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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **09/12/2022**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

PATRICIA WILSON

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Mr O'Donoghue KC with Mr McKenna BL (instructed by Ó Muirigh Solicitors) for the Applicant
Mr Simpson KC with Mr Steer BL (instructed by PPS) for the Prosecution

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Before: Treacy LJ, Sir Paul Maguire and Sir Declan Morgan

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SIR DECLAN MORGAN (*with whom Sir Paul Maguire agrees*)

[1] On 15 February 1978 the applicant was convicted after a trial of causing an explosion of a nature likely to endanger life or cause serious injury to property contrary to section 2 of the Explosive Substances Act 1883, possession of an explosive substance with intent, carrying a firearm with intent to commit an indictable offence all on 11 January 1977 and membership of a prescribed organisation, namely, Cumann na mBan between 23 October 1976 on 25 June 1977. On the same date she was convicted of causing an explosion likely to endanger life or cause serious injury to property contrary to section 2 of the 1883 Act and possession of an explosive substance with intent on 14 March 1977.

[2] At her trial the applicant did not give evidence nor was any witness called on her behalf. By virtue of section 2(6) of the Northern Ireland (Emergency Provisions) Act 1973 ("EPA") she had a right of appeal under section 8 of the Criminal Appeal (Northern Ireland) Act 1968 but did not exercise that right within the 28 day period allowed. In January 2014, 35 years after her conviction, she applied to the Criminal Cases Review Commission ("CCRC") for review of her convictions but the CCRC made a final decision in September 2018 not to refer her convictions. She lodged the application with which this court is concerned in December 2018 seeking an extension of time within which to appeal her convictions and leave to call witnesses and produce further evidence.

Background

[3] On 11 January 1977 at approximately 15:30 hrs the security man at Christies Wallpaper and Paint shop on Crumlin Rd, Belfast noticed a girl coming to the front door with a scarf around her face. She came into the doorway of the shop leaving the outside door open and a couple of seconds later a man who had been outside the doorway entered the shop, put his hand in his pocket and produced a gun. A second man entered with a carrier bag which he left in the middle of the shop. The man who had been carrying the bag and the girl left the premises and the man with the gun told customers and staff that they had five minutes to get out. The bombers made off in a car and the bomb exploded causing the destruction of the premises approximately 10 minutes later.

[4] At about noon on 14 March 1977 two ladies with prams entered a confectionery shop in Castle Lane, Belfast to get sweets for their children. As they were coming out of the shop two boys in their early 20s came in and behind them was a girl carrying a dark coloured shopping bag. The girl seemed to be in a hurry and one of the ladies thought that the girl seemed to be with the two men. A short time later the owner of the premises saw a black plastic half shoulder bag which he thought someone had left behind and he carried the bag into the interior office premises to keep it safe. His wife then looked at the bag. She saw wires and called to passing soldiers who immediately raised the alarm. About five to seven minutes after leaving the shop there was an explosion which completely destroyed the shop. The prosecution case was that in each instance the applicant was the girl who was mentioned.

Arrest, Interviews and Trial

[5] The applicant was arrested at her family home at 06:40 on 23 June 1977 and taken to Castlereagh Police Office where she arrived at 07:20. She was born on 6 November 1959 and was therefore 17 years old at the time of arrest. She was seen by Dr Alexander, a Forensic Medical Officer ("FMO"), at 09:10 and made no complaints. She did not have access to a solicitor or her family until the completion of her interviews.

[6] The interview records obtained by the CCRC indicate that the applicant was first interviewed on 23 June 1977 at 14:00 for 1 hour and 35 minutes by DCs Freeborn and Nesbitt. She had a second interview at 16:15 by the same officers for one hour and in a final interview that day commencing at 19:25 she is recorded as being interviewed by DS Brown and WDC Lowry for 3 hours 5 minutes with three other officers present including DC Bohill.

[7] The applicant's first interview the following day commenced at 10:05 with WDC Lowry and DC Bohill and lasted for two hours 10 minutes. At 13:00 she was interviewed for 35 minutes by WDCs Houston and Kennedy. At 15:45 she was again interviewed by DCs Nesbitt and Freeborn for one hour 30 minutes. At 19:00 she was

examined by Dr Henderson, Forensic Medical Officer ("FMO"), with Dr O'Rawe also present.

[8] The doctor noted that she had no complaints about her interviews on the first day but recorded her complaint that in the second interview on the second day she had been made to stand up and was pushed twice by a policewoman who also slapped her across the shoulder with an open hand. During the next interview she was questioned by two policemen one of whom pushed her about the room while the other shouted at her. She was not threatened but she was called names such as "bitch." She explained that she did not want to be examined by the doctor and felt perfectly well. Dr Henderson submitted a record of the complaint at 19:30 recording "verbal threats and pushed about" and the complaint was sent to RUC headquarters on 25 June 1977. It was not possible in the course of the hearing to establish whether there was a practice of referring any complaint made by a detainee to the RUC either by this FMO or generally.

[9] At 19:45 on 24 June 1977 an interview commenced with DS McCoubrey and DC Clements. WDC Lowry is also recorded as being present from 20:30. During this interview the applicant is recorded as initially denying any involvement in the Christies bombing. She then admitted getting involved with Cumann na mBan. The interview notes state that she said that she had agreed to meet two men at 11:00 on the day of the bombing and that one of the men brought the bomb along in a green bag. DS McCoubrey pointed out to her that the bombing did not take place until 15:25. She stated that she was told to go home and come back at 13:45. When she returned there were three men and they all travelled together by car to Christies. She went to the door of the shop with one of the men and another ran past the security guard and put the bomb on the floor. They all left after one man gave a 10 minute warning. DS McCoubrey wrote out the statement which she signed concluding at 21:15. WDC Lowry wrote out a statement in relation to the Turks bombing at 21:45 which she again signed concluding at 22:30.

[10] The applicant had one further interview on 25 June 1977 from 11:00 to 12:45 with WDC Lowry. Nothing of significance arises from that interview. She was seen by her parents at 19:45 that evening. At 20:00 she was taken to the medical room to be examined by Dr Henderson and is recorded as refusing to be examined. She made no complaints. At 20:30 she was transferred to Townhall Street Police Station and shortly thereafter was charged with the Turks bombing. On 26 June 1977 at 11:05 she was noted to have been seen by her solicitor, PJ McGrory, and on the same day was visited again by her parents at 17:45. She left custody to attend court at 10:35 on 27 June 1977.

[11] The applicant signed two complaint certificates in which she was asked whether she had any complaints to make against any police officer while she was detained in police custody. The first was in respect of the period from 06:40 on 23 June 1977 to 2-:30 on 25 June 1977. Her reply is recorded as "no" and she signed the certificate. There is a second certificate in respect of the period from 08:45 on 25 June 1977 to 14:30 on 27 June 1977. Again, her reply was "no" and the certificate was signed

by her and witnessed. She was remanded in custody to the women's prison in Armagh until her trial.

[12] On 26 October 1977 the applicant was committed for trial on the two charges in respect of the Turks bombing. Shortly after this on 31 October 1977 her solicitor Mr McGrory wrote to the DPP indicating that he had been instructed that she may have made two or three other statements at the same time as the statement upon which the Crown relied on the Turks case. He stated that he did not think it fair that she should be tried, or her case listed if there were further matters on which she was going to be returned. There appears to have been a reply of 9 November 1977 suggesting joinder of other charges and on 11 November 1977 Mr McGrory wrote indicating that he should not be taken as meaning that there should be joinder of charges which were unrelated in a way which would be prejudicial to his client.

[13] The applicant was returned for trial on the Christies charges on 2 December 1977 and her trial on all charges took place at Belfast City Commission on 15 February 1978. The only available record of the trial is a report in the Newsletter newspaper of 16 February 1978. Despite extensive enquiries the CCRC was unable to locate a record of the trial or the judgment. The report indicates that the judge told the applicant that if it had not been for the evidence of a detective he would have sentenced her to life imprisonment for causing two explosions in Belfast.

