VIPER identification was mistaken or deliberately invented but that fortunately for her, the person she wrongly identified happened to have the double misfortune that his vehicle was used to commit the murder. Another unfortunate coincidence would be that Michael Smith, whose company David Smith had been in that evening and whose phone mirrored the movements of the car, happened then to be found in possession of the murder weapon;

(xi) The jury was entitled to draw an adverse inference against Michael Smith's failure to give evidence.

[37] As noted earlier, the first and primary ground of attack in the case of Michael Smith related to the decision of the Trial Judge to admit the identification evidence of Naomi Smyth. The application to exclude the evidence was grounded on the alleged failure of the police to comply with the relevant portions of the PACE Code on identification. Paragraph 7 of Annex A of the PACE Code of Practice states as follows:

> "The suspect or their solicitor, friend, or appropriate adult must be given a reasonable opportunity to see the complete set of images before it is shown to any witness. If the suspect has a reasonable objection to the set of images or any of the participants, the suspect shall be asked to state the reasons for the objection. Steps shall, if practicable, be taken to remove the grounds for objection. If this is not practicable, the suspect and/or their representative shall be told why their objections cannot be met and the objection, the reason given for it and why it cannot be met shall be recorded on forms provided for the purpose."

[38] It was common case between the parties that in order to persuade a court that evidence be excluded because of a breach of the PACE code, it is necessary to establish that the breach or breaches were "serious" and "substantial" and that the defendant was placed at a "substantial disadvantage", see judgment of Kerr LCJ in *R v Bothwell* [2008] NICA 7. The focus of the court should be on the seriousness of the unfairness that arises as a result of the breach, not the seriousness of the breach itself (see Blackstone 2020 F2.30).

Statement of Agreed Facts

[39] The breach of the Code that is alleged is that Philip Breen, solicitor for Michael Smith, was not given a "reasonable opportunity" to view the images used in the VIPER procedure before those images were shown to Naomi Smyth, the ID witness in the case.

[40] A statement of agreed facts relating to Mr Breen being unable to view the set of images chosen for the purposes of the identification process was read to the jury. It is reproduced below:

> "1. Philip Breen of Breen Rankin Lenzi is the solicitor representing Michael Smith and was so at the time when Michael Smith was interviewed at Musgrave Street Police Station and when the identification procedure took place on 28 and 29 February 2016.
>
> 2. On 28 February 2016 Mr Breen made an arrangement with police to attend at the VIPER identification suite on 29 February 2016 at 1.00pm. The purpose of his attendance was to view the images that the Police intended to use in relation to Michael Smith for an identification procedure. This is in accordance with a recognised procedure and entitles the solicitor to make representations to the Police about the images to be used, including removing certain images. These representations are made before any identification witness is shown the images.
>
> 3. On the morning of 29 February 2016 Mr Breen was attending at the interview suite in Musgrave Street Police Station. Due to a misunderstanding between the Police in the interview suite and Mr Breen, Mr Breen believed that the viewing was to take place at 3.00pm, not 1.00pm. Accordingly, he did not arrive at the VIPER suite until shortly before 3.00pm.

4. When he arrived at the VIPER suite, the police in the VIPER suite (who were different police officers to those in the interview suite) explained that they had been expecting Mr Breen at 1.00pm. Mr Breen explained the misunderstanding and requested sight of the still images prior to any identification witness seeing them.

5. The Police in charge of the VIPER suite refused this request.

6. Accordingly, Naomi Smyth participated in the identification procedure without any viewing in advance of the images by Mr Breen."

Voir Dire

[41] The Trial Judge conducted a *voir dire* in relation to the admissibility of the impugned identification evidence. During the course of the *voir dire*, Mr Breen, who is a very experienced criminal solicitor, gave evidence on oath and was cross-examined by the prosecution. He was rightly described by the Trial Judge as:

> "a vastly experienced criminal defence solicitor who has in depth knowledge and practical experience of the workings of both the Serious Crime Suite and the PACE suite including, adjacent to it, the VIPER suite at Musgrave Street PSNI."

