

<b>Neutral Citation No: [2024] NICC 27</b>	<b>Ref: OHA12448</b>
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	<b>ICOS No: 21/003256</b>
	<b>Delivered: 29/02/2024</b>

**IN THE CROWN COURT IN NORTHERN IRELAND  
SITTING AT LAGANSIDE**

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**THE KING**

v

**JAMES STEWART SMYTH**  
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**Mr C Murphy KC and Mr D Russell KC with Ms N Pinkerton (instructed by the PPS) for  
the Prosecution**

**Mr M Borrelli KC with Mr P Bacon (instructed by Reavey Solicitors) for the Defendant**  
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**O'HARA J**

***Introduction***

[1] The defendant faces five charges arising from events on 17 May 1994 in North Belfast. He is charged with murdering Gary Convie and Eamon Fox and attempting to murder Witness A, all at the same time, on a building site at North Queen Street. In addition, he is charged with possession of the murder weapon, a Sten submachine gun, and ammunition with intent to endanger life. Finally, he is charged with membership of the Ulster Volunteer Force, the illegal terrorist organisation responsible for this sectarian outrage.

[2] Witness A, who survived the gun attack, is an electrician who worked on the building site with his cousin Mr Convie and his brother-in-law, Mr Fox. After working through the morning they sat in Mr Convie's car to eat their lunch. As they did so, a single gunman approached from the side and opened fire. He murdered Mr Convie and Mr Fox. Witness A, who had been in the back seat, was wounded but escaped.

[3] The only reason this attack took place was that the three workmen were Catholics and were working at a time of sectarian tension on a site in what would be regarded in our divided society as a loyalist area. The victims were not in any way sinister. They were not in any way threatening. They were not in any way dangerous.

They were just Catholics but in the eyes of the UVF that was enough to make them targets and easy targets at that.

[4] One UVF member, John Marsden, has been convicted in connection with the murders. A second, Gary Haggarty, has also been convicted. The sole question in this trial is whether this defendant was the gunman. The case against him was opened by the prosecution on the basis that he was the sole gunman. At the close of the case it was suggested that I might be satisfied that he was guilty even if it had not been established that he was the gunman. I reject that suggestion. In my mind the only question for me to decide is whether it has been proved beyond a reasonable doubt that the defendant was the gunman.

[5] The case against the defendant is a circumstantial one. That does not make it a weak case. Many prosecutions based on circumstantial evidence succeed. What it means is that the evidence relied on by the prosecution comes in different parts which, on their case, amount to clear evidence of guilt when the parts are pieced together. There are four main elements which are relied on, and which will be considered in turn as follows:

- (i) DNA evidence found on the collar of a jacket in a bag with the murder weapon 11 days after the murders, in a derelict house beside Marsden's home, just a few streets from the murder scene.
- (ii) The defendant's conviction for a sectarian murder, attempted murder and possession of a firearm with intent to endanger life, offences committed on 27 January 1994 in Ballymena, Co Antrim.
- (iii) The evidence of Gary Haggarty.
- (iv) Inferences which I am invited to draw from the defendant's failure to give evidence in his own defence at this trial.

### *DNA evidence*

[6] The connection between the defendant and the jacket was probed by the defence during the presentation of the prosecution evidence, but the fact that there is a connection has now been conceded.

[7] What is now challenged is exactly what that connection actually proves in relation to the murders. In order to analyse that issue the evidence has to be put in context.

[8] Marsden lived in a house resembling a squat in Alexandra Park Avenue which is near the murder scene, just a few streets away. On 28 May 1994, 11 days after the murders, police searched the adjacent house which was derelict. In the kitchen they found a bag with a cloth or coat on top of it. Inside the bag was a submachine gun

which was later confirmed to be the murder weapon. Also found inside the bag were gloves, a hat and a navy Barbour jacket. Tape lifts of fibres were recovered from these items of clothing. At the time the tests conducted on those items did not yield any results of evidential value.

[9] In 2006 the items were removed from secure storage and tested again, using updated methods of analysis. Nothing was found which connected the defendant to the hat, but his DNA was found on lifts from the inside collar of the jacket i.e. where the collar would meet the skin when worn by the defendant.

[10] I am satisfied from the DNA evidence that at some point before 28 May 1994 the defendant must have worn the jacket, which was found on 28 May 1994 with the murder weapon, not far from the scene of the murders. The prosecution relies on this as strong circumstantial evidence which connects the defendant to the murders, emphasising that the gap in time between the murders and the find is only 11 days.

