*Privy Council Appeal No. 52 of 1982*

**Brian Ronald McDonald** – – – – – – *Appellant*

*v.*

**The Queen** – – – – – – – – *Respondent*

FROM

**THE COURT OF APPEAL OF NEW ZEALAND**

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# REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 28TH FEBRUARY, 1983, DELIVERED THE 14TH APRIL, 1983

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*Present at the Hearing:*

LORD CHANCELLOR (LORD HAILSHAM OF ST. MARYLEBONE)

LORD DIPLOCK

LORD KEITH OF KINKEL

LORD BRIGHTMAN

SIR WILLIAM DOUGLAS

[*Delivered by* LORD DIPLOCK]

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On 28th February 1983 their Lordships announced that they would humbly advise Her Majesty that this appeal should be dismissed. They now give their reasons for doing so.

The appellant, McDonald, was tried at Auckland, before Prichard J. and a jury, for the murder of Margaret Bell. While standing in the entrance to the Main Street Cabaret in Upper Queen Street, she had been shot in the head by a bullet from a high velocity rifle fired from across the street. McDonald was convicted. His appeal against conviction was dismissed by the Court of Appeal (Richmond P., Woodhouse and Quilliam JJ.). For the purpose of explaining the questions involved in the appeal to this Board, a very brief summary of the facts will suffice. A rather more extensive one is to be found in the judgment of the Court of Appeal [1980] 2 N.Z.L.R. 102.

McDonald was one of a group of young men of whom two others were named O'Connor and Speck. After an evening's peripatetic drinking they went to the cabaret in the early hours of the morning, but were refused admission, ostensibly because Speck was not properly dressed. There was evidence which McDonald (who himself gave evidence from the witness box) did not dispute that, after the altercation at the cabaret, the three of them went in a car driven by McDonald to a house belonging to him and O'Connor where they collected a rifle which, as was proved by forensic evidence at the trial, was the weapon by which Miss Bell had been shot. They returned with the loaded rifle in the car to the

vicinity of the cabaret. All three, McDonald, O'Connor and Speck, were there or thereabouts at the time the fatal shot was fired. They then left in the car, still driven by McDonald, and went some three miles to Panmure Bridge, where the rifle was thrown into the river, from which it was subsequently recovered and identified at the trial as one which had been sold some time previously to McDonald and O'Connor.

At the trial of McDonald, the prosecution relied upon the evidence of O'Connor and of Speck, who were plainly accomplices of McDonald in the murder. Confessions had in the first instance been obtained from each of them by a promise made to him by the police that if he told the truth he would not be prosecuted for any offence in connection with the killing of Miss Bell provided he was not the one who pulled the trigger. The confessions obtained from each of them after being given this promise identified McDonald as having been the one who fired the shot that killed Miss Bell.

On the day that the taking of depositions started, the Solicitor-General signed undertakings to direct a stay of proceedings in the event of any being brought against either O'Connor or Speck—

> " (*a*) as a party to any offence involving the culpable homicide of Margaret Bell on or about the 1st day of July 1979 at Auckland; or
>
> (*b*) as a party to any conspiracy involving the culpable homicide of the said Margaret Bell; or
>
> (*c*) as an accessory after the fact in respect of any offence involving the culpable homicide of the said Margaret Bell."

The document signed by the Solicitor-General concluded by stating that the only condition of the undertaking was that the witness in question " gives evidence in proceedings against Brian Ronald McDonald of Auckland on a charge of murdering the said Margaret Bell, and that when giving evidence he does not refuse to answer any questions on the ground of self-incrimination in respect of the above-recited matters ".

It would appear that the undertaking to Speck was not actually shown to him until the voir dire that was held at the outset of the trial before Prichard J. in the absence of the jury, when objection was made to the admission of O'Connor's and Speck's evidence; and that the undertaking to O'Connor was not shown to him until, after the objection had been over-ruled, he was in course of giving evidence before the jury.

In a careful and lucid summing-up to the jury, Prichard J. gave the standard warning about the danger of convicting on the uncorroborated evidence of accomplices and directing them that there was no corroboration of O'Connor's and Speck's evidence in the case. He went on to give them the following warning:

> " The fact that these witnesses have received what is often called ' immunity against prosecution ' and so can gain nothing by their evidence at this stage does not eliminate the danger. An accomplice may well have given a false account at the beginning or in the first place in order to ' save his own skin '. Having once given a false account, such a witness is likely to stick to it."

He told the jury on more than one occasion in the course of his summing-up that there were two alternative bases upon which they could find McDonald guilty. The first was if they were satisfied beyond reasonable doubt that he was himself the man who pulled the trigger. The second, which would arise if they were not so satisfied, was if they were satisfied beyond reasonable doubt that McDonald was a party to a common plan with O'Connor or Speck or both of them to shoot someone

(not necessarily Miss Bell) with the rifle. That it was upon the second basis that the jury found McDonald guilty is evident from the statement by the foreman after the verdict had been delivered—" The jury have asked me to inform the Court that we have found this man guilty as a participant with others".

The first point made by counsel for McDonald on the appeal to this Board was that the judge had misdirected the jury as to the effect of the Solicitor-General's undertakings to O'Connor and Speck not only in the passage which their Lordships have already quoted, but, more specifically, later in his summing up when answering a written question handed up to him from the jury which was in the following terms:—

" Judge said:

' Speck and O'Connor cannot be charged in any circumstances, even if they said, under oath, " we did it ".'

My understanding of S.G's letter is that it granted immunity *only if* they did not pull the trigger."

