Neutral Citation No: [2024] NICC 14 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **McF12534** *ICOS No:* **21/091956** *Delivered:* **30/01/2024**

IN THE CROWN COURT OF NORTHERN IRELAND
SITTING AT LAGANSIDE COURTHOUSE

_____

THE KING

v

GARY BAIRD

_____

Mr R Weir KC with Ms L Ievers (instructed by the Public Prosecution Service) for the Crown
Mr B McCartney KC with Mr S Toal (instructed by Finucane & Toner solicitors) for the Defendant

_____

This is an edited transcript of an ex tempore ruling delivered on 30 January 2024

McFARLAND J

[1] This is my ruling on the admissibility of the evidence of Dr Brennan. Dr Brennan is a consultant psychiatrist retained by the prosecution and he has prepared three reports. The first being the primary report dated 25 October 2022 with two addendum reports, one of 24 January 2024 and the second of 28 January 2024. The addendum reports reflect the evolving nature of the evidence in the case.

[2] In the reports Dr Brennan has analysed evidence and material provided to him by the prosecution and others and stated his opinion concerning Mr Baird's state of mind at the time of the incident and, in particular, whether the partial defence of diminished responsibility is open to him. The defence have applied to exclude the evidence in its entirety under Article 76 of the Police and Criminal Evidence (NI) Order 1989 ("PACE").

[3] I would like to thank counsel for skeleton arguments and, indeed, oral submissions. These were prepared at very short notice and were very helpful to me in considering the application.

[4] Article 76 of PACE states that:

> "Where it appears to the court having regard to all the circumstances including the circumstances in which the evidence was obtained the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[5] The core basis of the application is the use by Dr Brennan of material which has not been adduced in evidence or has been excluded by the court as inadmissible. The defence case is that by using that material and other material, Dr Brennan has formed his opinion and essentially the defence cannot challenge the basis for his opinion without opening up to the jury evidence which has not been adduced or is inadmissible. The defence assert that this is highly prejudicial, material.

[6] I have referred to the provisions of Article 76 of PACE and I would specifically refer to the relevant part – "having regard to all the circumstances including the circumstances in which the evidence was obtained." Whilst focus has concentrated in many Article 76 applications on the obtaining of the evidence, for example, police misconduct and so on, this does not exclude a general consideration of the provision – "all the circumstances." No real complaint of improper conduct by any party has been made in relation to this. In my view, it was entirely proper for the prosecution service to forward a full file including background material to the psychiatrist for the purpose of the report that was being sought. This situation has arisen due to the run of the case, and it largely has been impossible to predict, but we have to deal with the situation as it now arises.

[7] In addition to Article 76 the court has common law powers to exclude evidence if it would be likely to have a prejudicial effect and that outweighs the probative value. I have been referred to the House of Lords decision in *R v Sang* [1980] AC 402. With regard to the actual test, the English Court of Appeal in *R v Samuel* (1988) 87 Cr App R 232 in referring to section 78 of the UK Act (which replicates Article 76) said:

> "It is undesirable to attempt any general guidance as to the way in which a judge's discretion under section 78, that is Article 76, or its inherent powers should be exercised. Circumstances vary infinitely."

[8] Lord Lane CJ in the *R v Quinn* [1990] Crim LR 581 (a case where there was a dispute about the identification evidence), set out the general principles when considering Article 76/section 78 applications:

> "(i) The function of the judge is to protect the fairness of the proceedings;

(ii) normally proceedings are fair if a jury hears all relevant evidence which either side wishes to place before;

(iii) crucially proceedings become unfair if for example, one side is allowed to adduce relevant evidence which for one reason or another the other side cannot properly challenge or meet."

[9] The emphasis, of course, in this application relates to the ability of the defence to challenge the evidence of Dr Brennan properly. Dr Brennan's evidence in summary is that whilst he accepts that Mr Baird was suffering from an abnormality of mental functioning arising from a recognised medical condition, he does however, differ from Dr Bunn on that issue in that he says that there is not a presence of psychosis. He does accept the abnormality of mental functioning, but Dr Brennan considers that the abnormality did not impair Mr Baird's ability either to understand the nature of his conduct or to form a rational judgment or to exercise self-control. Therein lies the major disagreement with Dr Bunn and, of course, those are issues which are critical to the jury's consideration of the diminished responsibility defence.