[11] For the defendant, it is submitted that the 11 day gap is significant because it opens up the real possibility that the defendant's wearing of the jacket was at some place or time quite distinct from the North Queen Street murders on 17 May, whether before or after. In addition, it is contended that it is not even clear from the evidence that this jacket was worn by the gunman at all. This suggestion arises from a lack of clarity in Haggarty's evidence. At one point he seemed to say that the jacket, which was too big for the defendant, was given to him precisely because it was too big and would therefore enable him to hide under its bulk the large submachine gun which he was to use for the killings. At another point Haggarty seemed to say that the jacket was carried by Marsden and was brought into use only after the murders, as the defendant ran away from the scene. On this version the defendant gave Marsden the gun as he ran off and Marsden then concealed the gun with the jacket as he walked back towards the derelict house. On that second version of events, the jacket was not worn by the defendant at all on 17 May. If that is correct, the case against the defendant is arguably significantly weaker because it is critical for the prosecution to connect the wearing of the jacket by the defendant to the murders on 17 May.

[12] From this brief summary it will be clear that the prosecution case is strengthened by the DNA evidence but not to the point where all doubts have been extinguished. In a circumstantial case that is not fatal to the prosecution, but it is troubling. The next question is whether other parts of the circumstantial case can fill the gap.

### *The defendant's previous convictions*

[13] In a ruling delivered on 30 October 2023, I admitted as bad character evidence the fact that in 1995 the defendant was convicted of the January 1994 sectarian murder of a Catholic man in Ballymena and the attempted murder of his wife as she tried to protect her husband. On that occasion the records show that the defendant was one of two gunmen who entered the family home and opened fire.

[14] I admitted that evidence because it establishes a propensity to commit offences of the kind charged in relation to 17 May 1994. I also considered that that propensity makes it more likely that the defendant was the gunman as alleged by Haggarty. The defence objected to the admissibility of that evidence on a number of grounds, one of which was that the prosecution was seeking to rely on those convictions to bolster what is, in effect, a weak case against the defendant. As such the admission of the evidence would have such an adverse effect on the fairness of the proceedings that I should not admit it.

[15] At the end of my ruling, having admitted the convictions in evidence, I said that:

“Just how far they take the prosecution case, if they take it anywhere, is a matter for another day.”

[16] That day has now come. In my judgment, and considering all of the evidence in context, I conclude that the convictions are highly probative. They suggest to me that there is strength in the prosecution argument that a man who is willing to murder and shoot Catholics only because of their religion in January 1994 would be equally willing to do so in May 1994. Such a man does not need proof that his victims were active republicans waging some sort of violent campaign against the Union. He was just happy to murder Catholics for being Catholics. That was the rationale in January 1994 and, again, in May 1994.

[17] The Ballymena convictions strengthen the prosecution case.

### *The evidence of Gary Haggarty*

[18] This case could not have been brought without Haggarty’s evidence which is the only direct evidence that the defendant was the gunman on 17 May 1994. Unfortunately Haggarty is a deeply flawed individual, a murderer who will lie, deceive and mislead at the slightest opportunity. Extensive written concessions to that effect were made, quite properly, by the prosecution. This explains why Haggarty’s evidence needs corroboration and can not be relied on without more.

[19] The written concessions open with a document headed “Agreed position between Prosecution and Defence – Public Prosecution Service Disclosure Document dated 13 June 2023.” In the course of that agreed position, the following appears:

“... the prosecution has serious and significant issues which undermine Gary Haggarty’s credibility and reliability as a witness. The prosecution has assessed him as a deceptive witness, a dishonest witness with regard to his motivation in entering the SOCPA process, a flawed witness and a witness that may well be motivated by

getting revenge on his UVF associates and Special Branch handlers. The prosecution concludes "having regard to the above matters it is inevitable that any court asked to receive and assess evidence from Gary Haggarty will require a sufficient level of corroboration".

[20] The documents then go on to explain just why Haggarty is both a valuable but also a flawed source of information. For instance, it is stated that:

"In respect of the vast majority of incidents that Gary Haggarty has discussed in the SOCPA process, he has provided detailed and very consistent evidence. However, there are a number of very significant inconsistencies that exist in respect of some of the most serious incidents in which Gary Haggarty has been involved. It is considered that these matters undermine Gary Haggarty's credibility and reliability. These matters are outlined in Annex B to this document."

[21] Before going on to look at what is set out in Annex B, it is worth recording that among the other points conceded about Haggarty are that he minimised his role in connection with being a Battalion Commander in the UVF, he minimised his role in connection with UVF extortion and that there is a notable decrease in serious criminal incidents admitted to by Haggarty in the SOCPA process subsequent to the Good Friday Agreement which may be evidence to support an allegation that he minimised his role in serious crime due to the fact that such offences would not benefit from the sentencing provisions introduced by the Good Friday Agreement.