[42] Two witnesses were called by the prosecution, Constable McNally and Inspector Cairns. It was just before Cairns was called that the prosecution disclosed to the defence the handwritten note from Inspector Tener which is found at pp.169-170 of the Book of Appeal.

[43] Although the disclosure was late and should have been made earlier, it appears that there may have been extenuating circumstances arising from the retirement of the officer which explained the delay in its disclosure. No point is taken by the applicant about the delay in the provision of this note. The material part of the note states as follows:

> "Advised Const Pye that if the solicitor attended witness viewings at 3pm and requested the V2 viewing after that it was too late as the witness was there and in the circumstances he has had his opportunity and failed to take it. Also it would be unfair to delay the witness viewings and if he raises any objections we would not have time to address them. Const Hanna confirmed

Tracey Lenzi verbally informed of V2 timings on 28/2/16
and stated somebody would attend."

[44] The Prosecution had sought to rely on the fact that Mr Breen had failed to reveal details of any objection that he would have raised following his viewing of the stills. In their Skeleton Argument furnished during the *voir dire*, the prosecution referred to the following exchange of correspondence:

"(i) Letter the PPS wrote to Mr Breen

Dear Sirs
I acknowledge receipt of your correspondence.
Please confirm that you are not relying on any legal authority in support of this application.
Please also set out the objections that Mr Breen would have had to the images used in this process, as this is not clearly set out in the argument served.
I look forward to hearing from you.
Yours faithfully
Lynne Carlin

(ii) The following reply was received:

Dear Sirs
Please note we are not relying at present on any legal authorities.
Secondly we are awaiting a copy DVD of the capture and are not in a position to provide any further response at present.
Philip Breen"

[45] In fact, the solicitor had made a contemporaneous note of his observations when he first had the opportunity to view the stills. His notes were produced in evidence. They read:

"1. Tan face and hair too dark

2. Older and clean shaven

3. Older

4. Clean shaven

5. Suspect

6. Too old and hair too dark

7. Clean shaven

8. Hair too dark and clean shaven

9. Hair too tidy, too old and clean shaven"

[46] Having viewed the images twice in court, having heard the evidence of Mr Breen and the two police officers called on behalf of the prosecution and with the benefit of detailed written and oral submissions, the experienced Trial Judge concluded as follows:

> "Having viewed the images with a keen awareness of the objections raised on behalf of each defendant, I can find no evidence to support a conclusion that the physical appearance of any of the other persons portrayed in either set of images contravenes the requirement of paragraph 2 Annex 2. Nor can I find any basis in the submission that the manner of dress of the respective suspects singles either out from the other portrayed in their respective set of images, so as to impact upon, still less undermines the stated objects at paragraph D.1.2."

He therefore decided to admit the evidence.

[47] During the trial before the jury, evidence was given of the impugned identification. Although there was cross examination regarding the procedure that was adopted by the police and there was the agreed statement of facts read to the jury, there was no cross examination regarding the actual images that were used. It is therefore clear that the defence did not call any evidence before the jury or cross-examine any prosecution witness in an attempt to demonstrate before the jury that any unfairness could have resulted from the use of the actual images used.

Furthermore, in their closing speech the defence did not, it was confirmed to us, suggest that the actual images used had resulted in any unfairness.

[48] In his charge to the jury, the Trial Judge directed the jury in the following terms in relation to the fact that Mr Breen had not previewed the images used before they were shown to the witness:

> "… the procedure set out in the relevant code of practice which governs these matters was not complied with in this instance, but that was not due to any intentional breach. There is a potential impact upon the fairness of the proceedings. But you have seen the images chosen and you are in as good a position as anyone else,

> including a solicitor, to assess whether any unfairness has been occasioned in this case."
> [Transcript p.12 Lines 5-9 (7 November 2018)]

Discussion

Was there a breach of the Code?

