Regina
v.
David Jason Coghlan

ADVICE ON GROUNDS OF A RENEWED APPLICATION TO THE CRIMINAL CASES REVIEW COMMISSION

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R.v. Jason David Coghlan

(1) I am asked to advise whether any grounds exist on which Mr Jason David Coghlan could seek to re-apply to the Criminal Cases Review Commission for a review of his conviction, with a view to a reference of the matter to the Court of Appeal Criminal Division.

(2) I have been provided with some papers, including in particular the transcript of the proceedings on the appeal, the judgment of the Court of Appeal Criminal Division on the appeal, and the application to the CCRC which was with some regret unsuccessful.

(3) I understand that the issues dealt with in the judge's summing up to the jury were issues raised in the Grounds of Appeal which complained of the manner in which certain issues were left to the jury. Mr. Coghlan's grounds of complaint relate to the way in which his trial was conducted. His first complaint relates to the security which surrounded the proceedings and which he considers may well have prejudiced the jury against him. His second complaint relates to the direction given by the Trial Judge regarding his 'silence' during the police interviews and what, if any, inferences could be drawn.

(4) I understand that Mr. Coghlan is deeply disappointed with the outcome of his appeal, and the original failure of the CCRC to refer his case back to the Court of Appeal and considers that his trial was unfair, particularly as a result of the direction given to the Jury by the Trial Judge. I have some sympathy with this view.

(5) It is important to understand that the Criminal Cases Review Commission does not exist to provide a further appeal from a decision of the Court of Appeal. Its function is to consider issues which were not apparent at the time of the trial and appeal, such as new evidence which has come to light since the proceedings were concluded, or material which has somehow been

ignored or overlooked. If the Commission considers that there is a possibility that a miscarriage of justice has occurred, it refers the case back to the Court of Appeal Criminal Division for a further hearing by that court.

(6) The terms of reference of the Commission are set out in the Criminal Appeal Act 1995 section 13, which provides as follows:

> (1) A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12 unless—
> (a) the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made,
> (b) the Commission so consider—
> (i) in the case of a conviction, verdict or finding***, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it,*** **or**
> (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and
> (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.
> (2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.

(7) The question of the adverse effect of the extra security at trial was fully considered in the judgment of the Court of Appeal, Criminal Division, as was the effect of the direction given by the Trial Judge It follows that these are matters which were "raised in the proceedings which led to it or on any appeal or application for leave to appeal against" and the Commission is not permitted in law to refer the case to the Court of Appeal, Criminal Division on either of those grounds, unless it can be shown that there are **"exceptional circumstances which justify making"** a reference.

(8) In the light of the provision of the Criminal Appeal Act 1995 section 13, I do not consider that there is any prospect of a successful renewed application to the Commission in the absence of

some new issue which has not been canvassed, **or some new evidence which was not heard at the trial.**

(9) My attention is however, drawn to the question as to why the Solicitor acting for Mr. Coghlan during the police interviews gave an advice which in effect was that Mr. Coghlan should remain silent during the said interviews.

(10) Mr Kris Gledhill appeared for the Appellant before the Court of Appeal, Criminal Division on the 23rd March 2001. In a valiant manner Counsel argued what were three basic grounds of appeal. It is important also to note that the Hearing on the 23rd March 2001 was indeed an application for leave because the Single Judge had refused leave. It is also important to note that Mr. Gledhill was not trial counsel.

(11) The three main grounds were the question of security at trial, the identification evidence and lastly the question of silence by the Appellant during the interviews.

(12) The Single Judge stated the following when refusing leave: " As to ground 1, it must be remembered that the jury would not be familiar with the degree of security commonly employed; and at page 41 of the transcript the learned Judge went out of his way to say that it was appropriate to the charge. As to ground 2, the learned Judge cannot be shown to have fallen into a trap: the coincidence he relied on was indeed remarkable and justified his decision. **As to ground 3, it was plainly a matter for the jury whether the silence was adequately explained**. Overall the summing up was careful and fair."

