

The Viability of Prosecution Based on Historical Enquiry

Observations of Counsel on Potential Evidential Difficulties

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1. Introduction

- 1.1 The remit of the Historical Enquiries Team, set up by the Police Service of Northern Ireland in September 2005, is to re-examine all deaths attributable to the security situation in Northern Ireland between 1968 and 1998.¹ It is envisaged that cases will be examined in four possible stages: first, collection and assessment of material, including the recovery and examination of existing records and exhibits; secondly, the review stage, in which cases will be examined to determine whether further investigative or evidential opportunities may exist; thirdly, re-investigation, focusing on issues identified by the process of review; fourthly, judicial proceedings or resolution in appropriate cases.
- 1.2 The purpose of this note is to identify and examine the potential difficulties faced by the process of historical enquiry from an evidential perspective. The note does not purport to offer a comprehensive survey of all evidential hurdles that may be encountered by the Enquiries Team. It is not unreasonable to assume that some unanticipated difficulties will present themselves as the process of inquiry evolves in practice. It is hoped, however, that the note can highlight potential sources of difficulty by reference to the normal process of investigation prosecution and to the rules of evidence and procedure.
- 1.3 At the outset, it is possible to identify three basic sources of difficulty likely to be encountered by the Enquiries Team. First, there is the possible diminution in quality of evidence through the passage of time; for example, the actual recollection of witnesses will naturally be affected, changes will have taken place in the physical environment in which offences were committed and forensic evidence, if obtained, may not have been adequately preserved. Secondly, in many cases evidence will simply be unavailable. Potentially material witnesses may have died or may prove impossible to trace. Forensic evidence, if not obtained at the time of the offence and preserved, will not readily be available to investigators. Further, confession evidence, which was a central feature of a large number of prosecutions for offences committed by paramilitaries in the course of the Troubles, is unlikely to be forthcoming. Thirdly, any prosecutions that might arise from the fresh enquiries will be subject to the normal evidential and procedural rules, including for example the disclosure rules, the strict standards imposed on evidence of visual identification, the need for caution when relying on the evidence of potentially suspect witnesses, the hearsay rule and other rules of admissibility. Against the backdrop of such rules, the standard of proof beyond reasonable doubt imposed on the prosecution in criminal cases is an exacting one: it is perhaps trite to observe that the attainment of that standard becomes more formidable where the quality of the evidential material available to the prosecution has been diminished by the passage of time.

2. Quality of evidence

- 2.1 Over the past thirty years, psychological studies have questioned the ability of witnesses to recall past events.² A particular phenomenon that has been documented is the distortion of memory by the acquisition of information after an event has occurred: the personal recollection of witnesses, including victims of crime, may be altered through time as they are exposed to other accounts of the event through the media and other sources. More specifically, studies have focused on the particular problems associated with identification evidence, which has been described as having a “chequered history of association with miscarriages of justice”.³ Indeed, official concern with the problems of such testimony led in the 1970s to the adoption of a cautionary approach to the reliance upon identification evidence in court proceedings, an approach which remains a feature of the law of evidence to the present day.⁴ It can be predicted that difficulties stemming from a witness’s capacity to recall will be particularly acute in some of the cases subject to the fresh inquiry process. It is indeed fair to say that time is of the essence where evidence of eyewitness testimony is concerned.
- 2.2 It should be noted, however, that provisions in the Criminal Justice (Evidence) (Northern Ireland) Order 2004 may alleviate some of those difficulties. In particular, where evidence has already been gathered at an earlier stage and preserved, the new provisions are designed to enhance witness recall. Thus a witness during the giving of his evidence may refer to a document to refresh his memory. The common law conditions governing this matter have been relaxed by Article 41 of the Order: provided the witness testifies that the document records his recollection of events at the time he made it and that his recollection is likely to have been

¹ For information, see the PSNI website at <http://www.psni.police.uk/>

² For a helpful introductory discussion, see E. Loftus, “Memory Faults and Fixes” (2002) *Issues in Science and Technology* 41

³ P. Roberts and A. Zuckerman, *Criminal Evidence* (2004, Oxford University Press), p. 490.