[14] Detective Sergeant McCoubrey is recorded as having given evidence in mitigation. He said that police believed the girl had been totally used by people in the Provisional IRA. She was not the typical type of girl terrorist. He is noted as saying:

> "I think she was acting under total fear of the organisation
> and I have never seen a young person so remorseful."

The applicant served her sentence and did not appeal.

The Application

[15] In December 2018 the applicant's solicitors lodged a notice of appeal. It contended that the convictions were unsafe as they were based on written confessions made during her detention and questioning that breached the Judges' Rules which required that every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. In light of this breach the court should have exercised its discretion to exclude the evidence of the appellant's confession.

[16] Secondly, it was submitted that the applicant was physically assaulted and ill-treated whilst detained and that her confession statements were obtained as a consequence of this. The applicant sought leave to adduce relevant evidence to demonstrate that her confession statement should not have been admitted in evidence either because it should have been excluded under section 6 of the EPA or in the exercise of the trial judge's discretion.

[17] It was further submitted that new evidence in this case had emerged after the applicant's trial and became available as a consequence of the investigatory powers of the CCRC and that as a consequence time should be extended to permit the appeal to proceed.

Fresh evidence application

[18] In order to advance the application for an extension of time and the appeal the applicant applied to introduce fresh evidence under section 25 of the Criminal Appeal (Northern Ireland) Act 1980 which provides:

> "25. - (1) For the purposes of an appeal, or an application for leave to appeal, under of this Part of this Act, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice-
>
> (a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case;
>
> (b) order any witness to attend and be examined before the Court (whether or not he was called at the trial); and
>
> (c) receive any evidence which was not adduced at the trial.
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to-
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> (a) whether the evidence appears to the Court to be capable of belief;
>
> (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible at the trial on an issue which is the subject of the appeal; and
>
> (d) whether there is a reasonable explanation for the failure to adduce the evidence at the trial."

[19] The proposed fresh evidence consisted of:

(a) the factual findings discovered by the CCRC in its Statement of Reasons;

(b) oral evidence from the applicant;

(c) written statements made by the applicant; and

(d) documentation relating to complaints against police officers arising from the interview of suspects.

We decided that we should hear the oral evidence of the applicant *de bene esse* before deciding whether to admit some or all of the proposed fresh evidence.

[20] The applicant gave her oral evidence on 12 November 2020 and 2 December 2020. In the course of her evidence attention was drawn to:

(a) a written statement she made which was attached to her application to the CCRC on 17 January 2014;

(b) an attendance note made on 29 June 2017 when at the request of the CCRC and in the presence of a solicitor she clarified certain aspects of her application; and

(c) two written statements made by her on 14 May 2019 and 16 October 2020 in support of her application to this court.

Her evidence largely related to events which occurred more than 40 years prior to her oral evidence, and it was understandable that her recollection of events was affected by the passage of time. Having given her account on several occasions over a period of years any assessment of her oral evidence must also take into account that some inconsistency in recollection is to be expected.

[21] In opening this application Mr O'Donoghue described this as a case in which there had been no previous appeal but where a new fact had been discovered. The discovery of a new fact leading to an acquittal in an out of time appeal is a requirement for a subsequent compensation claim under section 133 of the Criminal Justice Act 1988. It is not, however, a requirement for an out of time appeal. If established it can provide an explanation for not adducing that evidence at the trial. In this case the new evidence upon which the applicant relied was that there had been a complaint made to the doctors by the applicant on 24 June 1977 and it was contended that this was a new fact because she had no recollection of making the complaint.

[22] In her oral evidence the applicant was taken to the records dealing with her medical examination while in custody. The first was at 09:10 on 23 June 1977 where Dr Alexander recorded no complaints, the second was at 19:00 on 24 June 1977 where she made complaints in relation to her treatment in two interviews and the third at

20:00 on 25 June 1977 when she declined a medical examination by Dr Henderson. She accepted that the records indicated that she had been examined but claimed that she had no memory of any medical examination.

[23] She was also taken to the two complaint certificates, the first dealing with the period up to 20:30 on 25 June 1977 in Castlereagh and the second dealing with the period up to 14:30 on 27 June 1977 in Townhall Street. Both were signed by her and in each case the certificates stated that she had no complaints to make against police officers while detained in police custody. Again, she claimed that she had no recollection of signing the certificates but agreed that she had signed both.

[24] In her first statement in support of her application to pursue an out of time appeal made on 14 May 2019 she stated that she did not remember being examined by a doctor on 24 June 1977 nor did she remember seeing a doctor on 25 June 1977. In her second statement made on 16 October 2020 she said that she did not recollect seeing a doctor on admission to Castlereagh. This issue was touched upon at a conference on 29 June 2017 in her solicitor's office with the CCRC. The note of that meeting records that she did not remember seeing a doctor in Castlereagh between the third and fourth interviews nor refusing to see the doctor again.

[25] All of those accounts are, therefore, broadly consistent. They are, however, directly contradicted by the account which the applicant gave when she made her application to the CCRC on 17 January 2014. In the statement attached to the application she stated:

> "Throughout my interrogation I was interviewed by male and female officers. One of the interviews conducted by two female officers was extremely physical. These officers said to me:
>
> > 'Do you think I'm going to waste my time talking and trying to coax you? You sign the statements and we will help all we can.'
>
> When I didn't answer them the smaller female officer got up from the table and held me up against the wall and started slapping my face. When they were interviewing me two male officers were shouting in the door. I was placed back in my chair and when the males left, the female officer pushed me and made me stand against the wall. They slapped me in the back of the head and my forehead was hitting off the wall. They constantly cursed at me.
>
> I was interviewed again by two male officers who didn't touch me during that interview. I saw a doctor after this

> interview and he took notes when I told him about the physical abuse I was suffering." (underlining added)

[26] There is no doubt, therefore, that the appellant was aware in January 2014 that she had made a complaint to a doctor about physical abuse in the course of her interrogation. The point is emphasised further in her statement to the CCRC on 17 January 2014 when she explained why she signed the statements of admission in a later interview:

> "I only signed the statements to stop the physical abuse I was being subjected to. I never had anything to do with these charges and I have denied my involvement in this incident.
>
> I had been told by a doctor that if I was subjected to any treatment, like the kind I suffered during my interviews, then I should shout for a doctor and I would get to see one. When I pleaded to see a doctor during my final interview, the officers just laughed in my face."

[27] I consider that reading this statement as a whole makes it clear beyond any doubt that the applicant was aware that she had made a complaint to a doctor in January 2014 when she made her application to the CCRC. The inevitable inference is that she had been aware that she had made such a complaint from June 1977 until January 2014. There is no explanation offered by her for her change of account in June 2017 when she was interviewed by the CCRC and her adherence to that account thereafter. Even when faced with what she had stated in January 2014 she still maintained that she had no recollection of making a complaint to a doctor. The only realistic conclusion is that her accounts on this matter from June 2017 onwards were false and that they were advanced because she believed that they would help her application to extend time by presenting the complaint to the doctor as a new fact.

[28] That means, therefore, that her evidence generally needs to be examined with considerable caution. The only other explanation the applicant offered for pursuing this out of time appeal was contained in her statement of 14 May 2019 when she said that she had applied to the CCRC as she had become aware that courts had allowed appeals in a number of cases in which people who were young at the time had been convicted on the basis of statements they had made whilst in Castlereagh.

