

Judicial Communications Office

Monday 28 February 2011

CLARKE FOUND GUILTY OF 1973 MURDER

Summary of Judgment

Mr Justice McLaughlin, sitting today at Belfast Crown Court, found Robert James Brooke Albert Clarke guilty of the murder of Alfredo Fusco in 1973. The case was brought following an investigation by the Historical Enquiries Team.

The judge, who presided over the trial without a jury, heard that Mr Fusco was murdered in a storage room at the back of his fish and chip shop and ice cream parlour on the York Road, Belfast on 3 February 1973. Two gunmen entered the premises. One carried a pistol and remained at the entrance door. The other carried a sub-machine gun. Mr Fusco realised what was happening and ran to the back of his premises. The man with the sub-machine gun followed him. The court heard that he tried to use the sub-machine gun but it jammed. The gunman then went back out to the entrance door, took the pistol from his accomplice and returned. Mr Fusco tried to close the door of the storage room but the gunman pushed the door open with his hand. Mr Fusco was shot twice in the head and once in the body.

Two witnesses who were in the shop at the time were called to give evidence. Thomas Kirkham and William Kernoghan were customers in the shop at the time of the murder. Mr Kirkham made it clear to the judge that he had political objections to the work of the HET but did appear at the trial. He was able to describe the gunman but said that he did not know Robert Clarke. Mr Kernoghan was originally called as a witness by the prosecution but the Director of Public Prosecutions said he could not present him as a "witness of truth" so he then was called as a witness for the defence. Mr Kernoghan was convicted of murder in 1976 and met Robert Clarke in prison around that time. Mr Kernoghan was presented as a witness to see if he could have recognised Mr Clarke as the person he had seen carry out the murder when they met later in prison. He had told the police in 2010 that they had got the wrong person because when he saw Clarke in prison he did not associate him with the gunman, but he changed this during the trial to claim that he did not know if Clarke was or was not the gunman.

The judge was presented with forensic evidence taken from the door to the storage area. The court heard from a witness how the gunman was seen to

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push the door with his hand. Fingerprints and a palm print were lifted from the door and put onto white card. This was reviewed by the HET and in 2009 prints were obtained from Clarke. The expert who carried out this analysis had “no doubt these imprints were made by [Clarke]”.

The judge also heard evidence on behalf of Clarke that he could not have been the gunman as he had suffered partial amputations of two of his fingers on his right hand in an industrial accident in 1971. Clarke agreed to take part in a test firing of two weapons of the type used in the murder of Mr Fusco. He also provided a further demonstration to the court during cross examination. Mr Justice McLaughlin said it was abundantly clear that Clarke was significantly and permanently disabled as a result of the accident but that he was satisfied beyond reasonable doubt that with some accommodation he would have been capable of gripping a revolver two years after the accident and could have used a revolver to kill Mr Fusco.

Clarke filed an application that the proceedings should be stayed on the basis that they constituted an abuse of process and that a fair trial was not possible. He firstly claimed that the delay in bringing the case gave rise to such prejudice to him that it would be unfair to conduct a trial at all. The judge said that a stay on the grounds of delay should only be granted in exceptional circumstances:

“I accept without reservation that the delay was caused due to technological deficits which reflected resources and the state of forensic knowledge in the period 1973-2000. Coupled with this is the historical reality of our troubled history when terrorism produced so many victims it became impossible to keep investigations fully resourced and fully active over our dark period. The historical legacy of so many dead, disappeared, maimed and broken meant instant responses were impossible and resulted in no justice at all for many victims. The work of the Historical Enquiries Team has been going on from approximately 2006 and this has been done on an essentially chronological basis. Its work since then has produced finality and just satisfaction in many cases where contemporaneous evidence, reassessed in the light of modern technology, has produced a suspect”.

He concluded that Clarke had failed to establish that he had suffered any serious prejudice by reason of the delay in bringing the prosecution and refused the grant a stay of the trial on this ground.

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Clarke secondly claimed that there had been a loss of real evidence. The door from which the prints had been lifted had been removed and taken to the RUC Fingerprint Department but could not be found when the HET went to look for it. Also, the fingerprint officer, who retired in 1992, had destroyed his police notebooks in 2000 when getting major work done on his house. Mr Justice McLaughlin said the loss of the door and/or notebooks was “regrettable” but he did not consider there was anything sinister or malicious about this. While it would have been preferable if they had been available for consideration and examination, he was satisfied that a full and professional investigation of the evidence was carried out in 1973 by experienced officers and the door and notebooks were unlikely to yield any evidence capable of undermining the findings.

The third basis upon which Clarke sought a stay of the proceedings was that he was denied the opportunity of advancing an innocent explanation for the presence of his prints on the door because he could not be expected to have any meaningful recall of the events in 1973. Mr Justice McLaughlin said that Clarke declined to give evidence on oath during the trial and therefore no explanation on oath from him was available to undermine or contradict the inference that his prints were on the door because he was the gunman. He also said there was no explanation why Clarke could not give an innocent explanation.

The final ground was that the trial was conducted so long after the event that Clark was denied the possibility of Mr Kirkham and Kernoghan being able to say that he did not match the description of the gunman or was not in fact the gunman. It was claimed that if the trial had been brought at an earlier stage there might have been the opportunity that the witnesses to the murder might have been able to confirm or deny that Clarke was the gunman. Mr Justice McLaughlin said that visual identification evidence was notoriously unreliable. He concluded that Clarke had not established that the delay concerning identification had given rise to serious prejudice to him.

Mr Justice McLaughlin then went on to sum up the evidence which was largely circumstantial. The judge had also been presented with evidence that Clark had been convicted of murder, attempted murder and the possession of a firearm following an attack on the New Lodge Road, Belfast in 1975. He pleaded guilty to the charges and was sentenced to life imprisonment in 1976. Mr Justice McLaughlin said that these convictions acted as background information:

“Mr Fusco’s killer acted in a brutal and cruel manner showing a chilling determination to kill an entirely innocent and defenceless man. All indications are that it

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was a sectarian killing carried out by Loyalist paramilitaries as part of the blood letting in this community Few people in relative numbers are capable of that kind of act.”

The judge said this was further evidence that could be taken into account. He said it was of further significance that the gunman who killed Mr Fusco intended initially to use a sub-machine gun and that Clarke had used such a weapon to kill in 1975.

Mr Justice McLaughlin concluded that he was satisfied beyond all reasonable doubt that Robert Clarke left his prints on the store door on the evening of 3 February 1973 whilst acting as the gunman who killed Mr Fusco. He also concluded that Clarke could have had no other intention but to kill. Mr Justice McLaughlin therefore found Clarke guilty of murder. He also found him guilty of possession of firearms with intent to endanger life.

Robert Clarke will be sentenced on a date to be fixed.

NOTES FOR 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

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