[22] I turn then to Annex B which deals specifically with a number of murders in which Haggarty was involved. One was the murder of Sean McParland on 17 February 1994. The summary of Haggarty's information about that crime includes the concession that there were a number of errors or mistakes made by Haggarty including the identity of individuals who were involved in that murder. It is also stated in the document that "it is considered that Gary Haggarty has attempted to minimise the full implications of his involvement in this murder." In addition to that, he has made specific allegations against Police Officer B in respect of the immediate aftermath of this murder. There is stated to be cogent and persuasive evidence from OPONI that Police Officer B (who was one of two Special Branch handlers of Haggarty) was on long term sick leave from 16 February 1994 to 1 June 1994. This is said to undermine the evidence of Haggarty because it undermines his assertions that he had significant contact with B around 17 May 1994.

[23] In May 1997, a man named John Harbinson, was murdered in Belfast. In Annex B it is stated that "it is considered that there are significant issues which undermine Gary Haggarty's credibility and reliability in respect of this incident." The document continues:

“There are sufficient grounds to be satisfied that Gary Haggarty has distanced himself from direct involvement, or at least a greater role, in this murder.”

[24] It is unnecessary to go into the details of the murders of Mr McParland and Mr Harbinson for the purposes of this judgment. It simply has to be recorded that Haggarty’s versions of what happened on those occasions is recognised by the prosecution as being unreliable and unreliable to a significant degree, not just in some minor or insignificant detail.

[25] In the same Annex B there is a series of paragraphs about inconsistencies in the information which he has given about the murders of Mr Convie and Mr Fox on 17 May 1994. One general point which is made is that Haggarty did not give his Special Branch handlers the opportunity to intervene to prevent these murders, contrary to his assertions that that is exactly what he did.

[26] Perhaps more significant, however, in relation to 17 May 1994, is the difficulty in reconciling some of Haggarty’s evidence with other independent evidence. There are two specific examples which the defence has highlighted in its submissions and in its questioning of witnesses. The first is that Haggarty gave a detailed explanation to the court of what happened in the lead up to 17 May, on the morning of 17 May and immediately after the murders. Some of this detail is clearly accurate and is supported by other evidence, but it is difficult to say just how much of it is accurate. On one particular point there is a direct contradiction between Haggarty’s own version of what happened that morning and the evidence contained in statements provided by two police officers. Those officers said that they saw Haggarty in a car on the Shankill Road with Mark Haddock, another notorious UVF leader. On Haggarty’s account of events he was nowhere near the Shankill that morning, with or without Haddock. In his submission on behalf of the prosecution, Mr Murphy KC submitted that it may just be that the two police officers were wrong. That, of course, is possible, but what if they were not? I cannot ignore that possibility. If they may be correct, then Haggarty has either deliberately or inadvertently given evidence about the morning of the shootings which is wrong, whether deliberately or from poor memory. I have to consider what the consequence is, or might be, of his evidence being wrong and the evidence of the police officers being correct. Is that an important point or just an error which should not be given exaggerated importance?

[27] Arguably more fundamental than that issue is the eyewitness evidence about the height of the gunman. The defendant Smyth is 5’ 4½” tall. For a man that is short. And, in my view, it is obviously short. However, most of the independent evidence does not support the proposition that the gunman was short. Obviously, those who saw the gunman on his way to and from the scene of the murders, only saw him briefly and in extremely distressing circumstances. In addition, it should be noted that on the evidence the gunman had partly or fully covered his face so as to disguise himself. In such circumstances limited value is often attached to precise identification

evidence. It seems to me, however, that the witnesses' efforts to give an indication of the height of the gunman may be seen as a different matter.

[28] Witness A suggested that the gunman was a tall thin man. In a way I attach least significance to his evidence given that he was one of the targets of an attack which led to the deaths of two of his own relatives and friends. Other witnesses, however, suggest something along the same lines. A witness known only as B suggested that the gunman was 5' 8" or 5' 10" tall. A Mr Mooney described the gunman as having been 5' 10" tall. A Mr Foster suggested he was 5' 8" or 5' 9". The closest that one gets to the defendant is the evidence of another workman on the site, now deceased, a Mr Blaney, who said that "my initial impression was that he wasn't too tall" while another witness, a Mr Rainey, said that "he was a bit smaller than average height and of thinnish build."

[29] How are these pieces of evidence to be reconciled with the actual height of the defendant? I think it is difficult to carry out such a reconciliation. Allowing, as best I can, for the difficulties associated with giving an accurate description to police in the aftermath of such an awful episode, I find that the evidence of the majority of eyewitnesses as to height simply cannot be reconciled with the fact that the defendant is a small man. At the very least the evidence suggests that some of the witnesses, unless they are quite wrong, are not describing the defendant.