⁴ *Ibid.*, pp. 490-496. For detailed analysis of the issue of eyewitness testimony and the problems associated with it, see G. Wells and E. Loftus (eds.), *Eyewitness Testimony* (1984, Cambridge University Press).

significantly better at that time, then he may refer to any document including the transcript of a sound recording in order to refresh his memory. Furthermore, the relaxation of the hearsay rule under Part III of the Order will make it easier for the prosecution to have out of court statements read into the evidence: see further paragraphs 4.6 – 4.7 below.

- 2.3 A separate but nonetheless important matter is the change in physical environment which inevitably occurs over time. This was a particular problem faced by the Bloody Sunday Inquiry, which was tasked with reinvestigating the events that occurred on the streets of Derry in January 1972. For the purpose of the inquiry, elaborate technological methods were used to create a “virtual reality walkthrough” of the streets of the city as they were in 1972.⁵ This required a painstaking reconstruction of the scene of the events using ordinance survey data and old photographs. While it may be possible to use this kind of technique in the context of some of the old cases subject to investigation, it is unlikely that the necessary resources will be available to allow this approach to be adopted on a widespread basis. Further, in many cases, there may be insufficient evidence of the original locus to permit virtual reconstruction of the physical environment with the required degree of accuracy.
- 2.4 Where forensic evidence was obtained at the time of the offence, there is no guarantee that it will have been properly preserved. Cross-contamination of forensic evidence is a concern in any case where such evidence is relied on, but the likelihood of its occurrence becomes more acute with the passage of time. It is also worth recalling that the forensic laboratory in Belfast was destroyed by an explosion in 1992. The precise extent to which this destroyed or damaged forensic evidence is not known, although the Forensic Science Northern Ireland website records that very few exhibits were lost.⁶
- 2.5 A final point to note concerning the quality of evidence is that police practices regarding the recording of information are subject to higher standards today than prior to the introduction of the Police and Criminal Evidence (Northern Ireland) Order 1989 and associated Codes of Practice (and the Code of Practice on Investigations issued under the Criminal Procedure and Investigations Act 1996). Even if old investigative files have been properly retained, it is unlikely that the same range of information will have been recorded therein as would be expected today; it is also unlikely that the same rigour will have been applied to recording as is now required by the modern statutory regime. This could give rise to difficulty in the context of criminal proceedings, as failings at the investigative stage will have implications for the fairness of trials that may ensue from the enquiry.

3. Availability of evidence

- 3.1 It is not only the quality of evidence but also its availability that will present problems for the investigators. Potentially important witnesses will have died, others will not be able to be traced, others still will not wish to come forward to assist the investigation. In this latter category will be persons who may fear repercussions should they implicate others – whether members of paramilitary organisations or security forces – in criminality and persons who are simply reluctant to allow a traumatic episode in their lives to be reopened. It should be noted that throughout the Troubles, a major difficulty facing investigators was the reluctance of witnesses to come forward to make a statement; cases involving paramilitary violence in which eyewitnesses gave evidence were exceptionally rare. There is no reason to suppose that such witnesses, if available, will now be willing to come forward; even if such witnesses do emerge, their evidence will be susceptible to challenge on the ground of its quality as explained in section 2 above. The very fact that a witness declined to come forward many years ago and now appears willing to testify will in itself afford a basis for challenging the reliability of the witness’s evidence.
- 3.2 As regards deaths caused by the army, contemporary inquiries are often likely to be hindered by the inadequate investigation and recording of material at the time of the incident. Evidence given by the army during the Bloody Sunday Inquiry showed that prior to 1972, the primary jurisdiction for investigating a shooting incident involving the army was vested in the army “Special Investigation Branch” (SIB), while the RUC were left to interview civilian witnesses. Statements were taken by SIB investigators primarily for the purpose of informing headquarters as to what had happened, rather than for the purpose of considering a criminal prosecution or challenging the account. The statements were not taken under caution. Moreover, the volume of activity at the time, coupled with the fact that there were relatively few investigators, meant that not all cases were thoroughly investigated. Effectively the conduct of soldiers was protected from scrutiny.

⁵ For a description of the methods used, see S. Doran, “The Lens and the Legal Process: the camera, the court and the reconstruction of reality” Source: Ireland’s Photographic Review 23 (2000), p. 38.