[49] Against that background, we turn to consider the first issue - whether or not there was a breach of the provision of the code set out at para [37] above.

[50] Mr O'Donoghue submitted that, inconsistently with his ruling on the *voir dire,* the Learned Trial Judge (LTJ) himself expressed a view to the jury in his summing up to them that there had indeed been a breach of the code. The passage he relies upon is as follows:

> "Thus, the procedure set out in the relevant Code of Practice which governs these matters was not complied with in this instance, but that was not due to any intentional breach".

[51] Mr O'Donoghue speculates that:

> "… the LTJ may well have determined the issue of a breach of the code by reference to whether or not there was deliberate manipulation or an attempt to manipulate the process so as to disadvantage the Applicant.
> …
> Such reasoning, if it is to be implied into the ruling is incorrect. … The solicitor was prevented from viewing the images in advance of them being shown to the witness. That is the end of the matter. …"

[52] The prosecution on the other hand contend that the Defence had been given a "reasonable opportunity" to view the images. It notes that the VIPER Procedure is carried out by a team of officers who are completely separate from the investigation team. It argues that this team complied with the PACE Codes because it "… made an arrangement with Mr Breen, solicitor for Michael Smith, that he could attend to view the images to be used … at 1pm" on the day the identification took place [29/2/16]. On that day, just before this pre-viewing was due to take place, Mr Breen had a chance encounter with Detective Sergeant Cairns who was not a member of the VIPER team. The D/S knew the VIPER ID process was happening at 3pm and informed Mr Breen accordingly. D/S Cairns was referring to the actual VIPER procedure with the witnesses as opposed to the pre-viewing procedure by the solicitor. However, on foot of this exchange, Mr Breen left the station and returned just before 3pm expecting to pre-view the images then. Meanwhile, the VIPER team

had assumed that the solicitor had simply not turned up for the pre-view at 1pm as arranged. When he appeared at the VIPER suite just before 3pm, the constable in charge of the suite told Mr Breen that since he had not been present at 1pm, the Identification Officer had determined that the VIPER procedure with the witness would proceed at 3pm as arranged, even though Mr Breen had not pre-viewed the images selected.

[53] The constable's decision to refuse a preview was based on the instructions given by Inspector K Tener, the officer in charge of the VIPER suite on the day in question. When Mr Breen failed to appear at 1pm, the Inspector had issued an instruction which is recorded as follows in his notebook:

> "… Solicitor did not attend for V2 viewings as arranged above. Advised Const Pye that if the solicitor attended witness viewings at 3pm and requested the V2 viewing then that it was too late as the witness was there and in the circumstances he had had his opportunity and failed to take it. Also it would be unfair to delay the witness viewing and if he raised any objections we would not have time to address them. Const Hanna confirmed."

These instructions had been shared with the constable who met Mr Breen when he did present himself at the VIPER suite. On these facts, the prosecution contend that the Defence was given a "reasonable opportunity" to view the images at 1pm but had simply failed to take it.

[54] We are clear that there was a breach of the code in this case and that this was not a minor breach. The explanation for the experienced defence solicitor's non-attendance at 1.00pm was plainly as a result of the acknowledged misunderstanding set out in the agreed statement of facts, which resulted from the mistaken comment by Inspector Cairns to the solicitor that morning.

[55] It is a matter of concern that a decision about what should happen next in relation to the preview was taken by Inspector Tener when Mr Breen initially failed to appear and before any explanation for his non-appearance was available. The decision he took was communicated to Constable McNally, the officer who met Mr Breen when he arrived at the VIPER suite around 3pm. When Mr Breen explained the misunderstanding about the earlier appointment, the constable failed or refused to place that explanation before the Inspector to see whether he might wish to reconsider his earlier instruction in light of it. No doubt the senior officer would have demonstrated common sense flexibility in light of the highly material facts, which explained the absence of the solicitor at the 1pm viewing. But those facts were never put before him and so the effective denial of the opportunity to exercise a right enshrined in the code took place.

