Neutral Citation No [2003] NICA 57 | *Ref:* **CARJ3677**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **29/04/03**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

THE QUEEN

v

JOHN JOSEPH BOYLE

Appellant

CARSWELL LCJ

[1] We have reached a conclusion in this matter and we shall accordingly give judgment. This appeal is brought by Mr John Boyle on reference from the Criminal Cases Review Commission to this Court. The appeal is against his conviction before His Honour Judge Brown QC sitting without a jury at Belfast City Commission. He was convicted on 14 October 1977 on one count of possession of firearms and ammunition with intent to endanger life and another count of membership of a proscribed organisation. He was sentenced to ten years' imprisonment on the first count and two years' concurrent on the second count. He also had a suspended sentence invoked whereby a further two years were added to the ten years' imprisonment. He did appeal to this Court following his conviction and his appeal was dismissed by the Court. He then subsequently brought the matter before the Criminal Cases Review Commission which referred the matter to this Court for consideration and accordingly it falls to us to deal with it in the same manner as an appeal under the Criminal Appeal Act.

[2] The allegation against Mr Boyle is that he took part in a Provisional IRA gun attack on police officers in Franklin Street, Belfast, on 27 May 1976 and the case against the appellant was based exclusively on admissions. The Crown case was that he had made these to two police officers in the course of interview to the effect that he had been giving cover to the gunman but had not himself fired shots. Interviews took place on six occasions on 8 and 9 March 1977 and they were recorded in notes written by Detective Constables A, B, C and D. The material interview was interview five in which the notes of interview were set out. The interviewer Detective Constable A signed it as the officer recording the notes and they were countersigned by Detective Constable B. The interview commenced at 2.00 pm on 9 March 1977 and it concluded at 3.35 pm. It is recorded that Detective Constable C entered the room at 3.25 pm and he then continued interviewing on his own until 4.45 pm.

[3] The material admission relied upon by the Crown which was contained in the notes was that he said according to the text:

> "We continued to question subject about his admissions to us, about being in the Provisionals and he agreed and said 'I am making no statement'. When asked why he did not want to make a statement to clear the whole lot up he replied 'I can't make a statement I am an officer'. We continued to question the subject and he then said 'Sure you said yesterday that I am the QM'. "When the subject was asked if this was true 'he agreed'."

And then a further passage.

> "We continued to question subject about this incident and he admitted 'I only done cover with a pistol while another man fired an Armalite."

This was the major evidence against the appellant. The judge did not consider that the forensic evidence was probative or indeed admissible and that the other admissions or passages and interviews relied upon by the Crown were not probative against him, so that the case turned upon the acceptance or not by the judge of the veracity of the admissions. In that I include the fact that they were made first of all and secondly that they were correct. It is right to say that the appellant denied that he had made any such admission or that he had admitted either of the offences charged against him and he claimed, and it was put in cross-examination repeatedly, that the officers were writing down things which he had not said.

[4] Accordingly, it came down to a clear conflict of evidence between Detective Constables A and B on the one side and the accused on the other as to whether he had said what was attributed to him. The learned judge had to be satisfied beyond reasonable doubt that he had made the admissions and that the admissions were correct. In this he said in the course of his written judgment:

> "I observed the accused closely in the witness-box. I did not believe him when he denied making the admissions. On the contrary he seems a slippery, evasive and manifestly untruthful witness who was prepared to say anything he thought that would assist this case. By contrast I believe in its entirety the evidence of the two Detective Constables, both seem to me to be completely honest and truthful. If they had been dishonest they could have written down even more damning admissions in a much shorter time".

It is quite clear accordingly that in the contest of veracity the learned judge came down quite firmly in his assessment of veracity on the side of the Crown. So much so that he accepted beyond reasonable doubt that the conflict was resolved in favour of guilt.

[5] The appellant's advisers obtained and submitted to the Criminal Cases Review Commission a test conducted by the ESDA process, which is so well known to this Court that we need not go into the details of the process involved, which of course would not have been available at the time of his original conviction and appeal. The Criminal Cases Review Commission quite rightly referred the case to us in the light of the findings of Mr Hughes. Having considered his report we are content to accept it as agreed by the Crown, and having looked carefully at the findings which he has recorded it appears that there is a basis for his conclusion that there must have been another version of the interview note of interview five. We do not base this so much upon the absence of certain passages, which may perhaps at least be explicable by notes having been made on a different surface in the time when those portions were recorded, but what we consider is of substantial significance is verbal differences between the recorded interview and the impressions which were found by Mr Hughes on examination. These are not substantial matters and they do not bring in any other matter which was in itself damaging to the case of the appellant, and we should make that clear that there is no question in this case of matters apparently having been written which damn him and which are not contained in the impressions. But they vary in certain minor respects in wording which cannot be accounted for, in our opinion, by anything appearing or explicable from the impressions and accordingly we accept the

conclusion that Mr Hughes advanced that there appears to have been a different version of interview five in existence at some time.

[6] No doubt if the police officers had accepted that there was a rough version, as has been mooted, which was then rewritten faithfully as a correct record of what was actually said in the interview, the case would have taken one turn. But the way that the officers were asked about it they maintained quite clearly, and this appears in several places in the transcript, that the notes of the interview were made throughout the interview and in their own phrase "at the time" and accordingly they have committed themselves in evidence saying that the interview notes were all taken as the interview progressed and did not resile from that.

[7] If it now appears, as it does, that that cannot be correct, that immediately raises the question whether the credibility of the officers could have been attacked by this side door, legitimately enough by Counsel at the trial. One cannot say at this stage what view the judge would have taken of that. He might have taken the view that it had fatally undermined their credibility and removed the evidence from the area of proof beyond reasonable doubt to some lesser area, or he might have said that he nevertheless accepted that the evidence was reliable in substance and that the interviews reflected what was said. We are not in a position to say that and we simply could not say at this stage that the judge would necessarily have reached the same conclusion if he had known of the rewriting of the interviews and the matter had been pursued in evidence before him.

[8] This brings us to a conclusion very similar to that which we reached in the case which was cited to us of the decision of this Court in 1999 R v Gorman and McKinney where we said:

> "Unlike some other reported cases the evidence of rewriting does not show the inclusion of any material which was to the detriment of either appellant nor did the fresh evidence afford direct and irrefutable contradiction of considered testimony given by police officers about the circumstances in which rewriting took place. There might well be an innocent explanation of each instance of rewriting if the evidence were before us. In the absence of satisfactory explanations for the rewriting of interview notes, we cannot be satisfied beyond reasonable doubt that the judge's conclusion would have been the same if the issue had been explored before him. It follows that we consider that the fresh evidence might have led to a different result in the case and we cannot regard the convictions as safe".

[9] We consider that disregarding the question of material which appears in the interview notes and not in the impressions upon which Mr Treacy relied, the case comes very close to that of Gorman and McKinney and that that the same principles apply and because we are satisfied that there is at least a prima facie case that the notes were re-written, we cannot regard the conviction as safe. We shall accordingly allow the appeal and quash the conviction.