⁶ See <http://www.fsni.gov.uk/backgroundtxt.htm>

For example, it was unlikely that an SIB investigation would have access to statements from civilian witnesses before statements were taken from soldiers. Furthermore it was not normal procedure for an investigator to check the weapon of a soldier or to question him about his obligation under the “yellow card”.⁷

- 3.3 In November 1972, the Director of Public Prosecutions for Northern Ireland made it clear that existing standards were not satisfactory and directed that from then on all allegations made against the security forces were to be passed to him for examination. With a tightening of the investigative process after 1972, it was suspected that there was a tendency for soldiers to close ranks if there was a risk that one of their number might face prosecution.
- 3.4 It should also be noted that there is evidence to suggest that investigation into paramilitary murders and other offences has on some occasions been frustrated due to the involvement of agents and the desire of the security services to withhold relevant information from investigators. It is almost inevitable that investigations into some offences committed at the height of the Troubles will encounter difficulties of this nature.
- 3.5 As regards forensic evidence, in many cases such evidence will not have been acquired at the time and will simply not be available in the context of the contemporary investigation. It should be noted that many paramilitary operations in Northern Ireland in the course of the Troubles were often carefully planned and perpetrated in such a way as to avoid any trace of forensic evidence being left at the scene. As time went on, attacks on the security forces became more sophisticated and members of paramilitary organisations became more careful in their approach. Experienced operatives became acutely aware of the need to take careful measures to reduce the possibility of forensic evidence linking them to the crime or even the crime scene. The wearing of boiler suits, masks and surgical gloves, all of which would later be destroyed, greatly reduced the availability of useful forensic evidence for the purpose of prosecution. Even if there is forensic evidence available, it may in some cases be vulnerable to challenge on the basis that the methods adopted in the gathering, processing and storing of samples did not adhere to contemporary standards.
- 3.6 On the other hand, advances in DNA technology have yielded some investigative breakthroughs in England and the United States where forensic samples from old cases have been retained. A prominent recent example was the arrest and conviction of the person who made hoax calls and sent hoax correspondence purporting to be from the Yorkshire Ripper in the 1970s.⁸ Remarkably, a tiny piece of the seal of one of the envelopes sent by the hoaxer was subjected to the low copy number (LCN) sampling technique and the result produced a match to a DNA sample taken from the accused following an arrest for minor offences in 2001. Successful cases of this nature are rare outside the area of sexual offences, where a semen sample has been preserved and a linkage can be made to a person subsequently arrested from whom a swab is taken. Unfortunately, little hope can be taken from such cases, however, because the cases that the enquiry team will be dealing with are of an entirely different nature.
- 3.7 It was the scarcity of traditional evidence such as forensic evidence and eyewitness accounts that led to the over reliance on confession evidence.⁹ The need to rely on confessions was recognised in the early emergency legislation,¹⁰ which lowered the standard of admissibility by providing for the admissibility of confessions unless they were obtained by torture, inhuman or degrading treatment. Moreover, suspects arrested in connection with scheduled offences were afforded very little protection in terms of access to legal advice and recording of interviews. Reliance on confession evidence was reflected in the changed nature of the trial itself. Many contested cases began with a *voir dire* (or trial within a trial) in which the admissibility of the confession was challenged. If the challenge succeeded, often the trial proper collapsed through lack of any other evidence against the defendant. If the application to exclude the confession failed, often the defendant would plead guilty or the trial would proceed with the only triable issue being the truth of the confession.
- 3.8 Ironically it is confession evidence, used so successfully in the past, that is most likely to be unavailable in future trials of old cases. With the impetus of European Human Rights jurisprudence,¹¹ evidential and procedural protections accorded to persons arrested for scheduled offences have been incrementally brought into line with the protections accorded to persons arrested under the provisions of the Police and Criminal Evidence (Northern Ireland) Order 1989 and its associated Codes of Practice.¹²

⁷ This material is derived from the transcript of the inquiry: <http://www.bloody-sunday-inquiry.org.uk/>

⁸ “Wearside Jack pleads guilty to Ripper hoax”, *The Times*, 20th March 2006.

⁹ For detailed discussion of this issue, see J. Jackson and S. Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (1995, Oxford University Press), pp. 36-43.

¹⁰ Northern Ireland Emergency Provisions Act 1973, section 8.

¹¹ See, for example, *Murray v UK* [1996] 22 EHRR 29, para. 66.

¹² For a comprehensive documentation of the changes, see J. Jackson, “The Rights of Detainees”, in B. Dickson and M. O’Brien (eds.), *Civil Liberties in Northern Ireland: the CAJ Handbook* (4th ed., 2003, CAJ).