[56] This is a most unfortunate response from the police and this court deprecates it in the strongest terms. The rights enshrined in the code are the rights of the suspect, not anyone else. The solicitor, acting on behalf of his client, utilises this safeguard to guarantee against unfairness in the conduct of identification procedures. What occurred constituted a very serious breach of an important safeguard and the police were wrong in acting as they did. In taking the actions they did, the police denied the suspect (through his solicitor) the "reasonable opportunity" to preview the images, which the code stipulates that he should have.

[57] The actions of the police in this case were a serious breach of the mandatory safeguards set out in the PACE Code. Such actions mean that the processes used to secure evidence for use in a trial are flawed. Using flawed procedures to gather evidence creates the risk that verdicts reached on the basis of that evidence may eventually have to be set aside as legally unsafe. This risk can arise even in cases where the evidence appears to be strong. Whether the risk materialises or not will depend on the impact the breach has on the overall fairness of the trial, and not every flaw will create unfairness that could render the verdict unsafe. But that is not the point. The point for the police is that breaches of the applicable code put the verdict in that case in legal jeopardy. For this reason, it is critical that all police officers involved in gathering evidence via the VIPER process are scrupulous in delivering the safeguards set out in the Code. Those safeguards exist for the protection of both the accused and the police. They also help give confidence to the public that our criminal justice system works in the best way possible. It is important for everyone that the codes are followed carefully so that no avoidable risks to verdicts are generated by the actions of the police when administering these procedures.

Effects of the breach

[58] We have concluded that there was a serious breach of the code and have explained why such breaches must always be avoided. But that is not the end of the matter. The parties are agreed that the proper approach of the court when dealing with a breach of the code is that set out in *Bothwell* and Blackstone, referred to at para 38 above. The critical question in this case is - did the denial of the right to influence the images used in the identification procedure have "such an adverse effect on the fairness of the proceedings that the court ought not to admit it"? - see Art. 76(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989.

[59] In answering this question, we must consider the nature of the images that the police chose to use in the VIPER procedure. The relevant guidance says 'the set of images must include the suspect and at least eight other people who, so far as possible……resemble the suspect in age, general appearance and position in life.' We ourselves were not invited to look at the images, a point upon which Mr Neil Connor QC sought to rely, presumably on the basis that if there was any real unfairness said to stem from the use of particular images that the defence would

have been clamouring for the Court of Appeal to look at them. In the event, the Court had no difficulty in resolving the case without having viewed the said images.

[60] The fact remains that the Trial Judge himself viewed the images twice and heard and saw the witnesses give their evidence and be cross-examined on the *voir dire*. He concluded:

> "Having viewed the images with a keen awareness of the objections raised on behalf of each defendant, I can find no evidence to support a conclusion that the physical appearance of any of the other persons portrayed in either set of images contravenes the requirement of paragraph 2 Annex 2. Nor can I find any basis in the submission that the manner of dress of the respective suspects singles either out from the others portrayed in their respective set of images, so as to impact upon, still less undermines the stated objects at paragraph D.1.2."

[61] There was no challenge to the Trial Judge's factual assessment of the images. Mr O'Donoghue's argument amounted effectively to a contention that the breach of the code was so egregious that it was *ipso facto* substantially unfair. Such an approach in the circumstances of this case does not sit easily with the approach in *Bothwell* and Blackstone.

[62] As noted above, the factual findings about the images which the Trial Judge made have never been challenged. Moreover, the matters to which the solicitor drew attention in his note and about which he gave evidence in the *voir dire* did not surface during the trial. Mr Breen did not give evidence in the trial and, as earlier noted, there was no cross examination of the VIPER witnesses regarding the particulars of the images used. Furthermore, the matter was not pursued in the closing speech of counsel and the Trial Judge was not requisitioned on his summing up in relation to this aspect of the identification evidence. Finally, as the Trial Judge rightly observed, the jury was plainly satisfied about the identification evidence, as was reflected in their unanimous verdict of guilty.

