

Judicial Communications Office

Friday 20 January 2012

COURT DELIVERS VERDICT IN MASSERENE MURDERS TRIAL

Summary of Judgment

Sir Anthony Hart, sitting today in Antrim Crown Court, found Brian Shivers guilty of murder and related offences arising from the attack on soldiers at Masserene Barracks on 7 March 2009. He found Colin Duffy not guilty of the same offences.

Circumstantial evidence

2. In his written judgment, The judge set out the facts that were presented to the Court. He said the core of the prosecution case against Duffy and Shivers was comprised of the forensic evidence obtained from a Vauxhall Cavalier which the judge was satisfied was used by the two gunmen during their attack. The prosecution also relied on inferences which they say should be drawn from other matters which were said or not said by each of the defendants. The judge said that the prosecution evidence was of a circumstantial nature. This is where the prosecution relies upon evidence of various circumstances relating to the crime which, when taken together, establish the guilt of the defendant because the only conclusion to be drawn from that evidence is that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all of the questions raised in a case, nor is it necessary that each fact upon which the prosecution relied, taken individually, prove that the defendant is guilty: "The test for the court is whether all of the evidence has proved the case against the defendant beyond reasonable doubt". The judge added that circumstantial evidence must be examined with great care because, for example, it could be fabricated or one or more of the circumstances may be inconsistent with the defendant's guilt. The judge said that in the present case not only must the evidence against Duffy and Shivers be examined in the light of these principles, but the evidence relied upon by the prosecution against each of them must be examined separately because it is for the prosecution to prove beyond reasonable doubt that each is guilty of the charges against them.

The case against Colin Duffy

3. Colin Duffy was charged with two counts of murder, six counts of attempted murder and one of possession of two firearms and ammunition with intent to endanger life. The basis of the prosecution case against Duffy was DNA evidence from the tip of a finger from a latex glove which was found in a Vauxhall Cavalier after the attack and DNA from the metal tongue of the front passenger seat belt of that car. Counsel for the prosecution submitted that they could not say that Duffy was one of the gunmen during the attack because the evidence to say this was insufficient but that Duffy was so closely related to the items found in the car that he could have been in the car during the attack, or helped to prepare the car for the attack, or helped to try to destroy the car after the attack.

Judicial Communications Office

4. The judge said that if Duffy was present in the car during the attack, but was not one of the gunmen, then he was an accessory who aided and abetted the gunmen and would be regarded in law as a secondary offender. In order to convict him on this basis the prosecution would have to establish the following matters beyond reasonable doubt:

- Duffy did something to assist the gunmen carry out the attack, either by preparing the car or being present when the attack car was abandoned and an attempt made to destroy it;
- He did either of these things realising that they were capable of assisting the attackers either before or after the attack;
- He contemplated that the attackers were determined to kill soldiers at Masserene Barracks; or
- He intended to assist the attackers carry out their plan to attack the soldiers and escape afterwards.

5. Counsel for Duffy submitted that the latex tip of the glove may not have been in the front foot-well of the Cavalier because it was not physically recovered at the scene. The latex tip had not been found by the Warrant Officer who examined the car from an explosives perspective but was spotted by a PSNI Crime Scene Manager who visited the site. It was not removed from the car before being taken to the PSNI Station at Maydown for a detailed forensic examination because it was not considered suitable for rapid DNA examination. The judge said that if the latex tip was not in the Cavalier before it was removed from the scene it must follow that the crime scene officers lied to the Court and that someone was able to obtain a piece of latex glove with Duffy's DNA on it and place it in the car. He stated that a much more likely explanation was that "only some of those who looked into the Cavalier at the scene saw a small piece of material whose significance was only appreciated later, material which was in a position in the foot-well where it might not have been seen". Having considered all of the evidence the judge was satisfied that the latex tip was present in the front passenger foot-well of the Cavalier before the car was removed to PSNI Maydown for examination.