The alleged ill-treatment

[29] The applicant's case is that she made the statements of admission on which the prosecution relied during the interview which commenced at 19:45 on 24 June 1977 because of ill-treatment which she sustained during that interview. The earliest

written record of her account of the interview is contained in her application to the CCRC on 17 January 2014. The substance of her account was as follows:

> "They wouldn't let me sit down and they said, "you've kept it up so far, but this one will break you." The two of them held me up against the wall and they tried to break my arms. I was punched constantly with a closed fist in the head and slapped and beaten about. They told me I'd need a hospital when they were finished with me. They beat me for about an hour and were shouting and questioning me. Eventually I screamed and said what do you want me to tell you? They stopped physically beating me and asked me questions, but I didn't know anything as I had nothing to do with this. That is when they wrote the statement and I signed it. The officer then told me, "I'll have a couple of wee murder charges by the time we are finished tonight." He threatened me that if I didn't tell him it wouldn't be as easy as what I had just been through. They wrote more statements and I signed them.
>
> I was subjected to constant mental and physical abuse culminating in my final interview in which I signed the prepared statements.
>
> I only signed the statements to stop the physical abuse I was being subjected to. I never had anything to do with these charges and I have denied my involvement in this incident.
>
> I had been told by a doctor that if I was subjected to any treatment, like the kind I suffered during my interviews, then I should shout for a doctor and I would get to see one. When I pleaded to see a doctor during my final interview, the officers just laughed in my face."

[30] Her next account is recorded in the attendance note of a meeting on 29 June 2017 with representatives of the CCRC which is set out in a series of bullet points:

- She was pushed around by the male police officers during the first few interviews and they said things like we could rape you and no one would know.

- A female officer slapped her but without force.

- She was hit hard by the tall male officer in the stomach who said she was going to talk. She thought he did not have a local accent.

- She sank down the wall.
- When she came round they bent her wrist right back and then shook them out (so no bruising was left).
- She asked for sanitary items because she had started her period and these were thrown at her by the female officer in front of the male officers.
- She thought they wouldn't stop so she gave in.
- They wrote the statements out straight after the beating by the officers.
- She thinks she signed the statements.
- She did write the section at the end of the statements (confirmed after viewing the copy statements).
- She signed because she was afraid of what would happen if she didn't.
- They wanted her to write a further statement about another offence but she refused.
- They repeatedly tried to get her to give other names but she refused because she knew it would be a death sentence for anyone she mentioned.

[31] There are some discrepancies between these accounts and inconsistencies with other information. The suggestion that the applicant was pushed around by male police officers during the first few interviews is not consistent with what she told Dr Henderson when first examined by him. Her reference to bending her wrist is not the same as the allegation that there was an attempt to break her arm. The suggestion that she refused to write a further statement or give names is not included in her earlier account. I consider, however, that in the circumstances some level of inconsistency is explicable on the basis of the passage of time.

[32] Her account in her application to the CCRC about the conduct of the women police officers in her second interview on 24 June stated that a female officer slapped her on the face and slapped her on the back of her head causing her forehead to hit off a wall. That account was not recorded by the FMO who saw her that evening. Her complaint was that she had been pushed and shouted at. If she had complained about her forehead being hit off a wall there would undoubtedly have been a record of an examination of her forehead area.

[33] The most important inconsistency, however, concerns the allegation that she was constantly punched with a closed fist in the head for about an hour which she made in her January 2014 statement to the CCRC. Her account to the CCRC in 2017

did not repeat that allegation but alleged that she was hit hard in the stomach as a result of which she sank to the floor. Those are markedly different allegations of ill-treatment. If the allegation of constant punches to the head over the period of about an hour were true one would expect that clearly visible or detectable evidence of residual injury to the head would have followed. No such injury was pointed out by her to Dr Henderson when seen at 20:00 on 25 June 1977 and if it was obvious on inspection he would have recorded it. The applicant claimed in her oral evidence that she did have marks to her body but that she did not point them out because she did not trust anybody at that stage. There is no suggestion, for instance, that she pointed these out to her family or her solicitor when she saw them.

[34] In her statement in May 2019 in support of her extension of time application the applicant stated that she was pulled to a standing position by the hair during the statement interview, thrown against the wall and her legs were kicked apart before being punched in the stomach so that she was gasping for breath. In her oral evidence she claimed that this occurred on a number of occasions. She had not mentioned being pulled by the hair in her 2014 statement.

[35] When questioned in her oral evidence about the statement interview she denied that she was hit in any other way apart from the punching in the stomach. She denied that she had been punched in the head by a fist during that interview. She was then referred to her statement in 2014. It was put to her that she had alleged that she was punched constantly with a closed fist in the head during the statement interview. She agreed that she must have said that. She then stated that if that is what she said that must have happened. She claimed that she had a mental picture of being punched in the stomach but could not explain why she would not have mentioned that in her 2014 statement.

[36] During her evidence on 2 December 2020 the applicant claimed that on admission to Armagh prison on remand bruising from her interviews had been noted on a body chart. The applicant had never made a claim that she had suffered bruising prior to her oral evidence and her account in June 2017 appeared to suggest that no bruising was sustained. The medical records in relation to her admission to Armagh prison were no longer available.

Events leading up to the trial

[37] In her application to the CCRC in January 2014 the applicant mentioned that she had pleaded not guilty but that the prosecution had relied on her signed statements. She said that the statements were prepared by the police and that the four men mentioned were never charged with anything and were not at her trial. She did not discuss her interaction with her lawyers in that application.

[38] In her interview on 29 June 2017 the applicant gave some details about her engagement with Mr Cush, who was her counsel in the trial, and her solicitor, Mr McGrory. It is important to record that she made it clear at all times that her

lawyers had done all they could for her and she was satisfied with their efforts. The note of the interview records:

- She saw her solicitor, Mr McGrory, only after she was moved from Castlereagh.
- Her solicitor recognised that she was very upset.
- Her mother instructed Mr McGrory.
- She did not know there were two sets of offences.
- She told her solicitor about the conduct of the police officers and he was shocked.
- She remembers only that the trial was very short. Three police officers were present. One witness was called who gave a description of the girl the witness saw that did not match her.
- Her treatment in custody was not mentioned.
- She did not give evidence.
- The solicitor suggested she plead guilty but she refused.
- She did not understand why her treatment in custody was not raised by her solicitor or barrister.
- At the time she was angry but not surprised that it was not raised.
- Neither the solicitor nor barrister said anything about an appeal as far as she could remember.

[39] In her statement made in support of this application on 14 May 2019 she said:

> "At Old Townhall Street I first met my solicitor Mr McGrory. I remember him asking me then had anything happened to me in Castlereagh at which point I broke down crying. I spent seven months on remand waiting for my trial. I believe Mr McGrory saw me on two or three occasions at the prison before my trial and I would have seen him also at my weekly remand hearings.
>
> I remember very little about my trial except that it seemed very short. I do not remember precisely who gave evidence. I have been asked why I did not raise the issue of my ill treatment at my trial and accept that I must have

told my solicitor not to do so. I have been advised now that doing so almost certainly would have involved my giving evidence. As I was in all likelihood similarly advised before my trial, I believe that I would not have been able to do this at the time and would not have been confident that my evidence would have been accepted by the court. I do not recall ever seeing any record of my examination by the doctor on 24/06/1997 or the complaint that he made regarding my treatment. Neither do I recall these documents ever being mentioned at the time, they were certainly not discussed in court. The first time I saw this material was after the CCRC had carried out their investigation. I recall seeing the tall police officer who had punched me during my last interview in Castlereagh at my trial.

I recall my barrister pointing out to me that I was very young and he wanted to know if I would be recognising the court and whether I had considered pleading guilty. I was told by my solicitor and barrister that if I pleaded guilty it was likely that I would receive a more lenient sentence than if I contested the case. I told him that I would be recognising the court and that I wished to plead not guilty. I have no complaints about how I was represented at my trial."

[40] This account gives no indication of the instructions that the applicant gave to her solicitor. The applicant addressed that issue in a statement of 16 October 2020:

"46. I first saw Mr McGrory in Castlereagh on 26 June 1977 after all of the interviews had been completed.

47. I told him I had been assaulted. He was very kind. He knew I was very distressed. He explained to me what would happen next.

48. I saw him on a couple of occasions when I was on remand. I was placed on remand down in Armagh jail.

49. I did not meet Mr Cush until the day of the trial. This is not a criticism for he was very kind and very attentive and I have no doubt that he did his best for me, as did Mr McGrory.

