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Judgment: approved by the Court for handing down | *Delivered:* **16/10/19**

(subject to editorial corrections)*

IN THE CROWN COURT SITTING AT BELFAST

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THE QUEEN

v

IVOR BELL

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APPLICATION TO EXCLUDE REFERENCE RECORDINGS USED FOR PURPOSES OF IDENTIFYING THE ACCUSED BY WAY OF FORENSIC VOICE ANALYSIS

O'HARA J

[1] The accused, Ivor Bell, is charged with two offences of soliciting the murder in 1972 of Mrs Jean McConville. On the first charge he is accused of encouraging persons not before the court to murder her contrary to Section 4 of the Offences Against the Person Act 1861 and common law. On the second charge he is 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 relies is what it asserts is confessions made by Mr Bell to Mr Anthony McIntyre in 2004. Mr McIntyre conducted interviews as part of what became known as the Belfast Project, an oral history project conducted in association with Boston College, Massachusetts. The recordings made by Mr McIntyre were secured by the Police Service of Northern Ireland which obtained a court order in the United States. In the absence of any co-operation from Mr McIntyre or the Project Director Mr Ed Moloney the prosecution had to prove that Mr Bell was the interviewee known as Z in the materials it recovered.

[3] In order to address this aspect of the case the prosecution intend to present evidence from Mr Allen Hirson, a forensic voice analyst. He was provided with two separate audio recordings and asked to compare them. One was of Mr Bell's interviews with the PSNI from March 2014. The other was copies of the Boston Tape

Recordings from 2004 with the interviewee anonymised as Z. Mr Hirson's conclusion was that Z was likely to be Mr Bell.

[4] The value and strength of Mr Hirson's evidence was challenged by the defence but that is not the issue at this stage of the trial. Rather the issue at present is whether Mr Hirson's evidence should be ruled inadmissible because he should not have been given the PSNI interviews with Mr Bell in the first place.

[5] Mr Bell was interviewed over a number of days in March 2014 after he was arrested under the Terrorism Act 2000. At no point was he advised that the police intended to use a recording of anything he said to compare his voice to that of Z. And he was not invited to consent to any such use being made of the recordings.

[6] In *Re Corbett's Application* [2017] NI 288 the Divisional Court considered a case in which the applicant had been arrested under the Terrorism Act in connection with the planting of a bomb. Before interviews began his solicitor asked the police for an undertaking that any recordings of his voice would not be retained for use in alternative or future investigations. The police declined to give such an undertaking. The applicant initiated a challenge by way of judicial review, seeking a declaration that the PSNI policy to record and/or retain suspects' voices is unlawful.

[7] In its judgment the Court considered the only relevant code of practice under the Terrorism Act. That code provides for audio recordings of interviews. The Court's conclusion was that the working copy of the audio recording could only be used for matters connected to the criminal investigation in connection with which the interview was conducted. In the Court's judgment that limited interpretation of the code guards against arbitrary use of the recording.

[8] If that is the correct interpretation of the judgment of the Divisional Court, it means that no code of practice devised under the Terrorism Act allows for audio recordings of police interviews to be used for comparison purposes other than in the course of the immediate investigation.

[9] The question arose as to the correct approach to be taken to the use of the recordings made by the police of their interviews with Mr Bell in the present case.

The Case for Exclusion

[10] Mr Macdonald QC SC, with Mr D Hutton, for Mr Bell submitted that the recordings of the 2014 police interviews ("the comparison evidence") should be excluded under Article 76 of the Police and Criminal Evidence (NI) Order 1989. It 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."

[11] Fundamental to this submission is the argument that when being interviewed by police Mr Bell still enjoyed a right to respect for his private life within the meaning of Article 8(1) of the European Convention on Human Rights. I was referred to various examples of this proposition having been established, including cases in which secret recordings were made of individuals while in police cells or the custody area of police stations – see *PG v United Kingdom* [2008] 46 EHRR 51 and *Perry v United Kingdom* [2004] 39 EHRR 3.

[12] In the event that there has been interference with private life, Article 8(2) requires that such interference must be in accordance with law. This concept has been interpreted by the European Court of Human Rights to include the requirement that the law must be clear and that it must protect against arbitrary interference. This involves having clear detailed rules and minimum safeguards.

[13] It is also incumbent on the State to justify this interference as being necessary in a democratic society.

[14] As Mr Macdonald conceded however the European Court R has held on three occasions that even if the absence of a relevant code means that there is a breach of Article 8 it did not follow that admitting the evidence thereby obtained resulted in an unfair trial. Those three cases are *PG v UK* cited above, *Jalloh v Germany* [2006] 20 EHRC 575 and *Saunders v UK* [1996] 2 EHRC 358. The consistent view of the Court was that the right to silence and the right to self-incrimination are not transgressed by using materials such as breath, blood, urine, hair or voice samples.

[15] In *Khan v United Kingdom* [2000] ECHR 353 94/97 the European Court R held that at the time the applicant's voice had been recorded as he talked about drug offences, there had been no domestic law in the United Kingdom regulating the use of covert listening devices. Accordingly the recording which was an interference with his private life was not in accordance with law and could not be justified under Article 8(2) of the Convention.