(13) For my part and for the reasons I have stated in para. 6 of this advice, I see no merit in any renewed application to the CCRC on questions of 'security' at Court and the 'identification' although I can quite understand, especially in the ground relating to identification that this Appellant would have reasons to feel aggrieved. It is quite true that the Trial Judge turned his mind far more to the quality of evidence rather than the serious questions of identification. As an indication of how strong the Court of Appeal felt on this issue in para 13 of their approved judgement they stated boldly: **" The Judge was right: there was significant evidence which supported the identification by Mrs Edwards."**

(14) There is however, in my view a real window of opportunity at revisiting this case on the question of why this Appellant failed to reply to questions asked by the police at interviews. Whilst the Court of Appeal in their own judgement doubted whether even if Mr. Coghlan had

replied to questions it would have made any difference, it was evidently clear that Mr. Gledhill was only "instructed" to state that the silence was only as a result of advice given by the attending solicitor. The Court of Appeal firmly stated: **" If it was given (about which we have considerable doubts), it is far too late to go into the matter now."** The Court continued as follows however: **" What matters is the evidence at trial. There was no evidence at trial or by the applicant Coghlan that the reasons for his silence was on the advice of his solicitor."**

(15) What is evidently clear is that by the time of the appeal almost two years after the said police interview, which was made on the 14th April 1999 and after a trial lasting 5 days no reasonable explanation was provided as to (a) why the advice was given and (b) evidence that such advice was indeed given. One cannot help but sympathise with the Court of Appeal and commend wholly Mr. Gledhill for making submissions effectively without evidence and in the words of the Court **" late in the day."**

(16) The Court of Appeal frankly did not believe that such was the position and that as incredible as it was, if it were so why no evidence was adduced at trial or even at the said Appeal.

(17) The Applicant through the law offices of Chadwick Lawrence made representations to the Criminal Cases Review Commission on the 30th July 2001 and further submissions on the 12th October 2001.

(18) In a provisional decision refusing to refer the case back to the Court of Appeal the Commission in para. 6.3 confirmed as follows: **" The letter of 12th October included a submission by Mr. Coghlan's solicitors. In these submissions reference was made to a list of alleged violations of the European Convention of Human Rights, due to be submitted to the Court of Human Rights by Mr. Kris Gledhill (Mr Coghlan's counsel at the Court of Appeal) and Mr. Anthony Jennings QC."**

(19) In para 10.2 the Commission continue: **" The Commission takes the view that Mr. Coghlan's assertion that his silence was on the advice of his solicitor, without more, adds little to his defence. He had not advanced this point in his evidence in chief. In any event, *this evidence was not backed up by any evidence from his solicitor.***

(20) In para 10.3 it is evident the Commission are seeking evidence from Mr. Coghlan regarding the advice given by his solicitor. **" The Commission notes the following statements from recent Court of Appeal decisions: ' In the present case, the solicitor was not called before the jury, and the only evidence**

which they heard came from the defendant, namely that he had been advised to say nothing. This, as we have said, in the absence of any reason for that advice, was unlikely to inhibit the jury from drawing adverse inference.' ***R –v- Noble (1997) Crim. LR 449.*****"** Further, and more pertinent: **" If it is a plausible explanation that the reason for not mentioning facts is that the particular appellant acted on advice of his solicitor and not because he had no or no satisfactory answer to give then no inference can be drawn. That conclusion does not give a license to a guilty person to shield behind the advice of his solicitor. The adequacy of the explanation advanced may well be relevant as to whether or not the advice was truly the reason for not mentioning the facts. A person, who is anxious not to answer questions because he has no or no adequate explanation to offer, gains no protection from his lawyer's advice because that advice is no more than a convenient way of disguising his true motivation for not mentioning facts.** ***R –v- Betts and Hall (2001) EWCA Crim. 224."***

(21) What is of some considerable concern must be the reasons behind why a statement at the least from the solicitor who gave the advice was ever taken. This view is reinforced by the Commission who in para 10.6 stated the following: **" On 7th November 2001, the Commission wrote to Mr. Coghlan's solicitors to ask whether they had a transcript of Mr Coghlan's police interview,** ***and a copy of the notes made by the solicitor attending the interview."*** In Para 10.7 of more concern: **" On 4 January 2002, the applicant's solicitors sent the Commission a copy of the police interview of the applicant dated 15th April 1999. However, the applicants solicitors have to date not supplied the Commission with a copy of the notes made by the solicitor attending Mr Coghlan's interview. The Commission's request for a copy of the notes was repeated in its letters to Chadwick Lawrence dated 7 November 2001, 3 December 2001, 7 January 2002 and 8 March 2002."**

(22) It is in para 10.7.3 that the Commission make it clear what they require prior to considering a referral to the Court of Appeal: **" However, in the absence of any independent evidence of the solicitors advice, the Commission is of the view that the Court of Appeal will not hear evidence on this point."**

(23) It follows that the Commission refused to use its powers to refer the case for the reasons stated and in the absence of any independent evidence regarding the advice given by the solicitor attending this applicant will remain in custody to serve his term.

