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IN THE CROWN COURT IN NORTHERN IRELAND SITTING IN BELFAST

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REGINA

v

DAVID JONATHAN HOLDEN

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Ruling on admissibility of witness statement as hearsay evidence

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O'HARA J

[1] The defendant is a former soldier charged with manslaughter. This ruling concerns an application by the prosecution to have admitted as hearsay evidence a statement made by a Mr Gary Montgomery of the Northern Ireland Forensic Science Service. The background to the application will be explained below. The parties have been able to agree the basis on which a number of written statements from other witnesses can be admitted in evidence but there is no agreement in relation to Mr Montgomery's.

[2] On Sunday 21 February 1988 Aidan McAnespie was walking along the Monaghan Road, Aughnacloy, Co Tyrone. He was on his way to a GAA match. As he passed near a permanent army vehicle checkpoint three shots were fired. One of them, probably the first one, hit the ground, ricocheted upwards and struck him in the back. Mr McAnespie died at the scene.

[3] The shots were fired by the defendant from a general purpose machine gun (a GPMG). That fact is admitted by the defendant. The shots could not have been fired unless the gun was cocked. That is an agreed fact. The defendant says that his finger slipped off a trigger guard because his hands were wet. Prosecution experts engaged relatively recently by the Public Prosecution Service say that while this explanation is technically possible it is unlikely because in order for bullets to be fired the trigger would need to have had more pressure applied to it than would result from a finger slipping.

[4] The defendant was charged with manslaughter soon after the event but that prosecution was discontinued in September 1988. A fresh prosecution was initiated after the Attorney General for Northern Ireland referred the case back to the Public Prosecution Service many years later. Part of the prosecution evidence, potentially an important part, is a report obtained by newly engaged forensic firearm consultants, a Mr Mastaglio and a Ms Shaw. In effect they reviewed the work done 30 years earlier by Mr Montgomery.

[5] Mr Montgomery was medically retired from the service when he was 57, more than 14 years ago. The prosecution has given notice of its intention to adduce as hearsay evidence his witness statement on the ground that he is unfit to be a witness as a result of his medical condition and on the ground that it is in the interests of justice for that statement to be admitted. Provision for this is made at Articles 20(1)(c) and (2)(b) and 18(1)(d) of the Criminal Justice Evidence Northern Order 2004.

[6] The defence has objected to that application on a number of grounds which I summarise as follows:

- Insufficiency of medical evidence supporting the application.
- Lack of consideration of possible special measures.
- The significance of Mr Montgomery's evidence.
- The possible or actual contradiction between his contemporaneous analysis and the one conducted by Mr Mastaglio and Ms Shaw almost 30 years later.
- The lack of fairness which the defendant would suffer if he is not allowed to question Mr Montgomery.

[7] There is no doubt that Mr Montgomery would be a very significant witness if it was possible for him to attend the trial. Of particular interest to the defendant is a memorandum dated 7 September 1988 written by Mr Morrison of the DPP following a meeting late the previous evening. Those in attendance included two other senior representatives of the DPP and a detective chief inspector. According to Mr Morrison's memo, Mr Montgomery explained his report (effectively his written statement) in some detail. It is unnecessary for the purposes of this ruling to set out the memorandum in full but in essence Mr Montgomery expressed the view that the weapon had been mistakenly left in a cocked condition by another soldier, that the defendant would have had no reason to suspect that the gun was cocked and ready to fire, that the explanation given by the defendant that his wet finger slipped off the trigger guard onto the trigger and discharged the weapon cannot be ruled out but that the more likely explanation for the discharge was that in grasping the weapon in order to move it the defendant's finger pulled the trigger without slipping but without the defendant intending to discharge any rounds.

[8] It is more than likely that this expert opinion expressed by Mr Montgomery, whether it is right or wrong, was directly relevant to the decision taken soon afterwards in September 1988 to discontinue the prosecution. That opinion is,

arguably, supportive of the defence to the prosecution case, whether that case is framed as gross negligence manslaughter or unlawful act manslaughter. In these circumstances the defence is understandably anxious that Mr Montgomery gives oral evidence.

[9] Obviously I recognise that it is preferable that any expert witness who was involved at the relevant time and whose opinion was influential should give evidence all these years later. However I do not see how that is possible in the present circumstances.

[10] I have been provided with three reports from Mr Montgomery's general practitioners' practice dated May 2017, February 2021 and January 2022. The first two were written by Dr Brown and the third by Dr McCutcheon. Dr Brown in particular knows Mr Montgomery well, having been his doctor for "many years". In her February 2021 report she stated that any request or summons to him to appear as a witness in high profile cases causes him "considerable stress", that she has "grave concerns" as to his well-being and that she considers him to be at risk of his mental and physical health deteriorating further. She then asked for him to be excused permanently from any requests to attend court and added:

> "I really do not see how Mr Montgomery could be expected to participate as a witness even with added measures or adjustments."

[11] Dr McCutcheon's note of January 2022 sets out a list of four serious conditions from which Mr Montgomery suffers and concludes:

> "In my opinion he is permanently unfit to give evidence in court."

[12] For the defendant Mr O'Donoghue QC suggested that with all due respect to the general practitioners the prosecution should have Mr Montgomery examined by a consultant. I accept that in some cases such a course might be appropriate but not here, especially in light of what has been written by Dr Brown who knows him well. The only possible conclusion to be drawn from the medical evidence is that this gentleman who is now in his early 70s and who was retired on the grounds of ill-health more than 14 years ago cannot and should not be required to give evidence due to his severe ill-health, both mental and physical.

[13] Within the framework of the 2004 Order I am satisfied that Mr Montgomery who has made a witness statement is unfit to be a witness because of his bodily and mental condition – Article 20(2)(b). Having considered the non-exhaustive list of factors in Article 18(2), including the likely probative value of his evidence, I am satisfied that it is in the interests of justice for Mr Montgomery's statement to be admitted in evidence. However I do so on the basis that Mr Morrison's memorandum is also admitted since it in effect represents a further statement by Mr

Montgomery. What weight is attached to these statements and how they impact on the pending abuse of process application which will be made at the end of the prosecution case are not matters for determination at this point.