50. Mr Cush said that I was very young and explained to me the differences in sentences if I pleaded guilty. He

asked me if I had considered pleading guilty. I said that I would not plead guilty and I never pleaded guilty.

51. I have no recollection of any discussion about my ill treatment with Mr Cush or Mr McGrory but I had a fear of giving evidence and I would have said this to my legal representatives. At that time I never thought that there was any chance of my evidence being believed.

52. The trial was all over in about two hours. I cannot remember who gave evidence.

53. The judge convicted me that day.

54. Neville McCoubrey got up and gave character evidence on my behalf as to my remorse. He said that he had never seen anyone so remorseful. I received a sentence of 10 years in circumstances where the judge remarked that but for his evidence I would have received a life sentence. I don't know why he did that, particularly in circumstances where I had not pleaded guilty. I can only tell the truth as to what happened.

55. I don't remember if I told Mr McGrory that I complained to a doctor while in Castlereagh. I certainly do not remember either Mr McGrory or Mr Cush saying to me that they had a record of a doctor examining me, or the doctor's findings, or the fact that the doctor had made a formal complaint to the authorities about my treatment at Castlereagh.

56. I did not appeal my conviction at the time as I did not believe any appeal would be successful."

[41] At paragraph 47 of a statement made on 16 October 2020 the applicant stated that she told Mr McGrory that she had been assaulted. In her direct evidence on 12 November 2020 she stated that she told him some of what had happened and explained that she was upset and crying. She said that she could not remember if she told Mr McGrory that she had been assaulted but she thought she did. When further asked by Mr O'Donoghue whether she told Mr Cush or Mr McGrory that she had been assaulted she stated she that she honestly could not remember.

[42] In answer to Mr O'Donoghue she also explained that she had a fear of giving evidence and did not want to go into the witness box. When asked if she was saying that she told Mr Cush that she would not give evidence she said she did not say she would not and would have given evidence if she had been asked but she was nervous.

When asked if she remembered saying that to her legal representatives she said she did not. She said she was nervous and was not asked to go into the witness box. She did, however, remember saying that she did not want to and would not want to.

[43] In cross-examination she said that she could not recall whether she told Mr McGrory about the assaults she had allegedly suffered in Castlereagh. She could not think of any reason why she would not have told him and thought that she did mention it. She assumed that she told Mr McGrory about the assaults but could not remember. It was pointed out to her that her recollection of the conversation with Mr McGrory in November 2020 appeared to be different from her recollection in October 2020 when she made her written statement stating that she told Mr McGrory about being assaulted. She maintained that she could not remember.

[44] In a written representation by the applicant's solicitor to the CCRC on 19 July 2018 it was stated that the applicant said that her barrister did try to raise the issue of her mistreatment in custody at trial but this was rejected by the judge and the barrister was not allowed to pursue the matter further. She accepted that she must have said that but had no recollection of it now. She had no recollection of the judge mentioning anything of that kind in the court room. When it was pointed out that she had not mentioned this in her June 2017 interview she said that her recollection was not good.

[45] Correspondence from Mr Cush indicated that he had no recollection of the case some 40 years on. He stated that if the applicant had alleged to Mr McGrory that she made involuntary statements of admission he would have conveyed the information to Mr Cush and they would have agreed that it was necessary to challenge the admission of the statements. That was done by virtue of a voir dire. The defendant would have to give evidence of the alleged mistreatment which the prosecution would then have to rebut. The onus would have been on the applicant to raise the issue.

The interviewing officers

[46] Section 9 of the RUC Code of Complaints and Discipline provided at paragraph 4 that every complaint by a member of the public against a police officer would be recorded at Police Headquarters and investigated under section 13 of the Police (Northern Ireland) Act 1970. It is not clear if it was the practice for an FMO to forward any such complaint to enable this process to commence. The investigation file was then to be passed to the Office of the Director of Public Prosecutions unless the Chief Constable was satisfied that no criminal offence had been committed.

[47] None of the officers involved in the interviews of the applicant were convicted or disciplined in relation to the ill-treatment of detained persons but three of them, including Mr McCoubrey, had multiple complaints against them.

[48] Mr McCoubrey was also involved in the interviewing of one of the appellants in *R v McCartney and others* [2007] NICA 10. The appellant alleged ill-treatment and fabrication in an interview with Mr McCoubrey and Mr Bohill. That conviction was

quashed on the basis that another person being interviewed by members of the same team of detectives had been ill-treated. Mr McCoubrey and Mr Bohill were also among five police officers who were prosecuted at Newtownards Magistrate's Court on 31 October 1978 for assault in connection with the interview of Patrick Fullerton. The court concluded that Fullerton had been assaulted but was not in a position to make a finding against any individual office.

R v Brown and others [2013] NI 116

[49] This case set out the law on the admissibility of confessions under the emergency legislation prevailing at the time of this prosecution:

> "**The legal principles governing the admissibility of confessions at the time of trial**
>
> [6] A confession is only admissible at common law if it is free and voluntary. The common law position was encapsulated in the Judges' Rules which were designed to secure that only answers and statements which were voluntary were admitted in evidence against their makers. The introduction to the 1964 edition which came into force in this jurisdiction on 8 October 1976 noted that the Judges' Rules did not affect the principles …
>
> > '... (c) that every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation by the administration of justice by his doing so;
> >
> > ... (e) that it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.'
>
> The principle set out in paragraph (e) above is overriding and applicable in all cases.

[7] Oppressive questioning was described by Lord MacDermott in an address to the Bentham Club in 1968 as:

> 'questioning which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent.'

[8] Administrative Directions on Interrogation and the Taking of Statements were published by the Home Office at the same time. Paragraph 4 of these directions related to the interrogation of children and young persons.

> 'As far as practicable children (whether suspected of crime or not) should only be interviewed in the presence of a parent or guardian or, in their absence, some person who is not a police officer and is of the same sex as the child.'

This is replicated in the RUC Code (1974) Edition at paragraph 127 and is supplemented by section 52(2) of the Children and Young Persons Act (Northern Ireland) 1968 which states that a person whose attendance may be required must be informed where a child or young person is arrested. The Home Office subsequently published guidance in 1968 indicating that the reference to children in the Administrative Directions included reference to young persons. (The statute defined young persons as those who had attained the age of 14 but were under 17 so these provisions did not apply to the applicant at the time.)

[9] 1972 was the worst year of civil unrest in Northern Ireland. In that year there were 467 people killed, 10,628 shooting incidents and 1853 bomb explosions or devices defused. The government convened a Commission chaired by Lord Diplock to consider what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book individuals involved in terrorist activities. The Diplock Commission reported in December 1972. It concluded that witnesses were subject to intimidation by terrorist organisations and were thereby deterred from giving evidence. That also applied to jurors

although not to the same extent. The Commission also noted that the detailed, technical common law rules and practice as to the admissibility of inculpatory statements were hampering the course of justice in the case of terrorist crimes.

[10] The Commission concluded that trial by judge alone should take the place of trial by jury for the duration of the emergency. It also recommended a departure from the common law test for the admissibility of confession statements. It concluded that a confession made by an accused should be admissible as evidence in cases involving scheduled offences unless it was obtained by torture or inhuman or degrading treatment; if admissible it would then be for the court to determine its reliability on the basis of evidence given from either side as to the circumstances in which the confession had been obtained. It recommended that the technical rules, practice and judicial discretions as to the admissibility of confessions ought to be suspended for the duration of the emergency in respect of scheduled offences.

[11] Some but not all of the Commission's recommendations were implemented in the Northern Ireland (Emergency Provisions) Act 1973 (the 1973 Act). Section 6 of the 1973 Act provided for the admissibility of statements of admission.

> '(1) In any criminal proceedings for a scheduled offence a statement made by the accused may be given in evidence by the prosecution in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of subsection (2) below.
>
> (2) If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies them that the statement was not so obtained, exclude the statement or, if it has been received in evidence, shall either

> continue the trial disregarding the statement or direct that the trial shall be restarted before a differently constituted court (before whom the statement shall be inadmissible).'