6. DNA from the latex tip and from swabs of the seat belt buckle were examined by Dr Watson, a forensic scientist based in England. She compared the results with a DNA sample taken from Duffy after his arrest and concluded that the chance of obtaining the matching DNA profile if it originated from someone other than, and unrelated to him, to be less than one in one billion. Evidence on behalf of Duffy was given by Professor Dan Krane. He concluded that the DNA profile on the latex tip could be a mixture of two or more individuals. The judge, however, after considering all the evidence said he was satisfied that Dr Watson was correct in her conclusion that the DNA on the latex tip came from Duffy, and there was no evidence to show that anyone else handled or touched the latex tip found in the Cavalier. The DNA profile on the seat belt buckle was not as complete however Dr Watson was able to say that some of it could have originated from Duffy. The judge considered that the absence of a match probability did not mean that no significance could be given to the profile found on the seat belt buckle. He said it would be "an astonishing coincidence" for the DNA on the belt buckle not to be Duffy's when a complete profile of his DNA has been found on the latex tip lying in the foot-well of the car.

Judicial Communications Office

7. The judge was satisfied that Duffy had no contact with the Cavalier before it was sold by its owner on 22 February 2009:

“The presence of his DNA on the latex tip alone is strong evidence that at some point after the Cavalier was purchased, and before the car was abandoned by the attackers, Duffy had contact with the interior of the Cavalier whilst he was wearing a latex glove. That he was wearing a latex glove gives rise to a strong inference that he was doing so in order to conceal the fact that he had contact with the interior of the car. I consider that his DNA on the seat belt buckle provides further evidence that at some stage during that period he had occasion to touch the seat belt buckle ... in some way that left his DNA on the buckle.”

8. Counsel for Duffy relied on several pieces of evidence to show that he was neither in the Cavalier during the attack nor present when the car was abandoned:

- Duffy’s wife, Mrs Martine Duffy, gave evidence that he was at home on 7 March. The Court heard that when she visited Antrim PSNI Custody Suite on 26 March she made it clear to an officer that she had been advised to say nothing. The judge was satisfied that she adopted this attitude as part of a deliberate strategy of non co-operation with the police in case she said something that would harm her husband’s position and said that he did not regard her evidence as being of any value;
- Duncan Lees, an expert in analysing CCTV images, calculated that one of the gunmen was 1.914 metres tall (6 feet 3 inches) and the other was 1.992 metres tall (6 feet 6 inches). The judge said it was accepted by the prosecution that Duffy is 5 feet 11 inches tall and is right handed, whereas one of the gunmen is seen on the CCTV firing left handed. The judge concluded that there was considerable evidence to suggest that Duffy was not one of the two gunmen;
- Dr Catriona Storey-Whyte, an independent consultant specialising in the analysis of tape recordings, speech and language samples identified several male voices in the voicemail message recorded on one of two mobile phones found in the front of the Cavalier. She concluded that there were three male voices heard speaking in the car but that on the balance of probabilities Duffy was not one of them. The judge said that while Duffy may have been in the car and not speaking, the CCTV would suggest there were only 3 people in the car when that conversation was recorded and if Duffy was not, or may not have been one of them, then that is further evidence that he was not one of the gunmen or the driver.

9. The prosecution suggested that the DNA evidence indicated that Duffy was present when the car was abandoned however did not advance any suggestion as to how the DNA came to be in the car or what Duffy might have done if he was present. The judge said that whilst the DNA on the seat belt buckle was more likely to have been deposited by Duffy handling the buckle while sitting in the front passenger seat, the evidence about the height of the gunmen ruled out him sitting there during the attack, and would suggest that the DNA must have been deposited on the buckle at some other time, either by Duffy handling it or by secondary contact with the glove. The judge said that while he was satisfied that the latex tip became detached from the glove in some way after Duffy had worn it, he could not be satisfied that it became detached whilst Duffy was doing something in the car before it was set on fire and abandoned:

Judicial Communications Office

“That may have happened, although no satisfactory explanation has been advanced as to how that might have happened, but I consider that it is equally likely to have become detached on some earlier occasion after the car was purchased and before the attack. At the very least that the latex tip could have become detached on some earlier occasion cannot be excluded as a reasonable possibility. Once that reasonable possibility is accepted, as it has to be, I consider that the prosecution has failed to prove beyond reasonable doubt that Duffy was present [when the car was abandoned].”

