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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

REGINA

v

THOMAS McGLINCHEY

_____

Before: Keegan LCJ, McCloskey LJ and Kinney J

_____

Mr Desmond Fahy KC and Mr Stephen Mooney (instructed by Jack Quigley Solicitors) for the Appellant
Mr Philip Mateer KC and Ms Catherine Chasemore (instructed by the Public Prosecution Service) for the Respondent

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McCLOSKEY LJ (*delivering the judgment of the court*)

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Introduction

[1] The appellant was convicted by a jury of the counts detailed below, following a trial between 6 March 2023 and 20 March 2023, and was sentenced as shown on 9 June 2023:

Offence	Verdict	Sentence
Count 1 – unlawfully depositing waste: 9 September 2012 – 13 October 2013	Guilty	18 months' custody, suspended for three years.
Count 2 – unlawfully keeping controlled waste: 14 October 2013	Guilty	18 months' custody, suspended for three years.
Count 3 – unlawfully depositing waste: 14 October 2013	Guilty	18 months' custody, suspended for three years.
		Commensurate Sentence – 18 months' imprisonment, suspended for three years.

The appellant's application for leave to appeal against conviction was granted by McBride J in respect of count 1 only, ie unlawfully depositing waste between 9 September 2012 and 13 October 2013, on the ground that the learned trial judge had arguably erred in admitting into evidence the statement of a witness whom we shall describe as "L", who was deceased at the time of the trial.

Indictment and Convictions

[2] The appellant was returned for trial to Derry Crown Court on 27 April 2017. He was arraigned and pleaded not guilty to counts 1, 2, and 3 (formerly counts 3–5, before amendment of the indictment) on 27 September 2017. There were two previous aborted trials in March 2019 and January 2020. On the original bill of indictment there were three accused namely the appellant as the sole director of BrickKiln Waste Ltd (the "company"), the company allegedly dumping the waste, F as the driver of the lorry dumping waste at the time of the NIEA inspection and L as the owner of the land onto which the waste was deposited (the "site"). Prosecution of L was severed and subsequently discontinued, resulting in his acquittal. F was acquitted of the two counts against him.

[3] Prior to his acquittal "L" was interviewed under caution and confirmed that he owned the site at Carnmoney Road but stated that he had entered into an exclusive agreement with the company for them to provide the inert landfill material required to allow the site to be landscaped as it had closed as a dump site previously. "L" provided a copy of the agreement with the company which was signed by himself and the applicant. "L" also later made a statement to police which, following his death, was admitted into hearsay under the hearsay provisions. The appellant was not interviewed by police prior to the prosecution.

The prosecution case

[4] The appellant was sole director of the company which specialises in recycling waste. On 14 October 2013 the Northern Ireland Environment Agency (NIEA)

attended the site to carry out an inspection. While the NIEA inspectors were at the site a tipper-lorry driven by F and which was liveried with the company arrived. The NIEA inspectors noted an area of top dressing over the waste which was stored lower in the lorry so that a casual glance would not reveal that there was unauthorised waste. F drove the lorry to the lower end of the site and deposited the load. An inspection occurred at that time which revealed that the freshly deposited waste contained material including plastics, nappies, tins and food packaging which were illegal and in contravention of the licence under which the company and the site operated.

[5] The NIEA inspectors made a number of test pit digs and discovered that illegal waste had been unlawfully deposited on the site in contravention or in the absence of a waste management licence authorising such deposits. There was an inert top dressing that was present and there was evidence that there had been some degree of depositing of the waste, then covering it up and concealing, it for some considerable time with some material dating back to 2012.

[6] The appellant was prosecuted on the basis he was the director of the company. At the trial the prosecution adduced evidence that L and the company had executed a licencing agreement dated 7 September 2012 which was signed by the appellant on behalf of the company.

[7] By a ruling of the trial judge the prosecution was permitted to introduce in evidence, under the statutory hearsay provisions, a statement made by L (now deceased) dated 1 April 2021. L stated that he was the owner of the site. He further averred that he had entered into an exclusive agreement on 7 September 2012 with the company to provide inert landfill material. The agreement was signed by the appellant on behalf of the company. L stated that the company had sole access to the site and that he visited the site regularly. On two occasions he had noted illegal waste and arranged for someone from the company to remove this waste. He further noted that the company had an excavator on the site on a permanent basis and he assumed that this was being used to cover up the illegal waste daily.