[10] He bases his opinion partly on material which the prosecution had not sought to adduce or the court has ruled as inadmissible and, of course, the jury have not heard that evidence.

[11] The headline issues relating to this material are as follows. First of all, that there was chronic marital disharmony. Secondly, that Mr Baird was a controlling figure in the marriage based on money and jealousy. Thirdly, an opinion of a Ms Farr who said that Mr Baird exercised financial and coercive control over Mrs Baird. Fourthly, that Mr Baird liked to humiliate Mrs Baird, was verbally abusive and was unkind to her. Fifthly, Mrs Baird commenced divorce proceedings with reconciliation after counselling. Sixthly the reference to counselling notes, and I quote from those notes, "long term emotional abuse, underlying problems with husband's mental illness, depression and undiagnosed paranoia and excessive alcohol." And then, finally, a statement attributed to Dr Toner reporting that at the time of the incident Mr Baird had said that there had been a 'tiff', and that Mr Baird was irate.

[12] Now when one considers the actual evidence before the jury, some of this evidence was adduced. Most of this material in these various categories was not adduced. I also made some rulings in respect of other material that could not be agreed. It is also important to note Mr Baird's daughter's evidence to the jury. Her evidence was not challenged by the prosecution.

[13] I now return to the seven categories of evidence that I mentioned before. In relation to the chronic marital disharmony, yes there was evidence of marital

disharmony. One can debate the word chronic but certainly it was longstanding, if not, persistent. There is no real issue with regard to the use of this evidence.

[14] In relation to Mr Baird being a controlling figure in the marriage based on money and jealousy, there was no evidence presented to the jury in respect of that and, in fact, this was contradicted by the evidence of Mr Baird's daughter. Similarly, the opinion of Ms Farr that Mr Baird exercised financial and coercive control, again, no evidence has been provided to the jury on that and this was contradicted by Mr Baird's daughter.

[15] "Mr Baird liked to humiliate Mrs Baird was verbally abusive, and was unkind" again, no evidence concerning this, and it was contradicted by Mr Baird's daughter.

[16] With regard to the divorce proceedings, yes there was evidence. I am not too sure if the evidence was that a divorce petition was issued as it was more a letter was sent from a solicitor. Certainly there was evidence about a contemplated divorce and there was evidence about reconciliation after counselling.

[17] With regard to the counselling notes that I referred to, there was no evidence concerning long-term emotional abuse or excessive alcohol. There was evidence about underlying problems with the husband's mental illness, depression and what is stated as undiagnosed paranoia.

[18] Finally, we come to Dr Toner's evidence or material. I regard this as highly relevant because it relates to the mental health assessment carried out by Dr Toner and Mr Eugene McNulty several weeks after the incident. It did, however, relate back to what actually happened on the Sunday afternoon, in other words the last moments or hours of Mrs Baird's life. So, it is an extremely significant piece of evidence and no doubt it will be the clear focus of the jury's attention.

[19] I want to refer to what Dr Brennan said about it at para 5.7 of his first report when referring to the general issue:

> "My analysis of this issue has unfortunately been complicated by the differing accounts of the alleged offence provided by the defendant over time as follows."

He then sets out seven factors, one of those is as follows:

> "Accounts to Dr Toner/Eugene McNulty of having a 'tiff' and being irate with wife immediately pre-offence but later telling me at interview that there was no significant argument or loss of temper."

[20] The inconsistency of Mr Baird's reporting which is specifically referred to there, is a theme of Dr Brennan's analysis when he refers to other inconsistencies. The evidence before the jury came from Mr McNulty and the jury were advised that Mr Baird said there had been a 'tiff.' I am not going to get into the definition of what a tiff is but one assumes that is a minor or petty quarrel between friends or family.