3.9 The most fundamental change has been in the recording of police interviews. This ensures that everything said is available to the defence and more importantly to the court. Closely associated with this development is the accused's increased right of access to legal advice and the opportunity to have his solicitor present during the course of the police interview. It is therefore unlikely that the most prominent source of evidence leading to conviction in cases arising out of Northern Ireland's troubled past will be available in the majority of cases subject to the new investigative process.

4. Evidential and procedural rules

4.1 If the investigation of old offences leads to prosecution, the following evidential and procedural rules are likely to feature significantly in the context of contested trials.

i. Identification evidence.

4.2 The cautionary approach to be adopted to evidence of eyewitness identification arising from *R v Turnbull*¹³ and subsequent authorities:

- Where the case against accused depends wholly or substantially on correctness of eyewitness identification, the judge should warn the jury [or in a Diplock trial, the judge should remind himself] of the special need for caution before convicting the accused in reliance on the correctness of the identification.
- The judge should also inform them of the general dangers of this form of evidence, for example, the fact that a mistaken witness can often be a very convincing one.
- The finder of fact should be directed to examine closely the circumstances of the identification, for example the length of time it lasted, the distance between the parties, the lighting conditions at the time, whether the witness knew the accused from before and whether there were any discrepancies between the description the witness gave to the police and the accused's actual appearance.
- If the quality of the evidence is good, the finder of fact can be left to assess it without supporting evidence but with a suitable caution; if it is poor, then the judge should withdraw the case unless there is other supporting evidence which supports the correctness of the identification.

ii. Voice identification.

4.3 Due to expert research which suggests that voice identification is even more problematic than visual identification, the courts have accepted that an even more stringent warning than *Turnbull* should be given in such cases.¹⁴

iii. Warnings concerning the evidence of suspect witnesses.

4.4 Although the former requirement for a corroboration warning to be given in respect of the evidence of persons alleged to be accomplices, it is still accepted that the court should be alive to the potential weaknesses of "suspect" witnesses in general. In *R v Makanjuola*¹⁵, the English Court of Appeal was unimpressed by an attempt to "re-impose the straitjacket of the old corroboration rules" [these were technical rules applying to the reliance upon evidence of suspect witnesses such as accomplices], but accepted that in some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting on the unsupported evidence of a witness [again in the context of a Diplock trial, the judge himself or herself would have to proceed with caution in appropriate cases].

iv. Standard of proof

4.5 As noted in the introduction, the standard of proof beyond reasonable doubt will prove difficult to attain in some cases given the difficulties discussed in sections 2 and 3 above.

¹³ [1976] 3 All ER 549.

¹⁴ *R v Roberts* [2000] Crim LR 183.

¹⁵ [1995] 3 All ER 730.

v. **Hearsay**

4.6 As noted in paragraph 2.2 above, the new provisions governing the admissibility of hearsay evidence under Part III of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 will enable a wider range of evidence to be adduced. The rule against hearsay at common law rendered any assertion, other than one made by a person giving oral evidence in court, inadmissible if tendered as evidence of the facts stated. Thus a statement no matter how potent could not be used in court against the accused if the maker was not prepared or available to testify as to its contents under oath. A number of exceptions to this strict rule developed over the years but until recently it remained a substantial hindrance to the prosecution in successfully bringing cases to court.

4.7 This position has been fundamentally changed in the substantial reform brought into effect by the Criminal Justice (Evidence) (Northern Ireland) Order 2004. In the context of historical enquiry from an evidential perspective, arguably the most significant of these changes is contained in article 18 (1)(d), which gives the court discretion to admit out of court statements as evidence of the truth of their contents if this is in the interests of justice. Further, Article 20 provides for the admission of statements where the identified maker of the statement is: (a) dead; (b) unfit; (c) outside the United Kingdom and it is not practicable to secure his attendance; (d) cannot be found after reasonable and practicable steps have been taken to find him; or (e) in fear. It is clear that these provisions are of considerable potential significance in the context of old cases.