This section governed the admissions in the cases of Brown, Wright and McDonald. The provision was re-enacted as section 8 of the Northern Ireland (Emergency Provisions) Act 1978 which was the provision governing the case of McCaul.

[12] Soon after its enactment Lowry LCJ in R v Corey (December 1973) addressed a submission that there was a discretionary power to exclude a statement apart from the requirement to do so in section 6(2) in the 1973 Act.

> 'I agree with this general proposition since there is always a discretion, unless it is expressly removed, to exclude any admissible evidence on the ground that (by reason of any given circumstance) its prejudicial effect outweighs its probative value and that to admit the evidence would not be in the interests of justice.
>
> Section 6, of course, has materially altered the law as to admissibility of statements by singling out torture and inhuman and degrading treatment. This is clear from the fact that such things have always made for the exclusion of an accused's statement since they deprive it of its voluntary character. Accordingly, section 6(2) would merely be a statement of the obvious if it did not, in conjunction with section 6(1) render admissible much that previously must have been excluded. There is no need now to satisfy the judge that a statement is voluntary in the sometimes technical sense which that word has acquired in relation to criminal trials.'

[13] The scope of the discretion was addressed by McGonigal J in R v McCormick [1977] NI 105.

> 'In my opinion the judicial discretion should not be exercised so as to defeat the will of Parliament as expressed in the section. While I do not suggest its exercise should be excluded

> in a case of maltreatment falling short of section 6 conduct, it should only be exercised in such cases where failure to exercise it might create injustice by admitting a statement which though admissible under the section and relevant on its face was in itself, and I underline the words, suspect by reason of the method by which it was obtained, and by that I do not mean only a method designed and adopted for the purpose of obtaining it, but a method as a result of which it was obtained.'

[14] In R v O'Halloran [1979] NI Lord Lowry LCJ made two general comments.

> '(1) This court finds it difficult in practice to envisage any form of physical violence which is relevant to the interrogation of a suspect in custody and which, if it had occurred, could at the same time leave a court satisfied beyond reasonable doubt in relation to the issue for decision under section 6.
>
> (2) It may be necessary another time, when considering statements of suspects, to distinguish more explicitly the meaning of the word "voluntary" at common law and "voluntary" as a shorthand expression for "not against the suspect's will or conscience" in the context of cases decided under the European Convention of Human Rights. The mere absence of voluntariness at common law is not by itself a reason for discretionary exclusion of a statement and the absence of voluntariness in the European Convention sense is prima facie relevant to degrading treatment and therefore again is not primarily concerned with the exercise of discretion.'

[15] R v McCaul (12 September 1980) was the only case involving these appellants to be considered by the Court of Appeal. The court identified the real issue at the trial as whether, having regard to the appellant's mental condition and the fact that he was interviewed without having present a parent or other person to look after his interests, the written statements and the admissions which he made

to the police ought to be admitted in evidence and, if so, whether the learned trial judge ought to rely on them to the extent of being satisfied beyond reasonable doubt that he was guilty of the offences which he purported to admit. At the trial the learned trial judge had found that there was a breach of the Judges' Rules in not providing the appellant with access to his solicitor and a further breach because he was interviewed without anyone present to protect his interest. He concluded, however, that this had not resulted in such unfairness to the appellant that he should exclude the admissions in the exercise of his discretion. The Court of Appeal was satisfied that the learned trial judge's approach was correct and dismissed the appeal.

[16] The statutory background to the admissibility of statements in the exercise of the discretion was further considered by Hutton J in R v Howell and others (1987) 5 NIJB 10. That was a case in which it was accepted that the statement was admissible under the statute but the issue was whether or not it should be excluded in the exercise of discretion. The learned trial judge noted that the discretion should not be exercised so as to defeat the will of Parliament. He set out the first of Lord Lowry's general comments in O'Halloran and stated that it was the intent of Parliament in enacting section 8 of the 1978 Act that, provided there had not been torture or inhuman or degrading treatment, statements made by a suspect after periods of searching questioning whilst in custody should be admitted in evidence, notwithstanding that at the outset the suspect did not wish to confess and that the interrogation caused him to speak when otherwise he would have stayed silent.

[17] The final case on this issue to which we refer is R v Watson (26 September 1995). That was a case in which the issue was the exercise of the discretion to exclude an admission. By that stage the power to exclude in the exercise of the discretion had become statutory as a result of changes introduced in 1987. Carswell LJ gave some guidance on the approach to its exercise.

> 'This discretion, although it has to be exercised judicially, is a broad one. Like MacDermott J in R v Cowan [1987] NI 338, 352, we decline to define its bounds, which would be to fetter the discretion. The remark of Lord Lowry LCJ,

> however, in R v Mullan [1988] 10 NIJB 36, 41, that the exercise of the discretion is intended to discourage 'bad or doubtful conduct or trickery or dishonesty in conducting an interview or investigation' indicates an important area in which it may operate. It is for the trial judge in any case in which the discretion is invoked to consider the evidence and on the basis of his findings of fact to decide whether the admission of the statement would involve unfairness to the accused or whether it is otherwise appropriate to rule it out in the interests of justice.'
>
> [18] We have spent some time reviewing the law on the admissibility of statements of admission under the emergency provisions legislation because of a suggestion in decisions of this court in R v Mulholland [2006] NICA 32 and R v Fitzpatrick and Shiels [2009] NICA 60 that the test for admissibility was governed by the Judges' Rules. Accordingly, it was submitted that any breach of the Judges' Rules indicated a departure from the applicable legal standard at the time. We have no reason to doubt the correctness of the outcome of the appeals in Mulholland and Fitzpatrick and Shiels but in neither case was the case law to which we have referred opened to the court. The cases to which we have referred demonstrate that admissions made in breach of the Judges' Rules were admissible under the emergency provisions legislation unless obtained by torture or inhuman or degrading treatment. The residual discretion to exclude such admissions would not be exercised to render statements obtained in breach of the Judges' Rules inadmissible on that ground only. That was the law at the time of these trials. None of the parties before us contended that this was a change of law case although all parties recognised that the standards of fairness had significantly altered as a result of legislative changes arising from PACE and the Human Rights Act 1998."

[50] The Diplock Report dealt with the admissibility of confessions between paragraphs [73]-[92]. The Report concluded that the then current technical rules, practice and judicial discretions, which included the Judges' Rules, as to the admissibility of confession evidence ought to be suspended and replaced by the statutory test that was subsequently introduced on foot of that recommendation by the 1973 emergency legislation. I consider, therefore, that the submission that the

learned trial judge should have excluded the confession evidence in the exercise of his discretion because of a breach of the Judges' Rules is unsustainable.

Retrospectivity

[51] This is one of those cases where the trial took place long before the coming into force of the Human Rights Act 1998 ("HRA") but the appeal is being considered after its commencement. The issue arose for consideration in this jurisdiction in *R v Magee* [2001] NICA 18. The appellant had been convicted of serious terrorist crimes including conspiracy to murder on 21 December 1990 on the basis of admissions made by him during questioning in Castlereagh Police Office. He had contested his admissions on the basis of physical ill-treatment. The trial judge found that the allegations were fabricated. His appeal was dismissed on 16 June 1993.

[52] He applied to the European Court of Human Rights claiming a breach of article 6 or article 14 of the Convention. The Court concluded that there had been a breach of article 6(3)(c) by reason of the denial of access to a solicitor during his questioning. The CCRCp referred his case to the Court of Appeal on the basis that his admissions should have been excluded as a matter of discretion in light of the breach of his convention rights.

[53] The Court of Appeal indicated that this argument could not have succeeded at the time of his trial or his appeal as to do so would have defeated the will of Parliament. The court considered, however, that it was bound to adhere to Convention standards in the consideration of the appeal and allow the appeal by virtue of section 7(1)(b) of the HRA which provides:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

Section 7(6) of the HRA provides that legal proceedings in subsection (1)(b) includes an appeal against a decision of a court. The Court of Appeal gave judgment on 6 April 2001.

