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Fergal Caraher murder trial.

Judgment of Hutton LCJ: preliminary analysis

The basic facts

1. Two members of an unaccompanied Royal Marines patrol, Richard Elkington and Andrew Callaghan, were acquitted on 23 December last of the murder of Fergal Caraher and the attempted murder of his brother Micheal. The two Carahers were shot as they drove off the forecourt of a pub in Cullyhanna on the afternoon of 30 December 1990. According to the soldiers, the Carahers drove off in a reckless way after an altercation with the soldiers, and ignored attempts to get them to stop. The soldiers say they fired at the car in order to protect the life of a third soldier, known as Marine B who, they claim, was being carried away on the bonnet of the car. Local witnesses, however, claimed that there was no altercation and that they did not see Marine B being carried off on the bonnet of the car.

The judgment

2. Hutton begins his 70 page judgment by recalling events prior to the shooting which are not in dispute e.g. the arrival in Cullyhanna of the British patrol that morning, the setting up of VCPs, and the plan by the Caraher brothers and a friend to drive to Dundalk after meeting near Cullyhanna. As part of this plan, Fergal Caraher drove to the forecourt of a pub ("the Lite'n Easy") in Cullyhanna where he would transfer to the friend's car. It should be noted that, at this early stage, four soldiers met the three individuals in a routine and unexceptionable encounter on the road.
3. Hutton notes that the first point of dispute concerns the events as Fergal Caraher (driving alone) approached the Lite'n Easy car park. According to Elkington and Marine B, who were operating a VCP close to the car park, Fergal Caraher ignored a signal to stop and continued into the

car park. Local witnesses dispute the assertion that Fergal was signalled to stop. In any event (and Hutton says that this is undisputed), Marine B, on the instructions of Elkington, followed Fergal Caraher into the car park where a verbal exchange took place between them. Elkington then arrived at the car park, closely followed by Micheal Caraher, who was dropped off by their friend. Hutton asserts that the probability is that the evidence of the soldiers is truthful on this point - that an effort was made to stop Fergal Caraher as he drove through the VCP - on the grounds that it was difficult to see otherwise why Marine B would have walked down to Fergal in the car park. Hutton concludes that the local witnesses were untruthful on this point.

4. What happens next is also disputed: according to the soldiers, an argument continued as the two brothers prepared to drive off, revving the car. Elkington claimed that he was not agreeable to their departure because he had not identified Fergal Caraher and wished to know who he was and why he had driven through the VCP. As the car, according to Elkington, lurched forward, he found himself lifted up on the wing. He smashed the driver's window with his rifle butt as he fell. He also formed the view that Marine B (who backed up this story) was being carried away on the bonnet. He then fired at the driver and ordered the co-accused (Callaghan) to do the same. When firing had stopped, Marine B was seen on the ground at the edge of the car park. The car travelled for almost a mile before it ran into a ditch. The local witnesses give a very different story: in sum, they claim that they did not hear or see an argument in the car park and that they saw no marine on the bonnet of the car, nor lying on the ground. They did, however, see the soldiers shooting at the car.

5. Hutton rehearses the conflicting accounts in detail, concludes that they are irreconcilable and then turns to the scientific evidence. He focusses principally on two elements:
  - i) broken glass from the driver's window of the car which matched microscopic particles taken from Elkington's rifle butt and his clothing. Hutton concludes that Elkington did smash the driver's window. (However, and Hutton does not mention this, during the trial the forensic scientist commented that the packaging on the rifle had been ruptured when she received it. Thus, she said, the findings should be treated with caution);
  - ii) fibres and smears on the front of Fergal Caraher's car, which could have originated from the clothing of Elkington and Marine B, and which support the proposition that the clothing in question had been in contact with the car. Similarly, scrapes to the car are found to be consistent with a person making contact with the front of the vehicle although, in the words of the scientific officer "alternative explanations for the cause of this damage cannot be ruled out".
6. Hutton then devotes considerable and critical attention to the way in which the local witnesses gave statements to the RUC: he notes that before going to the RUC station, each witness prepared a written statement which was given to Tiernan, the Caraher family's solicitor. Accompanied by Tiernan, each witness then gave the statement to a police officer who transcribed it into a police statement form. The witness then signed the statement. Hutton recalls the cross-examination of witnesses where it was put to them that this was a pre-arranged plan and that some witnesses refused to answer further RUC questions. He considers the existence of local mistrust of the RUC but concludes, on the basis of

their cross-examination and "demeanour" in the witness box, that they lied when they denied a pre-arranged plan. This, he says, adversely colours his assessment of their entire evidence of what they saw in the car park. He notes that a somewhat similar procedure in respect of giving statements to the police was adopted by some witnesses in R v. Foxford [1974] NI 181, and quotes from the appeal judgment to support his view. (Note: R v. Foxford was also a lethal force case in which a soldier's manslaughter conviction was quashed on appeal).

7. Hutton, in markedly less critical terms, recognises that the two accused and Marine B had strong motives for supporting each other, whether the evidence was true or not.
  