vi. **Bad character**

4.8 The new provisions governing the admissibility of evidence of an accused person's bad character under Part II of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 may also assist the prosecution of old cases. The provisions depart from the strict common law approach whereby the evidence of an accused person's bad character and previous convictions was admissible only in exceptional circumstances. The new law adopts a more inclusionary approach to such evidence and allows the evidence to be admitted (subject to certain safeguards) if it falls within one of several "gateways" to admissibility, including where the evidence is relevant to an important matter in issue between the prosecution and the defence. Such matters include the propensity of the accused to commit offences of the nature of the offence charged. Subject to how this law develops, the trial of old cases arising from the Troubles may conceivably involve Crown applications to have prior convictions for paramilitary related activity admitted as part of the prosecution case against those charged with offences of this type.

vii. **Judicial discretion to exclude evidence**

4.9 The court has a discretion at common law to exclude evidence where the prejudicial effect of the evidence outweighs its probative value; and, under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989, a discretion to exclude evidence, having regard to the manner in which it was obtained, where the admission of the evidence would have such an adverse effect on the proceedings that the court ought not to admit it.

viii. **Abuse of process**

4.10 It will be open to the defence to initiate abuse of process applications for the proceedings to be stayed, based on the impossibility of the accused receiving a fair trial due to the delay in the case being brought to trial.¹⁶ The jurisprudence governing this subject is considerable in volume, but the basic principle is that criminal proceedings may be stayed if the defendant can demonstrate that as a result of the delay he will suffer serious prejudice to the extent that no fair trial can be held. In historical cases, an accused may be able to argue that difficulties in obtaining exculpatory evidence and securing the attendance of witnesses on his behalf will impede the defence significantly. The inability of witnesses to recollect events will also affect defendants in an adverse way: for example, the availability of an alibi defence may have been rendered ineffective with the passage of time.

ix. **Article 6 right to a fair trial**

4.11 Article 6.1 of the European Convention on Human Rights provides that every person charged with a criminal offence has the right to a fair trial by an independent and impartial tribunal within a reasonable time. Persons charged with criminal offences are also accorded specific rights under Article 6.3, such as the right to have

¹⁶ See Blackstone's *Criminal Practice* (2006), para. D10.41.

adequate time and facilities for the preparation of the defence case and, significantly, the right to examine or have examined witnesses against them and to obtain the attendance of witnesses on their behalf under the same conditions as witnesses against them. Attempts by the prosecution to rely on the new hearsay provisions to strengthen otherwise weak evidential cases may fall foul of this latter provision. Again, in the context of the Convention, the passage of time may prove a bridge too far for the prosecution of old cases.

x. Disclosure rules

4.12 It may be difficult for prosecutors to ensure full compliance with the disclosure obligations imposed by the Criminal Procedure and Investigations Act 1996 as amended. Indeed, if the case was subject to a prior investigation, it may be argued that the common law disclosure regime that applied before that legislation came into force should apply, imposing even more stringent duties on prosecutors to disclose unused material to the defence.¹⁷

xi. Special procedures for trial of scheduled cases

4.13 The trial of scheduled offences is conducted by a judge sitting without a jury, with the defendant having an automatic right of appeal in the event of conviction.¹⁸

4.14 The above list does not purport to be comprehensive. The general point to be advanced is that the range of evidential and procedural protections that are afforded to all suspects of crime may provide particularly difficult barriers for prosecutors to surmount in respect of old cases. Indeed, it is not unreasonable to predict that a number of cases will fail to satisfy the initial test of evidential sufficiency that must be met before a prosecution is initiated.¹⁹ On the other hand, the recent changes to the evidential rules governing bad character and hearsay are likely to facilitate the introduction of evidence that would not previously have been admissible.

5. Conclusion

5.1 This note has sought to highlight some of the evidential and procedural difficulties that are likely to arise from the work of the Historical Enquiries Team. It is not intended to suggest that prosecution for offences committed in past years is impossible. Indeed, as experience in other areas demonstrates, antiquity is not necessarily fatal to investigation and prosecution: one may refer, for example, to the successful prosecution of war criminals, convictions in cases of sexual abuse dating back many decades and the resurrection of seemingly dead lines of inquiry through the use of DNA technology.

5.2 It is, however, submitted that any optimism engendered by the injection of resources into the process of historical inquiry needs to be tempered by the often harsh realities of proof in context of the criminal trial.

¹⁷ For discussion of the change effected by the statutory scheme, see M. Redmayne, "Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996" [1997] 60 *Modern Law Review* 79.

¹⁸ Terrorism Act 2000, section 11.

¹⁹ See the Northern Ireland Code for Prosecutors, available at www.ppsni.gov.uk