[54] The implications of the decision were considerable, particularly in Northern Ireland. These provisions were considered by the House of Lords in *R v Lambert* [2002] 2 AC 545 in a judgment given on 5 July 2001, some 3 months later. The issue considered by the House was whether a claim that a public authority had acted in a way which was unlawful by section 6(1) caught acts committed before the commencement of the HRA. By a majority the House of Lords answered that question

in the negative. The section did not, therefore, bite on such acts. The policy reason for that decision was set out at paragraph 10 of the opinion of Lord Slynn:

> "10. After a fuller consideration of this point than that which took place in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 it seems to me that Parliament was not intending in this case that on an appeal Convention rights could be relied upon in respect of a conviction which took place before the Act came into force. It cannot be said that there is no good policy reason for this result since it may well have been thought undesirable that convictions lawful when made should have to be set aside as a result of considering Convention rights only subsequently enforceable in national courts. Moreover, it is plain as Mr Perry contended that the effect of opening up an examination of convictions prior to the coming into force of the Act could lead to great confusion and uncertainty."

[55] It follows, therefore, that the reasoning in *Magee* does not apply and in light of the fact that this conviction was made in February 1978 the appellant is not entitled to rely on the Convention rights in the HRA.

Consideration of fresh evidence application

[56] I accept that either of the accounts given by the appellant in 2014 and 2017 about her treatment in the statement interview would constitute inhuman or degrading treatment and the principal issue that the court has to address is whether her evidence in respect of either account is capable of belief. The initial account complained of being punched constantly with a closed fist in the head and slapped and beaten about. This treatment allegedly continued for about an hour. If true it was clearly very distressing and would have been very memorable. It formed the basis of the applicant's representations in January 2014.

[57] This allegation is, however, markedly different from the allegation made in June 2017 that she was punched in the stomach five or six times as a result of which she fell to the ground and had to be brought to a seat to drink water and possibly had similar treatment repeated. The applicant claimed that she had a mental picture of this attack. It does not accord with whatever picture she allegedly had in January 2014.

[58] I consider that the most likely explanation for this change of account was that she realised that if she stuck to the original story, she would not be able to explain why no one noticed any marks to her head, particularly when she was with her family and her solicitor. Her allegation that there was bruising on her admission to Armagh jail did not appear in any of her previous versions of events and in my view was a fabrication.

[59] The evidence in relation to the interviewers does not include any finding of ill-treatment at any time on the part of any of them. In respect of complaints there may well be admissibility issues in cases where a complaint was made but the evidence of complaint was rejected in a subsequent trial. The probative value of an unparticularised complaint is questionable and the complaint evidence could only afford a ground for allowing the appeal if it was accompanied by credible evidence of mistreatment.

[60] I accept that the complaint that the applicant was shouted at and pushed around in the second interview on 24 June contained in the medical examination conducted by Dr Henderson at 7 pm on 24 June 1977 is plainly capable of belief. On its own it was not relied upon as a ground for allowing the appeal. The applicant was recorded by the FMO as feeling perfectly well after this examination which was just before her statement interview. This complaint did not relate to the statement interview and the case made in respect of the statement interview did not depend upon that complaint.

[61] I am satisfied, however, that there is no reasonable explanation for the failure to adduce this evidence at the applicant's trial. The most likely explanation is that she told her solicitor that she had made the complaint to the doctor but that she did not want to pursue a challenge to her statement of admission in court. If she had recounted to her legal advisers the treatment to which she now alleges she was subjected there is no credible explanation as to why that would not have been pursued at her trial. A more remote possibility is that she did not disclose the complaint to her solicitor because she did not wish to pursue a challenge to her statement at her trial. In either event this was a deliberate and calculated decision on the part of the applicant having had legal advice from experienced criminal lawyers about whom she was anxious to indicate that she had no complaint.

[62] The decision not to challenge her statements of admission supports the inference of the absence of any proper basis upon which to do so. She has a recollection of Mr Cush suggesting that she consider pleading guilty. It is difficult to understand why she would remember this but not remember any discussion with her lawyers about the beating she now alleges. The suggestion by Mr Cush that she consider pleading guilty is not consistent with the case that she advised her lawyers about such a beating. It is consistent with the applicant not challenging her statement because she had no proper basis upon which to do so. The inference that she did not have a basis for challenging her statements of admission is also consistent with the contribution of Mr McCoubrey at her trial and her subsequent signed indication of no complaint before leaving police custody. She did recognise the court and there are many reasons why she may not have wanted to return to the prison in Armagh having pleaded guilty.

[63] The approach to the statutory test for the admission of fresh evidence was considered by the Court of Appeal in England and Wales in *R v Erskine and another* [2010] 1 WLR 183. The overall principle was set out in para 39:

> "Virtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focussing on the interests of justice. The considerations listed in sub-section (2)(a)–(d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However, it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore, if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the 'interests of justice' test will be satisfied."

[64] In order to deal with the application to admit fresh evidence it is necessary to come to a conclusion on the credibility of the evidence advanced. I am satisfied beyond reasonable doubt that she did not tell her lawyers about a beating of the nature described in her application statement in January 2014 or in the statements and evidence that she gave from 2017 on. Apart from the substantial inconsistencies which have been highlighted above that inference is consistent with the indication in the applicant's statement of May 2019 that she would not want to raise the issue of ill-treatment and the absence of any recollection of a discussion about ill-treatment with her lawyers.

[65] If ill-treatment of the kind described by her had been raised with her lawyers she would have received clear advice about how this might be advanced. It would have involved her giving evidence. It is difficult to see, however, how counsel could have encouraged her to consider pleading guilty if she was making such a case. I am satisfied beyond reasonable doubt that she did not make such a case to her lawyers and that the reason she did not do so was because no such ill-treatment occurred.

[66] The applicant's statement of May 2019 indicates that she believes that she would not have felt able to give evidence at trial. In her oral evidence she resiled from this position suggesting that she would have given evidence if asked. I consider that this was an example of the applicant seeking to tailor her evidence so as to deal with the submission that she had chosen not to challenge the statement at the trial when

she could have done so. I am satisfied beyond reasonable doubt that she did not challenge her statements of admission because she had no proper basis upon which to do so.

[67] It follows, in my view, that none of the evidence in relation to ill-treatment in respect of her statements of admission should be admitted in the interests of justice in pursuit of this appeal. I consider that the applicant's explanation that she embarked on these proceedings because she had been told that others had succeeded in having their convictions overturned is credible.

Disclosure

[68] The argument on disclosure concerned the practice at the time concerning the disclosure of interview records, custody records and medical records of defendants challenging their statements of admission on the basis either that they should be excluded under the statute or should be excluded in the exercise of the judicial discretion.

[69] It is common case that where it was sought to exclude such statements a *voir dire* was held in which the defendant made his or her case under oath and the relevant records were then disclosed to the defendant and their lawyers. The purpose of this approach was to expose those who may have made false complaints while in custody by preventing them tailoring their evidence to accord with their false account.

[70] It was submitted in this case that the applicant's trial was unfair because she had no recollection of her complaint to the FMO and that consequently her lawyers were not in a position to advise her as to the approach she should take in her trial. I have already concluded that the applicant was aware at all relevant times that she had made this complaint and that it was highly likely that she had communicated it to her lawyers. If she had not it was because of a deliberate decision by her not to challenge the admission of her confessions. That leaves the issue of whether there was an obligation to disclose these records even where no complaint about the statement was being pursued at the trial and if so whether the conviction was unsafe as a result.

Northern Ireland cases

[71] The practice to be followed where an issue arose which required a *voir dire* was considered by Hutton J in *R v McAllister* [1985] NI 407. In that case the defendant claimed that he had made statements of admission to serious terrorist offences because he was a police informer and was informed that he would get a good deal if he turned Queen's evidence. The defence sought documents containing details of all meetings between the accused and police officers and of information the accused had furnished to police.