[21] Dr Bunn in his report understood that the 'tiff' was about whether or not they would go to Bangor that afternoon, and I suppose that puts the issue at the appropriate level about what a 'tiff' is with regard to the scale on an argument meter. But significantly, there was no evidence from Dr Toner about this. In fact, although he was called to give evidence Dr Toner never actually reported that Mr Baird was irate and, of course, that was also referred to by Dr Brennan. Mr McNulty did not use that word either. Each had the opportunity to give that evidence, they were not asked and, I assume there was a reason for that. It is a very important issue in this case. It is highly relevant evidence, and, in my view, it is an important, not a key, factor, but it is an important factor upon which Dr Brennan based his opinion. There were other factors, and I am bearing that in mind as well.

[22] In his first addendum report at para 2.17 Dr Brennan refers to the matter again, and this would have been before this issue reared its head. He stated that there was an attempt by Mr Baird when speaking to Dr Bunn to minimise the incident clearly emphasising the relevance and importance of this in his mind.

[23] What the jury has been told is clear - Mr Baird said there was a tiff, then he heard voices, then there was the violent incident. Future statements by Mr Baird to Dr Brennan and to other professionals that there was, and I am quoting from Dr Brennan - "no significant argument or loss of temper" – do not contradict what the jury have been told, rather they are consistent.

[24] Dr Brennan has had the opportunity to reflect on the evolving picture but still maintains his main opinion notwithstanding the absence of the evidential base on this specific issue. He, of course, relies on other factors. That, of course, is his right and I do not criticise him for that. The difficulty in this case is then for the defence - how can Dr Brennan's general evidence and conclusion be challenged? How can questions be posed to Dr Brennan to undermine his conclusion without introducing the reference made by Dr Toner to Mr Baird saying he was irate, or, to use the actual words that Dr Toner used "becoming more irate." Irate, of course, is a strong word depicting not simply loss of temper but excessive anger, yet there is no actual evidence that he was irate or that he said he was irate or even that he was becoming more irate.

[25] I have focused on this particular aspect of the evidence, but I also take into account the other highly prejudicial material in relation to the matrimonial situation, and, of course, that is not before the jury either. The jury are aware of the matrimonial difficulties, they are aware of the contemplated divorce petition, they

are aware of counselling and reconciliation and, as they heard from Mr Baird's daughter, they heard about what was happening in 2020 in the various holidays.

[26] I have referred to Lord Lane's judgment in *Quinn* - one side is allowed to adduce relevant evidence which, and I emphasise, for one reason or another the other side cannot properly challenge or meet.

[27] I have indicated earlier that there was nothing wrong in the way Dr Brennan was instructed and nothing wrong in the way he prepared his report relying on the background information that was provided to him. But, as I have indicated, the court must now deal with the situation as it has now developed.

[28] This is not a case looking at the provisions of Article 76 where the court is considering how the evidence was obtained, but rather, having regard to all the circumstances, in other words, the wider position as set out in the legislation.

[29] The defence case is that they could not cross-examine Dr Brennan without introducing into the questions and into the potential answers, evidence which has either been excluded or the prosecution has not sought to adduce. They also say that some of the evidence is of no or little probative value, but large proportions of this evidence are highly prejudicial. Some of the evidence Dr Brennan relies on has been contradicted by unchallenged evidence adduced in trial by Mr Baird's daughter. The prejudicial material has the ability to undermine her unchallenged evidence. They also say that the overall effect has the potential to both confuse the jury about why this material was not given in the first place in evidence and then prejudice the jury against Mr Baird. And, finally, there is a subsidiary argument that exposure to and reliance upon this material has the potential to provide Dr Brennan with a bias, making it difficult for him to approach the case in light of the actual evidential background with an open mind.

[30] I do not consider that bias is an essential part of their argument and I have not really focused on it. I consider that Dr Brennan is sufficiently professional to set aside any bias should there be any bias, when formulating his opinion.

[31] The real difficulty would be in the defence exploring this with him in cross-examination. The prosecution case is that there is nothing improper in providing all this background material and I have already stated that that is the case. They also say that the opinions formed are primarily based on interviews with Mr Baird himself and on other factors and not specifically on the issues that have been specifically raised in this application. There is evidence of chronic marital difficulties, and the prosecution view is that the opinion or opinions of Dr Brennan could be fairly tested by cross-examination with suitable directions and warnings to the jury.