To that the Judge replied:

" I propose to answer that right now by saying that the immunity given to them is total as far as that letter is concerned. It may have been said to them initially by the police that they would have immunity if they did not pull the trigger, but that is not what the letter from the Solicitor-General says. The only condition attached to that letter is that they do not claim privilege when they give evidence. So they could, as I have said at the beginning, have gone into the witness box and said ' we did it, he didn't do it ' and they could not be touched. I hope I have made that point clear ".

Counsel for McDonald is recorded as having expressed his agreement with this answer; but before the Court of Appeal and now before this Board he has argued that the Solicitor-General had no power to give an undertaking that he would direct a stay of any future proceedings against either O'Connor or Speck which had not already reached the stage of his committal to the High Court for trial or the preferment of an indictment against him. The power of the Attorney-General, and *pro hac vice* the Solicitor-General, to stay proceedings, it was submitted, was statutory only. It was conferred by section 378 of the Crimes Act, 1961. Under that section it did not arise until that stage in current proceedings against a defendant had been reached; and no law officer of the Crown could bind himself or his successor as to how the statutory discretion would be exercised on some future occasion.

As was pointed out by the Court of Appeal, the practice of making promises of this kind to accomplices, in order to remove or minimise the inducement to them to give false evidence exonerating themselves and inculpating the accused, is of long standing in the administration of criminal justice in England. The history of such promises was discussed by Lawton L.J. in *R. v. Turner* (1975) 61 Cr. App. R. 67 to which the Court of Appeal referred. It dates back at least to 1775 in the time of Lord Mansfield when the usual form the promise took was the promise of a royal pardon. Such a promise, as Lord Mansfield pointed out, may not have been legally enforceable, but it is as effective in removing the inducement to an accomplice to give false evidence in order to exonerate himself as it would have been if it were legally enforceable. As the Court of Appeal said of the Solicitor-General's undertakings in the instant case:

" It is in our view immaterial whether such an undertaking is one which is as a matter of law strictly binding on the Crown. We say

> that because it is quite unthinkable that such an undertaking would not be honoured and in reality the importance of such an undertaking in relation to the evidence given by an accomplice lies in the practical effect which it will have both in protecting that accomplice and in bringing about a state of mind on his part wherein as far as possible he is removed from the fear of consequences of giving evidence incriminating himself and knows that he has nothing to gain by giving false evidence ".

Their Lordships are in entire agreement with the way in which the Court of Appeal disposed of this ground of appeal.

The second point, sought to be made before this Board, was that in rejecting the submission, made on the voir dire by counsel for McDonald, that the evidence of O'Connor and Speck should not be admitted, the judge made an erroneous exercise of the discretion, which it is conceded that he had, to admit or to exclude their evidence. A similar submission had been made to the Court of Appeal, who were of opinion that there was no ground on which they could properly interfere with the judge's discretion in this matter. Where a trial judge has exercised in a particular matter a discretion which he undoubtedly has and the way in which he has exercised it has been considered and upheld by a Court of Appeal in the Commonwealth country where the trial has taken place, their Lordships find it difficult to conceive of a case in which this Board, sitting in London, would take upon itself to interfere. Their Lordships certainly would not presume to do so in the instant case.

Lastly, it was submitted on behalf of the appellant that the judge misdirected the jury or failed to direct them adequately on the continuing effect on the minds of O'Connor and Speck of the conditional promise made originally to them by the police that neither would be prosecuted provided that it was not he that pulled the trigger. This, it was contended, remained a continuing inducement to them to swear falsely that McDonald fired the fatal shot, and the late stage at which they were first shown the Solicitor-General's undertakings, and their apparent vagueness as to the exact effect of the undertakings, prevented them from operating to counteract that inducement.

Their Lordships think that it is to be regretted that the Solicitor-General's undertakings were not shown to O'Connor and Speck before their depositions were taken and a written acknowledgment of receipt of the undertakings obtained. They consider that this ought to be a routine practice whenever immunity from prosecution is offered in this form to an accomplice by a law officer of the Crown.

This said, however, the question whether the judge's direction to the jury was adequate, falls fairly and squarely within a category of questions to which (as the Board has had occasion to repeat at all too frequent intervals since the rule was stated by Lord Sumner in *Ibrahim v. The King* [1914] A.C. 599, 614–615) it is not the practice of the Board to substitute their own answer for the answer given by the local Commonwealth appellate court—in the instant case a Court of Appeal composed of New Zealand judges familiar with the conduct of jury trials in New Zealand and the likely reactions of New Zealand juries.

The Court of Appeal pointed out that O'Connor's and Speck's vagueness as to the exact effect of the Solicitor-General's undertaking had been prominently brought out in the evidence and had been stressed by counsel for McDonald in his final speech to the jury. The Court of Appeal were satisfied that the judge's summing-up on this aspect of the case was adequate. Their judgment on a matter such as this is not one with which it would be the practice of this Board to interfere. Their Lordships would only add that it is, in their view, significant of the jury's

own appreciation of the situation of O'Connor and Speck in consequence of the original condition on which immunity had been offered to them by the police, that although O'Connor and Speck had each given evidence that he himself had not, but McDonald had, fired the shot that killed Miss Bell, the jury did not accept this part of their evidence as being true beyond reasonable doubt. They expressly stated that they had found him guilty on the second basis on which the Judge had told them it was open to them to find McDonald guilty, viz. " as a participant with others ".

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**In the Privy Council**

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**BRIAN RONALD McDONALD**

*v.*

**THE QUEEN**

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LORD DIPLOCK

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