

Regina

v.

Kenneth Noye

**ADVICE ON GROUNDS OF APPLICATION TO THE CRIMINAL CASES
REVIEW COMMISSION**

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Avv. Giovanni Di Stefano

R.v. Kenneth Noye

- (1) I am asked to advise whether any grounds exist on which Mr Kenneth Noye could seek to 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 an extensive file of 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 Mr Noye's observations on the judgment.

- (3) I understand that Mr Noye has not denied that he was the person who stabbed the deceased, Stephen Cameron. It follows that Mr Noye was guilty of murder unless either he did not intend to cause death or grievous bodily harm, or he acted under such provocation as caused him to lose all self-control and would have provoked a reasonable person to act as he did, or he was acting in lawful self-defence.

- (4) I understand that each of these issues was dealt with in the judge's summing up to the jury. I note that Mr. Noye's grounds of appeal do not raise any criticism of the manner in which these issues were left to the jury. Mr. Noye's grounds of complaint relate to the way in which his trial was conducted. His first complaint relates to the adverse publicity which surrounded the proceedings and which he considers may well have prejudiced the jury against him. His second complaint relates to the failure of the prosecution to disclose matters relating to the character of Mr de Cabral, a principal witness against him.

- (5) I understand that Mr. Noye is deeply disappointed with the outcome of his appeal, and considers that his trial was unfair, particularly as a result of the non-disclosure of material relating to Mr. De Cabral. I have some sympathy with this view.

- (6) 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.
- (7) 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.

(8) The question of the adverse effect of the pre-trial publicity was fully considered in the judgment of the Court of Appeal, Criminal Division, as was the effect of the non-disclosure of material relating to Mr. de Cabral's background. 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.

(9) 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 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.

(10) It follows that any application based upon the same grounds raised at the Court of Appeal and rejected would not be permitted unless there were "exceptional circumstances" which would justify such.

(11) Having the above well in mind I am asked to advise on the prospects of advancing this case as it is self evident the Applicant feels particularly aggrieved by the decision of both the Central Criminal Court and the Court of Appeal, Criminal Division. In particular I am concerned to establish whether the Court of Appeal may have based its judgement on an erroneous factual position, namely that far from there having been

TWO STAB WOUNDS to the deceased's body as described by the pathologist Dr. Michael Heath, there was in reality only ONE penetrating stab wound.

(12) I am comforted somewhat because of the way the Crown presented its case. The Case Summery dated 28th July 1999 and drafted by Counsel for the Crown, Mr. Mark Ellison shows the Crown relied upon only one stab wound (para.1.2 and 3.1). Contradicted by para.15.3 of the same Summery stating that cause of death was "stab wounds to the chest and abdomen."

(13) The death certificate issued by Dr. Heath however, confirms "STAB WOUND TO THE CHEST AND ABDOMEN."

(14) On the 5th January 2000 Dr. Vesna Djurovic from Kings College London was sought for an opinion. Dr. Djurovic stated quite categorically: "There are no photographs of stab wound No.2". Dr. Djurovic gives the cause of death: "1a STAB WOUND TO THE HEART."

(15) If it transpires that there was, or may have been, no more than a single stab wound, the terms of the Court of Appeal's judgement would indeed suggest that an arguable issue arises, in that the Court clearly relied on the facts of a second penetrating wound to counter defence submissions on self defence. In these circumstances a case would indeed be made out for the Criminal Cases Review Commission to refer the case back to the Court of Appeal for its further consideration on this aspect.

(16) The onus to prove such is now very much on the Applicant to establish that the factual position before the Court of Appeal was wrong. On the face of it is unlikely that that any pathologist would simply 'invent' a second stab wound which did not

present itself to him on examination of a deceased's body. Some scenario involving confusion on his part or his mixing up notes from two separate post-mortems might explain matters. It is to be noted however, that all the witnesses-including the main prosecution witness De Cabral-only confirm having seen the Applicant using the knife once. The documents as they stand can on the evidence only support ONE STAB WOUND.

- (17) It is to be noted that this line was not pursued at trial or at the Appeal. In my view it would thus fall in the line consistent with the Criminal Cases Review Commission's interest and whilst it is not per se 'new evidence' it was a matter not considered by the Court of Appeal for whatever the reason. The Lord Chief Justice did thus base his decision supported by his fellow brother judges on more than one stab wound.
- (18) If the line of enquiry into the existence or not of a second penetrating wound is to be pursued, the following must be undertaken where appropriate:
- (a) To obtain from solicitors who acted at trial and the appeal all witness statements taken from witnesses who EXAMINED the deceased at the scene of the incident or at hospital, before the post mortem. I refer to paramedics, police officers, nurses, doctors who engaged in any PHYSICAL EXAMINATION of the deceased no matter how rudimentary.
 - (b) Sight of all contemporary medical notes taken in respect of the deceased before post mortem.
 - (c) Was there any surgical intervention of any kind undertaken in an attempt to resuscitate the deceased.
 - (d) Sight of any photos that might exist showing the deceased at the scene or of his injuries at the hospital.

- (e) Sight of any photos taken at the time of the post mortem, including all original negatives retained by the photographer at the post mortem.
- (f) The photographer should be identified so that he can be asked for his recollection, if any, of a second wound and as to why his photos show only the one wound. If the photos were taken by Dr. Heath himself, this must be confirmed.
- (g) A copy of the original notes taken by Dr. Heath made at the time of the post mortem. I understand he dictated his notes onto a hand held tape recorder. A copy of that tape must be requested and obtained. If any video exists of the post mortem a copy must be obtained.
- (h) The identities of each and every person present at the post mortem should be established so that their recollection of the presence/absence of a second stab wound obtained.
- (i) Any garments (the white T Shirt specifically) should be available for inspection to examine whether a second entry hole is present. The evidence currently suggests only one hole consistent with one wound.