10. The judge said that that left the inference that Duffy took part in the preparation of the attack in some way. The fact that Duffy was in the car in circumstances where he wore a latex glove in an attempt to prevent his leaving any traces that might show a connection on his part with the Cavalier strongly suggested he knew the car was to be used to commit a crime. However, in order to establish Duffy’s guilt as a secondary party, the prosecution had to prove beyond reasonable doubt that he did something to assist the gunmen by preparing the Cavalier for the attack, that he did so deliberately whilst realising that what he was doing was capable of assisting the attackers, and when he did so he contemplated that the attackers were determined to kill soldiers at Masserene Barracks. The judge said there were two major obstacles to the prosecution being able to prove this to the requisite standard. The first was that they could not establish what Duffy actually did to prepare the car. The second was they could not prove when he did whatever he did.

11. In order to overcome these obstacles, the prosecution invited the judge to draw an adverse inference against Duffy from his failure to give evidence. Counsel for Duffy suggested that his explanation for not giving evidence might be that he might implicate others, or he might not be confident that his denial of involvement would be believed because of experiences he had in the past. The judge said that in any event neither of these reasons was an adequate reason for not giving evidence and that it was fair to draw an adverse inference against Duffy from his failure to give evidence:

“I am satisfied that the only sensible explanation for his silence is that he has no answer, or no answer that would stand up to examination, when questioned about the presence of his DNA on the latex tip and on the seat belt buckle. However, whilst his failure to give evidence provides some additional support for the prosecution case, I must not find Duffy guilty only, or mainly, because he did not give evidence.”

12. The judge also bore in mind that when a defendant is charged as an accomplice, it is not legitimate to convict him of any offence which, helped by the preliminary acts of the accomplice, the principal offender may commit. The crime must be within the contemplation of the accomplice. He said that even if the accomplice contemplates that his assistance will in some way help the commission of a terrorist crime, it does not follow that a court will be justified in including murder by the principal within the contemplation of the accomplice because terrorists have frequently used cars in this jurisdiction to carry out other crimes such as robbery, transporting firearms, kidnapping or assault.

Conclusion of the case against Colin Duffy

Judicial Communications Office

13. The judge concluded the case against Duffy at paragraph [58] of his judgment as follows:

“Having considered all of the evidence against Duffy I am satisfied that at some stage between the purchase of the Cavalier and the attack on Masserene Barracks he was present in the Cavalier whilst wearing latex gloves in order to avoid leaving any traces in the car that might identify him, and in doing so he must have known that the Cavalier was going to be used by others in the commission and furtherance of a criminal act. The prosecution must, however, prove more than that because they must go on to prove beyond reasonable doubt that the criminal act Duffy contemplated was an attack on soldiers at Masserene Barracks. There must be strong suspicion that Duffy did know what was going to happen and that that is why he has refused to give evidence. However, suspicion, no matter how strong, is not sufficient by itself to establish guilt beyond reasonable doubt, and is not an acceptable substitute for facts from which guilt can be properly proved. I consider that there is insufficient evidence to satisfy me beyond reasonable doubt that whatever Duffy may have done when he wore the latex glove and handled or touched the seat belt buckle meant that he was preparing the car in some way for this murderous attack, and I therefore find him not guilty on each count.”