[63] For all these reasons we consider that the Learned Trial Judge was entitled, on the evidence before him, to reach the conclusion set out at para 60 above. We are satisfied that, in this particular case, the breach of the code which took place did not have a significant adverse effect on the fairness of the proceedings or put this appellant at any substantial disadvantage during the course of his trial. For all these reasons we dismiss this appeal.

David Smith

[64] We can deal shortly with the appeal of David Smith. As noted earlier, we did not call upon the Crown in respect of his appeal against conviction. His appeal was

grounded on the contention that the Learned Trial Judge erred in admitting evidence of something the deceased had said about the applicant a week before the shooting.

[65] The evidence against David Smith was compelling. His car was used in the murder. He was caught on CCTV driving his car 4 hours before the murder and 1 hour after the murder. He was in the company of his cousin Michael Smith ('MS') 4 hours before the murder and MS was found to be in possession of the murder weapon 25 hours after the murder took place. Furthermore, he was positively identified by an eyewitness as being one of the murderers. As the Crown noted, he gave an unusual account in his evidence of having an alibi, without having raised the issue in interview and without calling any of the people he said could support his alibi.

[66] Even if, which we do not accept, the Learned Trial Judge erred in admitting the hearsay evidence, its admission, applying the principles in *R v Pollock* [2004] NICA 34, did not render the conviction unsafe. We agree with the Crown that the hearsay evidence was a small element of the Prosecution's case and paled in comparison to the overwhelming evidence of David Smith's involvement in the murder, which we have earlier summarised.

[67] The impugned hearsay was the evidence of Naomi Smyth that Stephen Carson told her that he had seen David Smith in the company of Brian "Tiger" Lane, close to where he lived in the Ormeau Road a few days before his death. According to her, Stephen Carson was panicked and told her that he had taken a detour to ensure that Mr Smith didn't find out where he lived.

[68] The Prosecution sought to introduce this evidence because Stephen Carson was dead. Following submissions, the Learned Trial Judge concluded that the probative value of the statement outweighed the prejudicial effect of its admission. We are satisfied on the facts of the present case that his decision to admit it is unimpeachable. As it transpired, the defence were able to challenge her evidence quite effectively. She had stated that Mr Carson had come into the house having seen Mr Smith and Brian Lane "a few days" before the murder. The defence by agreement then produced evidence that Mr Lane had been in prison since 12th February 2016 so that David Smith could not have been in the company of Mr Lane "a few days before" the murder. Thus, the defence were able to effectively challenge the evidence.

[69] The Trial Judge gave appropriate directions to the jury, warning of the difficulties the defence face in challenging hearsay evidence and pointing out some of the deficiencies in the evidence. We note that the Applicant has made no criticism of the Judge's direction regarding the hearsay evidence.

[70] We consider that the Judge was entitled to admit the evidence and, having done so, properly directed the jury. If, however, we are wrong about this, we do not

consider that its admission rendered the conviction unsafe in light of the overwhelming evidence of his guilt.

[71] As for the appeal against sentence in David Smith's case, we consider that the Judge was entitled to conclude, in light of the cold-blooded nature of this pre-planned murder, that his personal circumstances did not warrant a reduction in the tariff. Further, the Judge was correct in rejecting the submission that his culpability was less than that of Michael Smith. David Smith was armed with a hammer, sprayed something in the face of Naomi Smyth and assaulted and threatened her. He was an integral part of this pre-planned murder, which was committed in the presence of the victim's 9 year old child. He has a bad criminal record for s.18 wounding (which as the Prosecution submit is worse than that of Michael Smith) and he provided the car for use in the murder.

[72] The Trial Judge was entitled to conclude that the culpability of each of the Applicants was equal and sentence them accordingly.

Conclusion

[73] For the above reasons, we dismissed both appeals against conviction and David Smith's appeal against sentence.