(19) Mr David Martin Sperry-also instructed in this matter to advise- has recently spoken with trial counsel for the Applicant, Mr Stephen Batten QC. I understand that he was extremely helpful and quite open in his views about the trial. Mr Batten was extremely concerned about many aspects of the trial. He does not remember the issue of the second stab wound being investigated at trial and it did not form part of the case on appeal. He was in fact quite specific that at the time of the appeal the evidence was very much of only ONE stab wound. Instructions were withdrawn from Mr. Batten QC and Mr. Micheal Mansfield QC was instructed in his place. I can confirm that the issue of one or two stab wounds was not raised at the appeal.

(20) It is very clear that the evidence (albeit in its confused form) from Dr. Heath of two distinct stab wounds one causing the fatal injury to the heart and the other slicing

through the top of the liver was contradicted by the opinions of both Dr. Vesna Djurovic and Dr. Jerreat the coroner's pathologist who I understand conducted a second post mortem. Both considered that the injury to the liver was inflicted by the knife as it travelled through the body to reach the heart, and it was that single incision, tracking through liver and heart, was the ONLY penetrating wound.

(21) This being right, one must as a matter of course and law question why Dr. Heath should ascribe the injuries to these two organs to two separate entries of the knife. One possibility is that he has simply misled himself the two injuries do not 'line up' and in consequence has assumed without further investigation that they can only be explained by two separate thrusts of the knife. The other possibility as a matter of pure logic is that the second incision-of no great depth- was in fact inflicted carelessly during the course of the post mortem itself and that the allocation of internal injuries by Dr. Heath to two separate stab wounds was a convenient way of disguising such an occurrence. This would explain the proposition that the deceased's clothing contain an incision consistent with only one penetrating stab wound; no photograph being available of the second wound to the liver; the death certificate showing 'wound' in the singular; and that two other pathologists can only concur with the cause of death caused by a 'single stab wound.'

(22) Dr. Micheal Heath's standing as an expert witness amongst his professional colleagues and senior criminal practitioners both defending and prosecuting appears to be currently the subject of some debate. The Criminal Cases Review Commission have requested of ourselves a copy of Dr. Hill's recent criticism of Dr. Heath's evidence in the case of R-v- CULLEN a case upon which I am myself instructed. The CCRC wish to use that criticism in their investigation of a case R-v- JENKINS where Dr. Heath's evidence is being questioned.

(23) It is evidently clear that if only one stab wound was inflicted upon the deceased then the Court of Appeal was indeed misled. The Criminal Cases Review Commission is entitled thus to refer the matter back to the Court of Appeal on the basis that the Court of Appeal was not availed to all the facts of the matter.

(24) It would be quite unjust and the Applicant every reason to feel aggrieved standing convicted of murder if the elements leading to a conviction for murder were truly missing. It is self evident that if the deceased died of two stab wounds as opposed to one wound the possibilities of a submission of self defence is much lower. Couple that factor with the events in the past history of this particular Applicant the position would be fatal for the defence. As an example I cite the case of R-v- Joseph Barton heard at Manchester Crown Court recently. In short Barton stabbed his employer in January last year 13 times in an argument in the shop owned by the deceased. Barton denied murder claiming it was self defence. With insufficient evidence to prove the charge of murder, notwithstanding 13 stab wounds, the charge was reduced to manslaughter and a sentence of 13 and a half years imposed. It is interesting to note that Barton admitted drug dealing during the trial.

(25) Compared to the situation of this Applicant it cannot be stated as it was by the LCJ that 'he must have known' the consequences of using a knife. At its highest, an event the like of the DC Fordham episode involving 11 stab wounds and this Applicant would in my view be properly convicted of murder. The evidence as it currently stands however, is of ONE wound to the heart in a fight, upon which it was by the evidence, clear the Applicant was losing. Comparing such to the R-v- BARTON at Manchester Crown Court matter, this Applicant is entitled to feel he has simply not been adjudicated in a manner consistent with the evidence. Coupled with the complaints he raised at his trial and the Court of Appeal and now the unexplored yet pertinent question of fact as to whether the deceased died of one or two stab wounds, in my view this Applicant has not received a fair trial.

(26) In my view this matter is by the evidence currently available fit to proceed to a full application to the CCRC if read in conjunction with my letter addressed to the Applicant dated 1st December 2002 and 2nd December 2002. The fact that both Mr. Batten QC and Mr. Michael Mansfield QC did not raise the important issue regarding how many wounds were present is no criticism of the way they have handled the case of R-v- NOYE. The only pertinent issue for the purposes of the Criminal Cases Review Commission is that it was not raised. The matter is vital for the purposes of distinguishing between an arguable case for manslaughter as opposed to murder. The Court of Appeal was not availed to the full facts.

(27) It follows that upon that basis a case can be made to the CCRC to refer the matter back to the Court of Appeal.

(28) I am requesting Mr. Paul Martin to kindly make contact with the CPS and Mr. Henry Milner to obtain the documents I have requested to perfect the case as a matter of urgency.

(29) I also request a copy of this advice to be sent to the Applicant at HMP Whitemoor.

Avv. Giovanni Di Stefano

16/02/2003