The case against Brian Shivers

14. Brian Shivers was also charged with two counts of murder, six counts of attempted murder and one of possession of two firearms and ammunition with intent to endanger life. The prosecution case against him was that his DNA was found on two matches found on the rear seat of the Cavalier, one match found nearby and on a mobile phone found between the front seats of the Cavalier and from which the voicemail message referred to above was extracted. The judge said that this evidence was the foundation of the prosecution case against Shivers because without it the remaining matters would lose their evidential significance.

15. Two spent matches were found on the driver’s side of the rear passenger seat of the Cavalier. The judge was satisfied that petrol was poured over the back seats of the car and the matches were then used to ignite the fire before being thrown on the rear seat. A third matchstick was recovered from the road near the car. Dr Watson examined the matchsticks for DNA. She also analysed swabs taken from the mobile phone. Dr Watson estimated the chance of obtaining matching DNA profiles from the DNA on the two matchsticks if the DNA originated from someone else unrelated to Shivers to be 1 in 1 billion. She had also been provided with reference samples from Dominic McGlinchey and Gerard McGaughey (see later). Her evidence was that there was no scientific evidence to show that either of them had been in contact with the matchsticks. The judge said he was satisfied that it was Shivers’ DNA on these matches. Dr Watson then examined the single match found outside the car. Her evidence was that the DNA was a very low level partial profile indicating that there were contributions from at least two persons but that there were 9 out of 10 confirmed DNA components in the mixture which matched Shivers’ DNA profile. Dr Watson was again satisfied that no DNA from McGlinchey or McGaughey was present.

Judicial Communications Office

16. Dr Watson also examined the swabs taken by FSNI from the mobile phone. The result was a mixed DNA profile which indicated the presence of DNA from at least 3 individuals but that Shivers' DNA was fully represented within the profile. Counsel for Shivers suggested that the DNA traces which were examined by Dr Watson and which were stated to have come from the inside of the phone may have been transferred from the outside of the phone during the examination at FSNI. The judge considered there was some merit in this suggestion but made clear that in doing so he was not criticising the officer in FSNI who he was satisfied performed her tasks scrupulously and conscientiously. He said, however, that he could not exclude the risk of inadvertent transfer of minute amounts of DNA from one part of the phone to another. He therefore had to evaluate the significance of Dr Watson's evidence on the basis that the DNA which she considered could have originated from Shivers may have been found on the outside and not the inside of the phone.

17. The judge said the DNA had to be viewed in the context of the entirety of the DNA evidence against Shivers. He was satisfied that Dr Watson's evidence established that Shivers could have contributed to the DNA found on the phone and on the single match, and that the DNA which was found was Shivers' DNA. This provided further support to what he considered to be an extremely strong piece of evidence connecting Shivers to the burning of the car, ie his DNA on the two matches on the back seat:

"It may be that on Dr Watson's evidence that when the DNA evidence against Shivers from the phone is considered alone, or the DNA evidence from the single matchstick is considered alone, the inference to be drawn from each might be insufficient to establish a connection between Shivers and the Cavalier. When all three parts of the DNA evidence are taken together their combined effect is much greater. I consider that it would be a truly remarkable coincidence were the DNA found by Dr Watson on the mobile phone not to be Shivers' DNA, but to be that of someone else, when one considers that the phone was found between the front seats, and when the two matches on the back seat which did contain his DNA were so close".

18. The prosecution also relied on a number of other matters:

- Evidence of the analysis of CCTV images from Magherafelt on 7 March 2009. This was alleged to show Shivers' car and the Cavalier in close proximity to each other earlier in the day. The judge said that the most that could be said from the CCTV evidence was that it was a Cavalier but that it was insufficient to establish beyond reasonable doubt that it was the same Cavalier that was used in the attack. For this reason the judge did not place any reliance on this evidence;
- Evidence that it was possible for Shivers to have been present when the car was set alight and then return to Magherafelt in time to order a meal by mobile phone from a Chinese restaurant at 10.27 pm;
- Evidence of Shivers' fiancée, Lisa Leacock. When called as a prosecution witness she said that Shivers arrived home at about 9.55 pm to 10.10 pm. Her timings did not provide Shivers with an alibi for the period after the shooting until he returned home. The judge said her evidence in a number of respects was supportive of

Judicial Communications Office

Shivers' denials that he was involved in these offences and he took those matters into account in his favour.