(24) On the 28th February 2003 I received via Paul Martin and Co Solicitors a letter from Mr. Coghlan dated 19th February 2003 received by Paul Martin & Co on 21st February 2003. Within the contents of the said letter I received a copy of the document so sought after by the Commission and the Court of Appeal entitled: " POLICE STATION INSTRUCTION SHEET". Section G of that document holds a title: " ADVICE GIVEN TO CLIENT (AND

REASONS)". In script is states: **" No comment- no explanation given at this stage. Client clearly did not wish to comment (evidence not good enough to charge)" Clients view: Agrees."**

(25) On the 3 March 2003 at 17.19 I received from Draycott Browne Solicitors, for which I am extremely grateful, a witness statement from the very solicitor who had attended Mr. Coghlan at the police station, JOHN ALAN KENNERLEY who is now employed by the esteemed firm of Burton Copeland Solicitors, confirming the advice given and the reasons. I quote from the said statement in part: **" Following disclosure from the police officers in the case it was my opinion that there was at that stage insufficient evidence to charge David Jason Coghlan."**

(26) This, in my view, now constitutes the evidence required of the Criminal Cases Review Commission to substantiate and merit a referral of the case of Jason David Coghlan back to the Court of Appeal. It is the evidence that all have been requesting. The Court of Appeal doubted it existed. The Commission wrote no less than four occasions for this information without response. No blame can be apportioned to Mr. Gledhill, who in my view made a bold and valiant application without evidence, and neither can any blame be levied upon Draycott Browne Solicitors. To all intent and purposes an explanation must be given as to where this document has been kept for the past four years and more important why Chadwick Lawrence failed to respond to the Commission.

(27) For the purposes of the Commission if any fault is to be found with the applicant regarding the document now in my possession then the only prejudice that has occurred is by his own making. I doubt however, that Mr Coghlan would fail to disclose a document that would assist his case. He has campaigned endlessly regarding his innocence. He has now been in custody nearly four years on a twelve year sentence. He would not normally be considered for parole for another two years and with a robbery charge it would be highly unlikely the Parole Board would release him for a license period longer than two years. Whoever is to blame however, for failure to disclose the document that was requested by the Commission has in my view hindered Mr Coghlan's real chances of proving his innocence albeit on technical grounds.

(28) I take the view that this matter can now very safely be restored to the Criminal Cases Review Commission with the following documents: (1) This and any other advice rendered by myself and Mr. Kris Gledhill (2) The Police Station Instruction Sheet (3) The Witness Statement of John Alan Kennerly.

(29) It is vitally important the Commission are made aware of their previous decision and that the renewed application is based upon the evidence they sought in their refusal to refer citing specifically para. 10.7.3

(30) There is now the evidence and in my view this is a matter that should be restored to the Court of Appeal Criminal Division as a matter of urgency. In the event of a referral by the said Commission I take the view this matter is fit for an application for bail pending a listing unless assurances can be given by the Registrar of Criminal Appeals that the matter will be treated as priority and listed forthwith.

(31) I am supplying a copy of this advice to Kris Gledhill, Anthony Jennings QC, Draycott Browne Solicitors and Paul Martin & Co Solicitors. I would appreciate if the solicitors would be so very kind as to send a copy of this advice to Mr Coghlan.

(32) I do not consider it the appropriate course of action as requested by Mr Coghlan to canvass the Foreign & Commonwealth Office to concede the application so well drafted by Leading Counsel and Junior Counsel to the European Court of Human Rights. Whilst there is some merit to the application it must be remembered that any decision made by the ECHR is not automatically binding on the Court of Appeal. We have seen this in the well publicised case of *Guinness* and it is without doubt we will receive no welcome signs from the Foreign Office who to date contest each and every application.

(33) There is, in my view, only one way forward. Now that the evidence is available, it cries out to be used and no doubt Mr. Gledhill or any other chosen counsel will valiantly approach the Court of Appeal on the basis that this new evidence is sufficient to make the direction given by the Trial Judge fall within the *Betts & Hall* case which was decided on the 9th February 2001 making the said decision, in my view, a binding precedent.

(34) It follows if I can assist in any other way I am available. I thank all those concerned for their assistance in this matter and for their kind cooperation without which this advice would not have been possible.

AVV. GIOVANNI DI STEFANO
05/03/2003