[32] I have not been referred to any direct authority on this issue. In any event, each case very much depends on its own facts and, as I have already indicated,

Article 76 cases do tend to focus on improperly obtained evidence, breaches of PACE and so on. But we are looking at the wider context here. I believe some assistance can be obtained from abuse of process cases where after partial acquittals the court has refused to allow retrials on the outstanding counts because of the inability of the defence to advance its case without inviting prejudice and speculation about conduct upon which a jury has already ruled.

[33] I refer specifically to the case of *R v McGrath* (unreported 2003) in which His Honour Judge Hart QC gave a ruling and my own ruling in the case of *R v Chee* [2020] NICC 10. There is also a very recent ruling of Her Honour Judge McColgan KC in *R v Gray* (unreported 8 January 2024). There are similar themes in all of those cases. I propose to quote from the *Chee* judgment. In that case the defendant had been acquitted of numerous offences over two trials. There were five counts left where the jury could not make a decision and the prosecution wanted to come again before a fresh jury on those charges. This raised the issue about how the defence would run its defence before the third jury and the choices that were open to the defence counsel. Either they would have to give up a valuable plank of their case or they would have to run the risk of prejudicial material being placed before the jury. I said at para [43]:

> "I would consider that this would go well beyond the normal tactical decisions that are open to a defendant when conducting a normal defence. Each option, despite whatever efforts can be exercised by the skill of his counsel and by warnings to the jury from the trial judge, will create significant prejudice to the defendant."

[34] I believe there are similar parallels in this case. Any cross-examination of Dr Brennan will have to involve reference to this material. It is inconceivable that it could be done without such a reference. The purpose and value of the voir dire this morning was not so much for me to assess Dr Brennan's evidence because that, of course, is not my function. But it was an exercise for me to reflect on how Dr Brennan's evidence could be challenged without reference to the prejudicial material, and it was obvious from my observations that that would be virtually impossible. The cross-examination of Dr Brennan will introduce highly prejudicial material which has not been adduced or has been deliberately screened out of the evidence for valid and proper reasons. The presentation of the defence case, either through comment by Dr Bunn or cross-examination of Dr Brennan would be severely restricted if this material could not be referred to.

[35] It would be possible to warn and direct the jury. The issue is whether that would preserve the fairness of the trial. I have considered the test for discharging the jury when exposed to prejudicial material and, particularly, the case of *R v Docherty* [1999] 1 Cr App R 274 and I quote from that judgment:

> "The real danger of injustice occurring is because the jury, having heard the prejudicial matter, might be biased. Furthermore, where there is more than one interpretation of the inadmissible evidence the judge should approach the issue on the basis of the more prejudicial meaning that could be placed on it rather than on some lesser prejudicial interpretation."

[36] I do not consider that the defence could properly challenge Dr Brennan's evidence without introduction of this prejudicial material as a basis of undermining Dr Brennan's overall analysis. The fact that certain concessions have now been made during the voir dire and in the addendum report, would have to be explored in the full context of the evidence. There would be no real method to protect and prevent the jury from being exposed to this material. Warnings, given the nature of the prejudicial material, would not be sufficient and, ultimately, should it happen, I believe discharge of the jury would be the only option.

[37] In all the circumstances, I rule that the admission of Dr Brennan's evidence would have such an adverse effect on the fairness of the proceedings that I will not admit it. I make this ruling without passing any personal judgment on the robustness of Dr Brennan's reports or his opinion. That is not my function. My function is to consider the adverse effect on the fairness of the proceedings by the inability placed on the defence to mount a challenge to Dr Brennan without exposing the jury to extremely prejudicial material. It is on that basis that I make my ruling.

Postscript

After the delivery of this ruling the prosecution successfully applied for the discharge of the jury and for an adjournment of any re-trial to enable it to retain another psychiatrist. On receipt of that new report, the defendant re-entered his plea to manslaughter on the basis of his diminished responsibility on 20 May 2024, and this was accepted by the prosecution.