[8] A calculation disclosed that there were 7,634 cubic metres of unlawful waste at £110.40 per tonne (the cost of lawful disposal), the total benefit to the company being £842,793.60. While some efforts were made to have the appellant interviewed these were unfruitful.

The rulings of the trial judge

[9] The trial judge made two oral rulings, namely the impugned hearsay admission ruling and a refusal of the no case to answer application. No written rulings were provided. In making the first ruling, the judge stated that he was minded to admit the written statement of L and that any difficulties arising from its admission could be dealt with within the trial process and by his direction to the jury.

[10] In ruling against the application for a direction of no case to answer, the trial judge expressed his assessment there was a circumstantial case against the appellant, particularly with regard to section 20(2) of the Interpretation Act (NI) 1954 and a director not exercising due diligence as he ought to in the circumstances of the case. He considered that a jury could come to the conclusion that the appellant was guilty on the evidence presented.

Grounds of appeal

[11] These are:

(i) The trial judge erred in admitting L's statement into evidence;

(ii) The judge failed to give an adequate care warning to the jury in respect of the evidence of L; and

(iii) The judge erred in not acceding to the appellant's direction application.

Statutory framework

[12] Article 18(1)(a) and (2) of - The Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") provide:

> "**Admissibility of hearsay evidence**
>
> **18.**—(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
>
> (a) any provision of this Part or any other statutory provision makes it admissible,
>
> (b) any rule of law preserved by Article 22 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);

(c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

By Article 20, so far as material:

"**Cases where a witness is unavailable**

20.(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in paragraph (2) is satisfied.

(2) The conditions are—

(a) that the relevant person is dead."

[13] The appellant contends that L's statement should have been excluded under either Article 76 of the Police and Criminal Evidence (NI) Order 1989 ("PACE") or Article 30(1) of the 2004 Order:

Art 76 PACE

"**Exclusion of unfair evidence**

76.—(1) 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.

(2) Nothing in this Article shall—

(a) prejudice any rule of law requiring a court to exclude evidence … "

Art 30(1), 2004 Order

"**Court's general discretion to exclude evidence**

30.—(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if—

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence."

Directions to the jury

[14] The judge's general directions to the jury were orthodox. In the context of the first and second grounds of appeal the following are noteworthy: the jury was directed to decide what evidence it accepted and rejected, what facts it found to be proved and that inferences or conclusions could be drawn from evidence which it accepted; there was a duty to consider all of the evidence; each count on the indictment had to be considered separately; the first count related to the period 9 September 2012 and 13 October 2013, during which the licence agreement between the company and L subsisted; and with specific reference to the first count, the jury had to be satisfied beyond reasonable doubt of three matters, namely: controlled waste was deposited upon the land, the appellant knowingly caused or knowingly permitted this to occur and, finally, this was not permitted by a waste management licence. With regard to the interplay between the appellant and the company, the direction was the following:

> "The liability of a director or officer of a company is dependent upon personal involvement and responsibility and a company director may be liable to be prosecuted as if he had personally committed the offence and shall, if on such prosecution it is proved to the satisfaction of the court that he consented or connived at or did not exercise all reasonable diligence as he ought in the circumstances to have exercised to prevent the offence having regard to the nature and functions in his capacity and to all of the circumstances. So, a director or an officer of the company may lawfully be prosecuted but it is dependent upon his degree of knowledge and actions."

[15] The judge then summarised the oral evidence of the prosecution witnesses, all of whom appear to have been NIEA officials. Dealing with the last of these witnesses, the judge stated:

> "He confirmed that [L], the landowner, was a suspect and had been cautioned and that he was prosecuted but the charges were withdrawn against him."

[16] The next section of the judge's charge was devoted exclusively to the topic of L's statement. Given the contours of this appeal, it is appropriate to reproduce this in full:

> "[An NIEA witness] told you that he examined the lorry and that there was a docket book but there were no dockets in it. He confirmed that [L], the landowner, was a suspect and had been cautioned and that he was prosecuted but the charges were withdrawn against him.