19. Shivers was interviewed by the police on a number of occasions in May and July 2009. He initially made predominantly "no comment" interviews but in an interview on 22 July the following statement was read out on his behalf after he consulted with his solicitor:

"I would like to say that I had nothing to do with the murder of the two soldiers or any of the other offences. I am not and have never been a member of the Real IRA. I am engaged to get married to my fiancée, Lisa Leacock, and we plan to have children. I spend most of my time looking after my health and I am not going to spend whatever years I have left doing anything other than enjoying my life with my fiancée. I can't understand how it is my DNA, if it is my DNA. If it is proven to be my DNA it can only be there for innocent purposes as I had nothing to do with this."

20. The judge said that when considering the evidence that Shivers gave on his own behalf at the trial, and the evidence against him, he had to take into account some general matters:

- Shivers is 46 and has a clear record. He is therefore a person of good character;
- He has suffered from significant ill health due to cystic fibrosis for many years and has a restricted life expectancy as a result;
- There was no sign of any political motive or commitment on his part. Shivers volunteered to the Court that he attended four meetings of Eirigi out of curiosity and at the suggestion of Dominic McGlinchey. The judge said there was no evidence before the Court to support the prosecution assertion that Eirigi was an organisation with "dissident" sympathies. He said that the only evidence about the aims and objectives of Eirigi in this case came from Shivers and did no more than suggest it is an Irish Republican organisation sympathetic to the establishment of a 32 county Irish state. The judge said he therefore proposed to leave Shivers' motives for attending those meetings entirely out of account.

21. Shivers gave evidence to the Court that he left his house at 6.30 pm on 7 March 2009 and went to 7.00 pm Mass at Newbridge Chapel which is between Magherafelt and Toome. After Mass, he visited the graves of some neighbours buried in the cemetery beside the church. He then went to Toome where he bought a Chinese takeaway which he ate in his car. He claimed he had intended to drive to Belfast to meet some Polish friends for a farewell drink, and had told his fiancée this, but changed his mind because he was not feeling well and his fiancée was not happy that he was going to Belfast. He said instead he decided to visit his brother in Toome. The house was in darkness but he let himself in and made a cup of tea. He said left at about 9.40 pm and drove back to his house in Magherafelt. His fiancée said she had not eaten so he used his mobile phone at 10.27 pm to order a meal from a nearby Chinese restaurant.

22. The judge said he was satisfied that Shivers lied about his actions and whereabouts on 7 March between 6.30 pm and his return to his home sometime after 10.00 pm. He reached this conclusion for the following reasons:

Judicial Communications Office

- The account Shivers gave in Court could not be reconciled with his statement to the police in his first interview when he claimed to be home all night only leaving to go to a nearby Chinese restaurant;
- Shivers did not give this detailed account to the police during any of his interviews. It only emerged when a defence statement was filed during the second week of the trial.

23. The judge found it inconceivable that if Shivers' account of his movements on the evening of 7 March was true, he was unable to recall the details until 2 years and 5 months after he was first questioned about the events. The judge was satisfied that these are facts that Shivers could reasonably have been expected to mention at the time he was questioned, and considered that he should draw an adverse inference against him from his failure to give those details at that time and that the reason why these facts were not mentioned was because they had since been invented by Shivers. The judge said he was also satisfied that the account given of his movements contained elements that did not stand up to examination, such as why he spent time visiting the graves after the Mass, why did he decide to go into his brother's house when it was empty, and wait for his brother and family when he saw they were not at home instead of returning straightaway to Magherafelt:

"Shivers account has all the hallmarks of having been created at a very late stage of these proceedings in order to explain what he was doing, an account which could not be checked because there could be no one after such a period of time who could plausibly be expected to remember him either being at or not being at any of the places where he said he was some 2 years and 8 months after the event."