[30] There is some level of disagreement in the legal authorities about the consequences of a finding that some part of the evidence of an informer or assisting offender is unreliable. In *R v Graham and others* [1984] NICA 24, the then Lord Chief Justice Lord Lowry stated:

".....independence evidence which contradicts a Crown witness, even on an irrelevant point, has much more probative value against the Crown than evidence which supports a witness could have in favour of the Crown."

[31] As the prosecution has emphasised that approach, even from such a distinguished judge as Lord Lowry, might overstate the consequences of inconsistent or clashing evidence. All of the evidence in a circumstantial case is to be considered in the round. Or to put it another way, the existence of some inconsistent evidence will not inevitably be fatal to the prosecution case.

[32] What is clear, however one approaches the evidence, is that there is an inconsistency between the majority of the prosecution evidence about the likely height of the gunman and the actual height of the defendant. In my view, this is a more significant problem for the prosecution case than whether Haggarty was in a car with Haddock on the Shankill Road on the morning of the murders because the evidence as to height goes to the heart of the case – was the defendant the gunman?

*The defendant's failure to give evidence*

[33] At the end of the prosecution case a submission was made that there was no case for the defendant to answer. On 9 January 2024, I rejected that submission. At that stage Mr Borrelli KC, on behalf of the defendant, indicated that the defendant would not give evidence, nor would any evidence be called on his behalf. I am therefore, in the position where I am invited by the prosecution to draw such inferences as appear proper from the failure of the accused to give evidence in accordance with article 4 of the Criminal Evidence (NI) Order 1988.

[34] Simply put, it is the prosecution case that the evidence before me calls out for an explanation from the defendant who could easily and simply be expected to provide an innocent explanation, if there was one. The prosecution submits that his failure to give evidence allows me to draw an inference that there is no honest explanation which he can give, and which would stand up to scrutiny in cross-examination. It is further contended that his failure to give evidence supports the contentions advanced on behalf of the prosecution that he was the gunman on 17 May 1994.

[35] For the defendant, Mr Borrelli submitted that this is a case in which inevitably any court will be very suspicious about the defendant. He is a sinister sectarian gunman, prepared to kill Catholics. But the question is whether there is sufficient evidence to convict him of these specific murders and attempted murder, not of being a killer generally.

### *Conclusion*

[36] This prosecution has been brought on the basis that Haggarty's evidence requires what the prosecution described as "a sufficient level of corroboration" in order for the court to convict. I should add that either the defendant is guilty of all of the charges or none of them. This is not a case in which I can convict him of some offences but not others.

[37] When I refused a direction of no case to answer, I said that this is not one of those exceptional cases in which a court can say that the defendant cannot be convicted, that there is no possibility of conviction.

[38] The question at this stage is obviously very different. The question now is whether I am satisfied beyond a reasonable doubt that the defendant was the gunman on 17 May 1994. I am not so satisfied.

[39] Looking at all of the evidence in the round in this circumstantial case, I am not satisfied that Haggarty's evidence has been corroborated by the DNA evidence, taken with previous convictions and his failure to give evidence. Inevitably I must have significant doubts about the extent to which I can rely on Haggarty who has a track record for implicating people in the wrong, settling scores and deflecting responsibility from himself onto others. Some of his evidence is perfectly plausible but



at least in part that is because he was personally involved in the murders. And plausible just isn't enough when the test for conviction is proof beyond a reasonable doubt. Specifically, I have a doubt about when the defendant wore the Barbour jacket and whether it was actually worn at all on 17 May by the gunman who killed Mr Convie and Mr Fox and tried to kill Witness A. I also have a doubt about whether Haggarty has told the truth about his movements on the morning of 17 May and specifically whether he may have been on the Shankill Road with Haddock. Most importantly of all I have doubts, based on the eyewitness evidence, about whether Mr Convie and Mr Fox were murdered by a gunman who was 5' 4½" tall.

[40] I have considered whether my doubts can be overcome by the combination of the convictions for the January 1994 sectarian murder and attempted murder taken together with the failure of the defendant to give evidence. That just isn't possible, no matter how suspicious I am as to the defendant's guilt. For these reasons, I must find the defendant not guilty.

[41] The defendant does not leave this court without a stain on his reputation. He was and remains a convicted sectarian gunman and murderer. In relation to 17 May 1994, however suspicious I am that he was the gunman, I must acquit on all counts because I cannot be sure of his guilt beyond a reasonable doubt.