If you'll give me one moment, ladies and gentlemen. Yes. That concluded the evidence save for the statement of Mr [L] which was read to you, and I wish to give you a direction about that statement.

Mr [L's] statement was read to you. He could not give evidence in court because he had died, and it was read to you. The fact that this statement was read does not mean that the prosecution and defence agree that it or all of it is true. In particular, Mr McNeill disputes the assertion that Mr [F] was the main driver for Brick Kiln who delivered to the site.

You must decide how much importance, if any, you give to this evidence and when you are doing so, you must bear in mind that this evidence has a number of limitations, and you should exercise caution in examining and assessing this portion of evidence. Firstly, although Mr [L] signed a formal declaration at the beginning of the statement that it was true and that [L] knew that he could be prosecuted if he deliberately put something into the statement which was false, the statement was not made under oath or affirmation.

Secondly, if [L] had given evidence to you in court, he would and could have been cross-examined and you do not know how Mr [L's] evidence would've stood up to that cross-examination. Mr McNeill in particular submits that he would've questioned Mr [L] about firstly, in his statement, he claims there were no issues with the site, but Mr Mooney told you in evidence that there were issues with monitoring and reporting results to NIEA.

Secondly, in his statement, he says with confidence there was no illegal waste prior to 2013 yet there are best before dates from pits outside the red area which show best before dates of 2004 and 2007.

Thirdly, in his statement, he says he saw bitumen and reported it to Brick Kiln whereas Mr McCormick pointed this out to [L] on the inspection on the 15th of August 2018.

Fourthly, he states in his interview that he was on site for the tipping and all looked okay whereas in his statement, he says everything was covered up quickly.

> Fifthly, his assertion in interview that he went to Brick Kiln to inspect is not in his statement and lastly, he does not mention [F] in interview but does so in his statement.
>
> When you are deciding whether or not you can rely upon what [L] said in his statement, you should also take into account what you know about [L]. In particular, you know that he was prosecuted for waste management offences as the landowner. You know that the prosecution was discontinued against him and that shortly that, he made the statement that you have now – you have heard read to you.
>
> Finally, when you're deciding how much importance, if any, you give to Mr [L's] evidence, you must look at it in the light of the other evidence in the case. You must also keep [L's] evidence in perspective. It is only part of the evidence in this case and must be considered in light of all of the other evidence."

Grounds 1 and 2

[17] In granting limited leave to appeal, McBride J reasoned as follows:

> "I consider the applicant has established an arguable case as regards his conviction for count 1, namely the offence prior to the inspection of 14 October 2013. [L's] statement was critical to proving this offence and the learned trial judge failed to go through the article 18(2) checklist. If he had done so it is arguable that he should have concluded that the statement ought to have been excluded given its unreliability and the fact the counterbalancing safeguard of a direction to the jury was insufficient to remedy the prejudice caused by the admission of this statement."

The judge continues:

> "This analysis does not apply to counts 2 and 3. These offences were not reliant on the evidence contained in [L's] statement as NIEA officers were able to give direct evidence about events on 14 October. Further, I do not consider it is arguable that the admission of the statement was key to counts 2 and 3. The learned trial judge in the exercise of his discretion was entitled to consider on the basis of other circumstantial evidence that a jury, properly directed, could convict on counts 2 and 3. I therefore refuse leave to appeal convictions in respect of counts 2 and 3."

[18] The appellant accepts that L's statement was admissible under the provisions of article 18(1)(a) and article 20(2) of the 2004 Order on the basis that the maker of the statement was deceased. It is submitted, however, that the court ought to have excluded the statement under Article 30 of the 2004 Order and/or Article 76 of PACE having regard to the factors set out in article 18 (2) of the 2004 Order which are concerned with the question of whether the admission of hearsay evidence is in the interests of justice. It is further contended that the direction to the jury was inadequate.