[72] The judge noted that the Northern Ireland Court of Appeal had established in *R v Foxford* [1984] NI 188 that there was no rule of law that the defence in a criminal

case had a right prior to the trial to see documents, in the possession of the Crown or police, which were relevant to issues which might arise in the trial and especially to issues which may arise on the *voir dire* as to the admissibility of a statement.

[73] He took into account that the Court of Appeal had accepted that there was a discretion to direct that documents should be furnished and considered that this should be exercised having regard to the Attorney General's Guidelines on Disclosure of Information to the Defence published in England and Wales in 1981.

[74] Those guidelines indicated that in cases which were due to be committed for trial all unused materials should normally be made available to the defence solicitor if it had some bearing on the offences charged and the surrounding circumstances of the case. The guidelines set out a range of circumstances in which there was a discretion not to make disclosure. Those circumstances included cases where the statement was believed to be wholly or partially untrue or where the statement might be reserved for cross-examination of a witness where there was a concern that the witness might fabricate a different account.

[75] Hutton J accepted that the guidelines were not intended to apply to the issues which might arise on a *voir dire* but where the issues crystallised in a *voir dire* they could be applied by way of analogy. He stated:

> "I consider that, even by way of analogy to the guidelines, no question can arise of the Crown being under any obligation to furnish documents relating to the voir dire, until after the voir dire has commenced and the issues arising in it have emerged."

[76] The approach in McAllister guided the conduct of the prosecution in respect of disclosure of material relevant to the admissibility of statements of admission thereafter. The issue arose again in *R v Coogan and others* (21 May 1993) when Sheil J dealt with an application that the Crown should furnish all medical and custody records of the accused prior to embarking on the *voir dire*. Sheil J reviewed McAllister and other relevant authorities in England and Wales. He adopted the test of fairness to the accused as applied by Lord Lowry in *Berry v R* [1992] 3 All ER 881. He recognised the danger that early disclosure may enable a defendant to tailor his evidence but striking a balance between fairness to the accused and fairness to the Crown he considered that the balance fell in favour of the accused. He considered that fairness to the accused required disclosure to be made as soon as possible after the defence in any particular case had informed the Crown that a statement was to be challenged as to its admissibility.

[77] The last relevant Northern Ireland case to which I wish to refer is *R v McMullan and others* (18 November 1993). In that case Kerr J dealt with an application that medical records, detention logs, schedules and other materials relevant to admissibility be disclosed prior to the commencement of trial. The application was

refused by Kerr J. There was some suggestion during the hearing that at some later stage the judge had altered his conclusion in light of the decision in *R v Coogan* some months earlier. There is no record of any such alteration, and it seems highly unlikely that any such event occurred as Kerr J expressly deals with the case of Coogan in the detailed written judgment provided by him.

[78] Having examined the authorities Kerr J stated:

> "It appears to me that this reflects the perception that the duty of the prosecution and the rights of the accused are now to be determined ultimately by the general requirement that the accused be afforded a fair trial. A set of specific rules cannot be comprehensive of every situation in which disclosure might be required. If the application of one of the rules would operate to create unfairness to the accused the fact that the Guidelines had been observed would not excuse a failure to disclose. It appears to me that this conclusion provides the key to the resolution of the present application. The ultimate test must be fairness to the accused. A set of rules such as the Attorney General's Guidelines designed to ensure fairness will be relevant in the examination of whether unfairness has been avoided but will not necessarily be determinative of that issue."

[79] Kerr J recognised that although he had approached the issue by a different route he had arrived at the same conclusion on the applicable principle as Sheil J. Unlike Sheil J he then examined the arguments relating to possible unfairness to the accused and concluded that they did not demonstrate that there would be unfairness to the accused. He then went on to accept the danger that a witness may tailor their evidence and approved the course set out in McAllister.

[80] What is clear from each of these cases is that there was no duty of disclosure where the accused intended to challenge the admissibility of a statement of admission allegedly induced by inhuman or degrading treatment until the accused either indicated the intention to make the challenge or gave evidence on the *voir dire*. Nor was there any unfairness in this procedure. In this case the applicant did not give any indication at the trial that she was challenging her admissions. Indeed, the first indication of a challenge was made in January 2014 some 35 years after her conviction.

Other relevant case law

[81] The leading case on the approach which a court should take in a case where there has been substantial delay between the trial and appeal resulting in a change of law or standards of fairness and procedural safeguards is *R v King* [2000] 2 Cr App R 391. Lord Bingham considered the general approach.

> "We were invited by counsel at the outset to consider as a general question what the approach of the Court should be in a situation such as this where a crime is investigated and a suspect interrogated and detained at a time when the statutory framework governing investigation, interrogation and detention was different from that now in force. We remind ourselves that our task is to consider whether this conviction is unsafe. If we do so consider it, section 2(1)(a) of the Criminal Appeal Act 1968 obliges us to allow the appeal. We should not (other things being equal) consider a conviction unsafe simply because of a failure to comply with a statute governing police detention, interrogation and investigation, which was not in force at the time. In looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy. But this Court is concerned, and concerned only, with the safety of the conviction. That is a question to be determined in the light of all the material before it, which will include the record of all the evidence in the case and not just an isolated part. If, in a case where the only evidence against a defendant was his oral confession which he had later retracted, it appeared that such confession was obtained in breach of the rules prevailing at the time and in circumstances which denied the defendant important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would be at least prima facie grounds for doubting the safety of the conviction—a very different thing from concluding that a defendant was necessarily innocent."

[82] The first principle to be derived from this passage is that it is necessary to consider the circumstances surrounding the individual case. The issue of the safety of the conviction has to be considered in light of all the relevant material. Even in cases involving a finding of a breach of article 6 of the European Convention on Human Rights ("the Convention") the court's task is to consider the particular circumstances of the case (*R v Abdurahman* [2019] EWCA Crim 2239).

[83] The observations by Lord Bingham in King were particularly directed at those cases where the common law rules in force in respect of the admission of confessions at the time had been replaced by more stringent protections by statute. This case is different. The rules in relation to the admissibility of confessions under the emergency

legislation were statutory. If the accused raised an issue about admissibility they had to raise a triable issue by making their case at a *voir dire*. It was desirable that the Crown evidence in rebuttal should be reserved (*R v Thompson* [1977] NI 74). There was a basis for judicial discretion as set out in Brown. When considering in a case of this type the issue of the safety of the conviction and the importance of relevant safeguards later thought necessary I consider that it is necessary to recognise the statutory background and the statutory purpose as disclosed in the emergency legislation. The application of a test by this court leading to the exclusion of a statement of admission which undermined that statutory background would be to contradict the will of Parliament which is impermissible. I recognise that this was not the subject of extensive debate in this appeal and may be revisited in a case in which it is of some importance. I do not consider it necessary to my decision in this case.

[84] The submission on behalf of the applicant was that the disclosure practice to which I have referred in paragraph [68] *et seq* was contrary to established authority. I have already demonstrated that this submission is not supported by the Northern Ireland cases. The applicant relied in particular on the decision of the English Court of Appeal in *R v Hennessy and others* (1978) 68 Cr App R 419. That was a drugs case which was heard very shortly before this case in 1977. In the course of the trial two of the counsel appearing for the accused asked a prosecution witness if the phone of one of the defendants had been tapped. The basis for the question was the contention that this defendant had been induced by a telephone call from a Crown witness to commit the offence and had persistently stated that he would have nothing to do with such activities. The trial judge refused to allow the question as a fishing expedition.

[85] The Court of Appeal agreed with the conclusion of the trial judge on the particular facts of the case. The court made the following observation in the context of informers:

> "The Courts appreciate the need to protect the identity of informers, not only for their own safety but to ensure that the supply of information about criminal activities does not dry up: see *Marks v. Beyfus*, (*supra*). In general, this should be the approach of the Courts; but cases may occur when for good reason the need to protect the liberty of the subject should prevail over the need to protect informers. It will be for the accused to show that there is good reason. This should normally be done, not in the course of a trial, but in any proceedings which may be started to set aside a subpoena or a witness summons served upon a Crown witness who is alleged to be in possession of, or to have control over, tape recordings, transcripts of such recordings and the like. We appreciate that those whose telephones have been tapped will not normally know that they have been—and those who do the tapping intend that

> this should be so and for good reason—the public interest is involved. This the Courts must keep in mind. They must also keep in mind that those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence. We have no reason to think that this duty is neglected; and if ever it should be, the appropriate disciplinary bodies can be expected to take action."