8. Hutton then addresses the defence that the two soldiers fired because they believed Marine B would be killed or seriously injured if they did not do so. On this point, he quotes at some length from his own judgment in R v. Hegarty (a lethal force case in which an RUC officer, who killed Seán Downes with a plastic bullet in West Belfast in 1984, was acquitted (by Hutton) of manslaughter, his defence being that he had fired to protect other police officers). In this quotation, Hutton recalls relevant law and precedent (e.g. Section 3 of the Criminal Law Act (NI) 1967, Smith and Hogan on self-defence, and Lord Diplock's well-known ruling (Attorney-General for Northern Ireland's Reference [1977]) that the question of whether force was unreasonable is a question of fact which is not one for dispassionate ex post facto analysis but one which must be addressed from the position of the accused in the heat of the moment). He also cites from his R v. Hegarty judgment the precedent of the Privy Council's judgment in Palmer v. The Queen on the reasonableness and proportionality of defensive action. Subsequent precedents (R. v. Williams [1983]), the

decision of the Privy Council in Beckford v. R. [1987] are cited to the effect that, on a plea of self-defence, the issue is to be determined in the light of the facts as the accused honestly believes them to be, whether his belief was reasonable or unreasonable, so that "even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it" (R v. Williams at 280).

9. Hutton then summarises the issue he has to determine in the present case to decide guilt or innocence i. e.  
"whether there is a reasonable possibility that the white Rover car drove off from the car park with Marine B on the bonnet so that the two accused honestly believed that he was being carried away on the bonnet and that they had to fire at the driver of the car to stop the car in order to protect Marine B from death or serious injury by being thrown off the bonnet of the car".
  
10. Hutton recalls again the question mark about the impartiality of the local witnesses and the untruthful evidence which, he claims, they gave in the witness box. He also, at a very late stage in the judgment (p. 63) expresses doubts about part of the soldiers' evidence, in particular that of Marine B. He turns to the scientific evidence and concludes that, by reference to the test set out in para 9 above, he has a reasonable doubt whether the accused were guilty: "I considered that there was a reasonable possibility that Marine B was carried away on the bonnet of the white Rover car and that, in the emergency of the moment, there was a reasonable possibility that the two accused fired at the driver because they honestly believed it was necessary to do so to save Marine B from death or serious injury and that in the circumstances as the accused honestly believed them to be there was a reasonable possibility that this

constituted reasonable force".

11. He summarises the factors which give rise to this reasonable doubt:
  - i) contrary to the evidence given by local witnesses, there was contact between the car and the soldiers (the smashed window). This, taken with what he sees as other manifestations of untruthfulness by local witnesses who "could not be regarded as reliable", weakens the prosecution case;
  - ii) the scientific evidence "provides some support for the account of the two soldiers and of Marine B that he was on the bonnet of the car";
  - iii) it is probable, he believes, that Marine B did sustain some injuries in the area of the car park. He was seen subsequently by naval and civilian doctors.
  - iv) on the basis that Marine B signalled Fergal Caraher to stop at the VCP, it is clear, according to Hutton that the soldiers did not fire just because he failed to stop. A fortiori, it is unlikely that the soldiers would have fired a few minutes later (as they did) merely because Fergal ignored an order in the car park not to drive off, "and without something having happened in the car park quite contrary to the account given by the civilian witnesses"

#### Conclusion

12. On an initial reading, the judgment raises a number of points of interest:
  - Hutton's scepticism about the evidence of local witnesses

and the manner in which they gave their evidence is profound and sustained. (We are aware of suspicions from contacts in the North that Sinn Fein elements may have meddled in some way in the collection of local evidence).

While he concludes that the accounts of the local witnesses and the soldiers are irreconcilable, and thus turns to the scientific evidence, he invokes the scientific evidence to cast further doubt on the evidence of the local witnesses (on the question of the broken window). It is predictable that he would cite a previous lethal force case (R. v. Foxford) which occurred in the same area (Newry) in which a soldier's manslaughter conviction was quashed on appeal to justify his discounting of the reliability of the witnesses. He makes no serious effort to understand or situate the mistrust that exists between the local community and the security forces;

- objectively, there is no more reason to suspect collusion by local witnesses than there is by the soldiers (who, unlike the local witnesses, live under the same roof). Moreover, experience supports the suspicion that members of the security forces are drilled or coached in the stories that they give in such cases. Hutton does not address this point;
  
- Elkington's assertion, quoted without comment by Hutton (p 29), and central to the soldiers' case, that he did not know the identity of Fergal Caraher is implausible. The Carahers are a prominent Sinn Fein family in a small and heavily Republican village who would doubtless have featured on photomontage and other security force intelligence material. Caraher's car number would presumably be known to the Army;
  
- Fergal Caraher was in fact the passenger in the car. This calls into question the soldiers' claim that they



shot at the driver. Twenty rounds were fired in all. On this point, Hutton merely comments that "it is common knowledge that shots fired from a rifle do not always hit the precise target aimed at" (p. 46). An official forensic expert at the trial however, (Mr. Liam Rossey) is reported to have said that if the sight on the rifle is properly adjusted, the discharged rounds from the rifle should end up where the tip of the sight shows them to be;

- Moreover, Hutton's approach seems at first sight to be at variance with that of Campbell J in the 1993 trial of the two Paras (Clegg and Aindow) for the murder of the Lenadoon joyriders. In that case, the Judge distinguished carefully between individual shots so that Clegg was convicted of murder on the basis of one of his four shots and Aindow was convicted of attempted murder on the basis of two of his seven shots;
- It is noteworthy that Callaghan, acting on orders, removed the empty cartridge cases from the ground (p. 38) before the RUC arrived. This is referred to without comment by Hutton;
- Hutton puts very considerable weight on a small amount of forensic evidence;
- The test posited by Hutton of subjective reasonableness and the familiar precedents quoted at length illustrate very clearly our concerns that the criminal law in this area be re-examined.

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