[19] The first ground of appeal was developed in the following way in argument. The central ingredients of the submission of Mr Fahy KC were these: the most important feature of the admission of L's statement in evidence was that it entailed the twin factors of (a) L's death and (b) L's previous status of "accomplice"; the judge's directions to the jury gave insufficient weight to this status; the judge paid insufficient attention, or gave insufficient emphasis to, the discrepancies between L's earlier interview by the police and his later statement; the judge's direction in the passage reproduced in para [13] above suffered from the "glaring omission" of not mentioning either L's interview under caution or the dates of both the interview and the later statement and the judge had been misled by a passage in the prosecution skeleton argument at trial that the statement of L's was "admissible without more." The final ingredient in this ground of appeal is the criticism of the trial judge for failing to provide a ruling addressing the first five of the nine factors specified in Article 18(2) of the 2004 Order.

[20] Turning to the second ground of appeal, there was some equivocation in the argument advanced. At its outset, Mr Fahy stated that this was not a case in which the judge should have given a *Makanjuola* direction, or "care" warning to the jury. However, given that the need for such a warning is detailed in counsels' skeleton argument and, further, that the decision in *Makanjuola* was opened to the court, we shall assume that this decision underpins the second ground. This ground is encapsulated in the following passage from the skeleton argument:

> ".. the convictions are rendered unsafe by virtue of the learned trial judge failing to give a more detailed and focused care warning to the jury and advising them of the need to exercise particular caution before acting on the hearsay evidence of [L]."

[21] With regard to the first and second grounds of appeal, the theme of the unreliability of the contents of L's statement does not emerge clearly from counsels' skeleton argument, nor did it feature in the initial submissions to the court. However, judicial questioning elicited that this is a significant element of both grounds.

Grounds 1 and 2: Our Conclusions

[22] L did indeed have the historical status of co-accused. His written statement bears the date 1 April 2021. It is agreed that the PPS decision to discontinue his prosecution was made on 5 March 2021 and communicated on 8 March. The context is inevitably important, as the exchange of correspondence between the appellant's former solicitors and the PPS demonstrates. This development occurred following a second aborted trial, in January 2020. This prompted a review of the question of whether, evidentially, there was a sustainable case against L. This gave rise to the assessment that due to significant frailties in the evidence this prosecution could not be maintained. A subsequent enquiry established the willingness of L to give evidence for the prosecution.

[23] In the presentation of this aspect of the appellant's case there was a striking lack of particularity. The question, fundamentally, is why L's former status of co-accused should either by itself or in tandem with other factors have impelled the trial judge to dismiss the prosecution's hearsay application. There was a failure to grapple with this fundamental question. There is no evidential foundation for any nexus between the discontinuance of L's prosecution and his decision to testify for the Crown, as demonstrated. Nor is there any evidential foundation for any concern or unease about the reliability of the contents of L's statement by reference to his former status and the abandonment of his prosecution. We consider that there is no substance in this aspect of the first ground of appeal in consequence.

[24] The second aspect of this ground of appeal is the suggestion that the judge, in making his hearsay ruling, paid insufficient attention to the discrepancies between L's interview under caution and his later written statement. This discrete complaint could only be established inferentially. It is trite that there would have to be a basis for making this inference. None was developed in argument, and none is apparent to the court.

[25] The next two elements of the argument can be addressed together. The judge's oral ruling to admit the hearsay evidence was indeed brief. He expressed his intention "… to give a short ex tempore ruling in order to proceed with the trial expeditiously." This court is bound to respect the judge's assessment of this purely trial management issue. We are aware that the jury had been sworn on the previous working day and the relevant transcript makes clear that they were in attendance, waiting for the trial to commence.

[26] There are two salient features of the judge's short ruling. First, his awareness of the availability of the "trial process" to correct any possible unfairness that might loom. One specific feature of this was his pronounced intention to maintain his ruling under review. Second, the judge was clearly casting his mind forward to the stage of charging the jury. Significantly, there was no specific criticism of any of these features. Nor could there be, in our estimation. If the judge had not addressed his mind to how he would charge the jury on this issue in due course, this would have been a positive

weakness which this court would have been bound to highlight. That, however, is not this case. In short, in making the hearsay ruling, the coordinates on the trial judge's notional map joined together the salient Article 18(2) factors, the need for subsequent judicial alertness to possible unfairness to the appellant in the trial process and the directions which the jury would receive in due course. For the reasons given, we can identify no merit in these aspects of the first ground of appeal.