[16] Notwithstanding that finding the court held that since the fairness of the admissibility of the flawed evidence was considered at trial and since the trial judge had a discretion to exclude it if it would be unfair to admit it (Article 76 of PACE), the trial had been conducted fairly and there was no violation of the right to a fair trial.

[17] For Mr Bell, Mr Macdonald submitted that this line of decisions is wrong. He further submitted that the breach of Article 8 arising from the absence of a code

which applied and which was complied with meant that I should exercise my discretion under Article 76 to exclude the audio recordings of the police interviews and thus Mr Hirson's evidence. In other words, the evidence had been obtained unfairly and should be excluded because to admit it "would have such an adverse effect on the fairness of the proceedings".

Prosecution Response

[18] Mr Murphy QC with Mr D Russell submitted that the general principles with regard to admissibility of evidence are clear. Those principles include the admissibility of all evidence which is sufficiently relevant to the facts in issue subject only to exclusionary rules. Indeed the principles extend so that any evidence which is relevant is admissible even if it has been obtained illegally.

[19] So far as Article 8 is concerned, Mr Murphy submitted that the right to privacy is not interfered with if it is in accordance with law. In this case he contended that if I considered the issue of unfairness within the remit of Article 76 and exercised my discretion to admit it, that meant that it was "in accordance with law". On this analysis "in accordance with law" is synonymous with "fair".

[20] Still on Article 8, Mr Murphy referred me to authorities which emphasise that the correct starting point is to scrutinise common law and domestic statutes first and only then to turn to the European Convention on Human Rights which has a subsidiary role. That role is not unimportant but is subsidiary. See *Kennedy v Charity Commission* [2014] UKSC 20 and the analysis of Lord Sumption at paragraph 46 and Lord Toulson at paragraph 133.

[21] Mr Murphy relied on the European case law referred to above and contended that it was correct, directly on point and should be followed. As had already been conceded on behalf of the defendant the case law is against the propositions being advanced before me. Mr Murphy further relied on *McFadden & Sparks v HM Advocate* [2009] HCJAC 78. That was a decision of the High Court of Judiciary in Scotland, rejecting a claim that requiring a person to speak during an identification parade amounted to a requirement that he incriminate himself. At paragraph 35 the court stated:

> "… We do not agree that the procedure at the identification parade constituted a breach of the first appellant's right to silence or right not to incriminate himself. Those rights … relate to the right of a suspect not to be compelled to answer substantive questions concerning the crime, such as where he was at the relevant time, whom he was with, what he was doing and what he heard and saw … . The taking of a voice sample focusses not upon substantive comment but upon the timbre of a voice, intonation, register, accent,

pronunciation and other such features amounting to identifying features of the individual in the same way as, for example, facial features, hair colour, height and build; fingerprints; and DNA taken from blood hair or skin samples. As the European Court stated in *Jalloh* at page 693 para 102:

> `The court has consistently held … that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissues for the purposes of DNA testing …'."

[22] In all the circumstances the prosecution submitted that excluding the comparison evidence and therefore Mr Hirson's evidence would be contrary to general principles and to persuasive and compelling case law.

R v Morgan

[23] Both counsel referred me to the decision of Her Honour Judge Smyth in this case, given on 23 May 2017. The decision runs only to a single page. It is not quite an ex tempore ruling because it was given the day after submissions had been received but the judge expressly reserved to herself the right to provide a fully reasoned judgment if requested to do so. No such request has been made to her.

[24] It appears from the judgment, which is really no more than a note, that the judge was referred to some authorities on Article 8 and to the decision of the Divisional Court in *Corbett*. There is however no hint that she was referred to the authorities or principles which Mr Murphy has taken me to. Nor is it clear that the concession was made to the judge that on the European authorities the breach of Article 8 was not sufficient to lead to the exclusion of evidence under Article 76. Her understanding appears to have been quite different.

[25] In these circumstances I conclude that this particular judgment of Her Honour Judge Smyth does not assist in deciding on the application before me. I also think

that her judgment would have been quite different had she had the benefit of the extended submissions which I received from counsel.

Conclusion

[26] Section 2 of the Human Rights Act compels me, when determining a question which has arisen in connection with a Convention right, to take into account any judgments of the European Court of Human Rights. In essence the submissions made on behalf of the defendant are that I should take into account a consistent line of reasoning over a series of cases, conclude that the reasoning is flawed and decide that because there has been a breach of Mr Bell's rights under Article 8 the comparison evidence should be excluded under Article 76 of PACE. I reject that submission.

[27] Even if the use of the comparison evidence by Mr Hirson was somehow in breach of Mr Bell's rights under Article 8, which I do not find to be the case, I reject the proposition that I should then exclude that evidence under Article 76. Rather I accept the submission of Mr Murphy that it is well established that all evidence is admissible which is sufficiently relevant to the facts in issue subject only to exclusionary rules. The purpose of Article 76 of PACE is to ensure that the judge has discretion to exclude evidence which has been unfairly obtained. I do not consider it to be in any way unfair for the police to have used the recordings of Mr Bell's interviews as a means of investigating whether he was the person anonymised as Z on the Boston tapes. Accordingly I rule the comparison evidence in and decline to exercise my discretion under Article 76. How strong that evidence is ultimately regarded is another matter but it is admissible evidence.