24. The judge said that the mere fact that Shivers lied about his whereabouts was not itself evidence of his guilt of these charges but could be relied upon by the prosecution as evidence supporting the case against him.

25. In his first defence statement Shivers dealt with the alleged presence of his DNA on the matches and mobile phone by claiming that he may have innocently touched some or all of the items in the course of everyday life or it could have been transferred to the items without him having touched them. In his amended defence statement delivered in the second week of the trial, Shivers advanced a significantly different explanation as to how his DNA could have been on the matches. He claimed that Dominic McGlinchey and Gerard McGaughey regularly visited his house and were both likely to have used and taken away his matches. The judge noted that McGlinchey is not on trial in this case but the prosecution and defence had agreed a statement to the effect that he was arrested on the basis of reasonable suspicion that he assisted those responsible for the attack on Masserene Barracks after the attack and had a connection with the car used. That suspicion was based upon information that was assessed to be reliable. The judge considered he should take this into account when determining whether Shivers' evidence that McGlinchey could have taken matches from his house is or maybe true, and either used those matches to set the Cavalier alight or gave the matches to someone else who used them to set the car alight.

Judicial Communications Office

26. The judge was satisfied that these matters did not weaken or displace any inference to be drawn from Shivers' DNA being found on the two matches recovered from the back seat of the Cavalier because he accepted Dr Watson's evidence that there was no scientific evidence to show that either McGlinchey or McGaughey could have contributed to the DNA from the matches or to show that they had been in contact with the matches. The judge said that Shivers only gave the explanation involving McGlinchey and McGaughey after the trial had started. He said he was satisfied that Shivers only invented this later to try to explain away the presence of his DNA on the matches and that he should draw an adverse inference against Shivers in relation to his failure to mention these matters:

"For there to be an innocent explanation for the presence of his DNA on the two matches would require Shivers to handle the matches without striking them, and then put the unused matches into their box. He has not suggested how he might have done this, such as using the matches as counters from playing cards for example, or spilling them out of their box and picking them up and putting them back in the box. I am satisfied that his evidence that Dominic McGlinchey or Gerald McGaughey may have taken these matches from his house has been invented and is untrue."

27. The judge said that not only was Shivers unable to explain how his DNA came to be on the matches, but could not explain how his DNA was on the mobile phone taken from the car. The pay-as-you-go phone had only been topped up with credit the day before the attack although it was first used on 1 January 2008. The judge said this suggested that it was deliberately prepared for possible use the day before and was brought in the Cavalier by the attackers so that if they had to use the phone the call could not be traced back to anyone. He was satisfied that the evidence that Shivers' DNA could have come from this phone was a further indication that he was involved with the Cavalier.

Conclusion against Brian Shivers

28. The judge at paragraph [96] of his judgment said there could be no doubt that the person who set fire to the Cavalier played an essential part in the murderous attack because by setting fire to the car they were trying to destroy it, and so destroy any evidence that might lead to the arrest of those involved. He was satisfied that Shivers' DNA was found on the two matches found on the back seat of the Cavalier, and that those matches were used to set fire to the car before all those present left the scene. He was also satisfied that it was an extremely strong inference from these facts that Shivers' DNA got onto the two matches when he used them to start the fire. The judge said that that inference was strengthened by traces of Shivers' DNA being found on the mobile phone, something that he was wholly unable to account for, and on the other match. He also took into account that Shivers had lied about his whereabouts and actions before he returned home that night, and lied about Dominic McGlinchey and Gerard McGaughey handling the matches:

"Taking all of these matters together I am satisfied that the prosecution has proved beyond reasonable doubt that Shivers set fire to the Cavalier at Ranaghan Road and I therefore find him guilty on each count on the indictment."

Judicial Communications Office

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
Fax: 028 9023 6838
E-mail: Alison.Houston@courtsni.gov.uk