[27] The next issue concerns Article 18(2) of the 2004 Order. The starting point is that Article 18(2) applies only to one of the four gateways specified in Article 18(1), namely where the court "… is satisfied that it is in the interests of justice for it to be admissible." The judge, therefore, was not obliged to have regard to the factors contained in the Article 18(2) list. However, we accept that consideration of such of these factors as the trial judge considers "relevant" (the statutory word) may be appropriate in certain cases. The reason for this is that certain of these factors may be germane to the exercise of the court's discretion to exclude evidence under Article 76(1) PACE and, to a lesser extent, Article 30(1) of the 2004 Order. This accords with what was stated by Hughes LJ in *R v Riat* [2012] EWCA Crim 1509 regarding the equivalent English statutory provision, namely that the Article 18(2) factors may act as an aide memoire, which this court accepts.

[28] It follows that the first frailty in this discrete aspect of the first ground of appeal is that the trial judge was under no duty to have regard to the Article 18(2) list, this being a matter which lay within his discretion. The second frailty is that certain of the Article 18(2) factors clearly featured in the judge's charge to the jury. This, ultimately, was accepted on behalf of the appellant. Furthermore, it was not contended that any of the other factors in Article 18(2) ought to have been addressed in the judge's directions. We also take into account that at the stage when the judge made his ruling the material considered by him included three witness statements each attesting to the good character, honesty and reliability of L. For these reasons we can identify no substance in this aspect of the first ground.

[29] The contention that at the beginning of the relevant section of his charge to the jury the judge's failure to mention L's interview under caution was a "glaring omission" or certain related dates/events (see para [16] above) is in our view hyperbolic. Strikingly absent from this aspect of the argument was the absence of (a) any reason why the appellant's right to a fair trial required this to be done (b) any identified ensuing unfairness to the appellant and/or (c) any developed submission that the convictions are unsafe in consequence. In short, no concern of substance has been demonstrated.

[30] One discrete ingredient which permeated the arguments supporting the first and second grounds of appeal was that of the discrepancies between L's interview under caution and his written statement. A succinct riposte to this argument is appropriate. First, there is no suggestion that the judge failed to bring to the attention of the jury the discrepancies. Second, the impact of the discrepancies and the weight

to be attributed to them lay exclusively within the province of the jury, who were appropriately directed on this discrete issue.

[31] For the combination of reasons elaborated, we are unable to identify any merit in the contention that the judge's charge to the jury should have included a *Makanjuola*, or "care", warning. Furthermore, this appellate court is unavoidably struck by the absence of a requisition on this issue.

[32] Finally, the appellant was at liberty to directly challenge L's statement by giving evidence and/or adducing evidence from relevant members of the company's workforce. He adopted neither course. Furthermore, in considering all aspects of the first and second grounds of appeal it is appropriate to highlight the truism that the adduction of material incriminating evidence against any accused person is not, in the absence of any identified vitiating factor, unfair.

Ground 3: Our Conclusions

[33] The complaint in this ground of appeal is that the appellant's convictions are unsafe because the judge should have acceded to the application that he had no case to answer at the conclusion of the Crown case. This ground at all times has had the appearance of a makeweight. McBride J considered it unarguable. This court concurs. Two observations will suffice. First, there was clearly sufficient evidence upon which a jury properly directed could convict. Second, this court is bound to respect the trial judge's margin of appreciation in a context where the distinction between trial judges and appeal court judges is considerable.

[34] In refusing leave to appeal on this ground, McBride J reasoned:

> "I consider that it is not arguable that the learned trial judge erred in refusing the Direction. Under section 20 (2) of the 1954 Act guilt can be based on "consent", "connivance at" or "failure to exercise reasonable diligence." The learned trial judge correctly identified strands of circumstantial evidence, absent [L's] statement upon which a jury properly directed could reasonably infer the applicant either consented to or connived at or at the very least failed to exercise reasonable diligence, which are all bases for a conviction according to section 20(2). A trial judge enjoys a wide margin of appreciation in determining a *Galbraith* application, which in my view the judge did not exceed in this instance."

This court concurs.

Disposal

[35] The single judge granted leave to appeal in respect of the first ground only. For the reasons elaborated, we refuse leave to appeal in respect of the second and third grounds and dismiss the appeal as regards the first.