[86] The decision in Hennessey reflected on when the disclosure issue should be resolved in the case of applications which might involve the disclosure of the identity of informers. Such matters are clearly extremely delicate and as the court indicated not suitable for resolution by questioning at the trial. It is significant, however, that the court placed the onus on the defendant to raise the issue by way of an application for a *subpoena* or a witness summons in advance of the trial. Kerr J considered in McMullan that the Court of Appeal in Hennessey was not dealing with *voir dire* hearings in its observations but the need for the defendant to raise the issue is all the greater in cases where the defendant was well aware of the circumstances in which a statement of admission was made.

[87] In this appeal there was a well understood procedure for disclosure of materials relevant to the circumstances of an interview. Whether or not to make such disclosure was dependent upon the decision of an accused to challenge their statement. The issue in this case is whether the condition that the appellant had to challenge her statement before disclosure was provided was unfair and the unfairness was such as to render her conviction unsafe.

[88] This is not a case where the existence of a complaint about an earlier interview was unknown to the applicant. There was a concern about the fabrication of evidence. The Attorney General's guidelines published some years later indicated that there were circumstances where otherwise disclosable and relevant material might be withheld for some part of the trial. Hennessy reasoned that disclosure should be made when good cause was shown. In my view the disclosure of such material only when the accused had commenced the *voir dire* or at least indicated an intention to challenge the statement in cases alleging terrorist offences falling within the emergency legislation in this jurisdiction was compliant with the standards of fairness at the time and the statutory background.

[89] I accept, however, that if there were some relevant material on the circumstances of the making of an admission which the accused could not have been expected to appreciate for mental health of other reasons a failure to disclose to the applicant and her lawyers could be relevant to safety. In this case the applicant was aware of the complaint to the FMO but more importantly was aware of the circumstances of her statement interview. It follows that I do not consider that the

argument on disclosure assists the applicant despite the detailed and attractive submissions made by Mr O'Donoghue.

Discretion

[90] There is a dearth of material about the trial in this case. Kelly J was the judge. He dealt with the case in one day. It was contested. There was evidence from police officers and at least one civilian. The applicant was at pains to emphasise that Mr Cush and Mr McGrory did all they could for her.

[91] There was, however, material available to the defence which could have borne on the exercise of the discretion to exclude the statement. The applicant was 17 years old at the time of her arrest. She had a clear record and there was no evidence of previous police involvement. She did not have access to a solicitor after her arrest and did not have contact with any family member or appropriate adult prior to her statement interview.

[92] She was interviewed on seven occasions over a period of two days by rotating teams of police interviewers in an unfamiliar setting. The interview notes record that she was crying continuously while making the admissions indicating a high level of upset. That is consistent with the remarks made by DS McCoubrey at her sentencing hearing. If the cries were because of an assault being inflicted on her by a group of police officers one might not have expected to see a reference to it in the interview notes.

[93] There is no reason to suggest that an experienced team of lawyers would have missed these points. Although it would have been difficult to sustain an argument on the exercise of the discretion in the absence of evidence from the applicant these features would also have been advanced on the issue of reliability.

Reliability

[94] In respect of the Turks bombing the statement of admission indicated that she did this alone. There was evidence about two males who entered the premises just ahead of her but the only evidence that they accompanied her was the impression of one of the females wheeling prams. The distinction between a blue canvas bag which was her description and the shop owner's description of a black plastic bag is not significant. It is the sort of detail that is often unclear. She said that she phoned a warning but it is clear that the shop owner had detected the bomb before any warning arrived. I do not consider that there is any substance in the submission that these discrepancies in the account contained in the statement of admission rendered it unreliable.

[95] In respect of the Christies bomb the statement was taken by DS McCoubrey. In his statement dealing with the interview DS McCoubrey says that the applicant was already aware of his identity. It was suggested McCoubrey had never interviewed

the applicant before. He also records her saying "Look Mister, I was going to tell you last night but I am afraid." That could not have been possible if he had not been present during her previous interview.

[96] It is correct that DS McCoubrey is not identified as one of the interviewing officers in respect of her interview the previous evening but the CCRC records that in addition to the interviewing officers there were three other officers present at that time. Mr Bohill is identified as one of those officers but the others are not identified. It seems likely that the references in the statement indicate that DS McCoubrey was one of those officers. Unfortunately, in the absence of any record of the trial it is not possible to demonstrate how this rather obvious point was dealt with.

[97] Secondly, it is suggested that there is an inconsistency in the record suggesting that WDC Lowry witnessed the taking of the statement in relation to the Christies bomb. WDC Lowry made a statement in relation to the Turks bombing. These were originally separate indictments. The statement in relation to the Turks bombing does not deal with this statement of admission. She did, however, make a statement on 29 November 1977 dealing with this admission and her presence when it was taken.

[98] The third reliability issue advanced is that the interview notes indicate that the applicant originally appeared to suggest that she carried out the bombing shortly after meeting the other members of the unit at 11:00. She then corrected that to indicate that she came back sometime after dinner. In her written statement she records meeting the other participants at 11:00 and driving off to plant the bomb. Towards the end of the statement she indicated that although she met the others that morning she returned after dinner to play her part in the bombing.

[99] I accept that she might have dealt with that aspect of the timings earlier in her statement but I do not consider that it gives rise to any issue of reliability. If it was the case that the police were manufacturing a statement to demonstrate that she had participated in this attack the first step would have been to establish the time of the bombing. This particular detail is supportive of the inference that she made the statement as described by the police officers rather than an indication of unreliability in respect of the content of the statement. It also ensured that the statement demonstrated her initial failure to deal with the time point

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[100] The fourth issue concerned her position within the shop. Her statement states that the security man opened the door and "we walked in past him." The person with the bomb came in and set it in the middle of the shop. The security man stated that the woman came into the doorway of the shop leaving the outside door open. That suggests that there were two doors. The security man stated that the gunman came and ordered him towards the till and the second man came into the shop with a carrier bag. All of these people must have passed the girl. The context indicates that when the security man stated that the girl left the doorway he was referring to the position within the external shop door rather than suggesting that she was outside. The fact

that she was not noticed by the manageress is unsurprising as the manageress was focused on the person with the gun and the person with the bomb.

[101] The final point made is that it was strange that she should refer to one of the other fellows as having a gun as well. She did not identify that person. It is suggested that the prosecution case was that only one male had a gun. That is not correct. The prosecution case was that one man showed a gun.

[102] None of this gives rise to any concern about the reliability of these confessions.

Conclusion

[103] For the reasons given I am satisfied that this applicant had every opportunity to rely on the complaint she made to the FMO during the period of her detention. I am satisfied that she elected not to do so. She now seeks to pursue a challenge to her admissions but has provided no reasonable explanation for her failure to do so at her trial. Her evidence was deeply contradictory and unreliable and I am satisfied beyond reasonable doubt that she did not sustain the physical attacks that she alleged in various contradictory ways during her statement interview.

[104] The interests of justice require that those who are involved in the criminal process should make their case at their trial. I would refuse leave to introduce the fresh evidence upon which the applicant relies in respect of the admissibility of her statements of admission.

[105] I do not consider that there was any unfairness in this case by reason of any failure of disclosure. I am also satisfied that the arguments raised in respect of the reliability of the statements do not give rise to any concern about the safety of the convictions. We do not have the advantage of a record of the trial or the remarks of the trial judge on conviction. We know, however, that the applicant was represented by experienced counsel in whom she had complete confidence. No appeal was advanced or recommended by the lawyers representing the applicant. The applicant took no further steps for 35 years and cannot now come into court to make a new case which she could have advanced at the trial.

[106] I would refuse the application to extend the time for appeal.