

UNITED KINGDOM

@Northern Ireland: fair trial concerns in Casement Park trials

INTRODUCTION

The 19 March 1988 shootings of British Army Corporals David Howes and Derek Wood, after they were dragged from their car by participants in a Northern Ireland funeral procession, led to scores of arrests and 41 prosecutions. Many of these prosecutions and ensuing trials have failed to satisfy international fair trial standards.

The cases of Patrick Kane, Michael Timmons and Sean Kelly, which are currently being reviewed by the Northern Ireland Office, illustrate some of Amnesty International's concerns about these prosecutions and about fair trial concerns in Northern Ireland in general. Amnesty International believes that the prosecutions and convictions arising out of this incident warrant a wide-ranging review to examine the events leading up to and culminating in the murders and the eight group trials stemming from the prosecutions. In addition to calling upon the government to institute this broad inquiry, Amnesty International has urged the Government to refer immediately the cases of Patrick Kane, Michael Timmons and Sean Kelly back to an appropriate judicial authority for further review.

The broad picture of events of 19 March 1988, during which Corporals Howes and Wood were dragged from their car, beaten, taken from the scene and murdered has been well documented, although controversy remains over their unexplained presence and sudden intrusion into the funeral cortege. Television and newspaper reporting showed clearly the manner in which the two men were dragged from their vehicle; and police helicopter ("heli-tele") film, which Amnesty International now has seen, showed, less clearly, some of what happened after they were taken through the gates of Casement Park. The murder of the two men, after they were seized and beaten, by Irish Republican Army (IRA) gunmen, exemplified the kind of gross breach of minimum humanitarian standards that Amnesty International seeks to oppose, whether carried out by governments or political non-governmental entities.

BACKGROUND

The context in which the incident of 19 March 1988 took place cannot be ignored: it occurred in the wake of a series of events in and concerning Northern Ireland spanning 13 days.

On 6 March 1988 three unarmed members of the IRA, Máiréad Farrell, Daniel McCann and Sean Savage (known as the "Gibraltar Three"), had been shot dead in Gibraltar

by a special regiment of the British armed forces, the Special Air Services (SAS). Thousands of members of the nationalist community lined the route as the bodies of the three were driven by hearse from Dublin to Belfast on 14 March.

As people awaited the arrival of the three bodies in West Belfast, Kevin McCracken was shot dead by British soldiers in close proximity to the home of Sean Savage, one of the three shot in Gibraltar.

The next day, a young Catholic man was shot dead at his place of work by gunmen of the then legal Protestant armed group, the Ulster Defence Association.

The atmosphere in Belfast on 16 March 1988, the day of the joint funeral of the "Gibraltar Three" was extremely tense. There was a marked absence of uniformed security forces in West Belfast, who had been heavily present in the city throughout the preceding week. The congregation from the funeral at St Agnes Church was joined by thousands as the funeral cortege made its way to the Milltown cemetery. As the graveside funeral rites were ending, those in attendance were suddenly bombarded by exploding hand grenades and automatic gunfire inflicted by a lone gunman, later identified as Michael Stone. (Michael Stone had operated for many years as a gunman for Loyalist - predominantly Protestant - paramilitary groups.) Some 70 mourners were shot or wounded in the attack before Michael Stone was caught by some of those in attendance. He was eventually removed from the area in one of the police Land Rovers which arrived on the scene after the attack began. Three people were killed in this attack: Thomas McErlean, John Murray and Caoimhín Mac Brádaigh.

The next three days were marked by the gathering of the predominantly Catholic nationalist community for funerals of the victims of the previous days' political violence. On 17 March 1988, Kevin McCracken was buried. On 18 March 1988 two of the three victims of the attack at Milltown Cemetery, Thomas McErlean and John Murray were buried.

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The assaults and murders of Corporals Wood and Howes on 19 March occurred as the funeral cortege of the third of Michael Stone's victims, Caoimhín Mac Brádaigh, made its way to the Milltown cemetery. Following a service at St Agnes Church, the funeral procession was formed. The procession was lead by a phalanx of 20 black taxis, five abreast and four deep, as Caoimhín Mac Brádaigh had been a taxi driver. Behind this followed a piper, followed by two more black taxis, then members of the family and friends carrying the coffin behind the empty hearse. The thousands in attendance, some of whom followed the procession and others who lined the street, included mourners, spectators and many representatives of the national and international media. Except for an army helicopter hovering overhead, the community again noted the unusual absence of the police and army.

Just as the cortege moved down Andersonstown Road approaching Casement Park, Corporal Wood drove a silver Volkswagen Passat, carrying Corporal Howes as his passenger, at a high rate of speed past a number of funeral marshals who attempted to wave him down, and directly into the funeral procession. He drove up onto the footpath to get by some of the taxis, turned down a service road, then reversed at speed back into the funeral procession. People attending the funeral subsequently claimed that the sudden intrusion of the soldiers' car into the funeral cortege, just three days after the previous attack, caused panic among the people assembled who were already in a state of high anxiety and fear. People believed that another Loyalist attack was about to begin. In the light of recent precedents and the lack of a security force presence the people gathered may have had little confidence that government forces would protect them from attack by sectarian gunmen.

A group of youths ran after the car, and a crowd surrounded it as it was forced to stop, blocked by two of the black taxis. A crowd swarmed around the car and attacked it. The state of panic and mass confusion was increased when at least one of the soldiers in the car displayed a weapon. Both were wearing plain clothes and carrying loaded pistols and extra rounds of ammunition. The crowd dispersed momentarily at this time and then swarmed around the car again, violently removing Corporals Wood and Howes from it. The crowd dispersed again momentarily when Corporal Wood's pistol was discharged, as he was wrestled to the ground. The Corporals were beaten, and then dragged and pushed, one at a time, into Casement Park. The Volkswagen was removed from the area, and later burned. As the funeral procession continued, the soldiers were beaten and stripped of most of their clothing in Casement Park, behind closed gates. The gates were opened once during this time, when a priest, who had been in the park and said prayers for the soldiers, was forcibly led out. The badly beaten and bleeding soldiers were then thrown over a wall of the park; they were driven away in a black taxi which arrived on the service road, taken to a nearby area of wasteground on Penny Lane where, after another short struggle, they were each shot by two gunmen who arrived on the scene.

These gruesome events were broadcast internationally on television and covered extensively in the print media. The killings of Corporals Wood and Howes generated widespread condemnation of the nationalist community of Belfast.

THE PROSECUTIONS

Following the incident, over 1500 police were assigned to view the photographs and video footage which recorded the incident in detail. Over two hundred arrests were made. To date 41 people have been charged with crimes arising from the incident, though none of them has been alleged to have been either of the two gunmen. The charges lodged against the accused ranged from causing an affray, to false imprisonment, causing grievous bodily harm, to murder. Eight group trials have been conducted in one-judge juryless courts (known as "Diplock Courts") between January 1989 and December 1992. Twenty-one people have been convicted, including five who are serving life sentences for the murders, their appeals having been dismissed.

As discussed further below, in some of the trials (notably those in which the accused were acquitted) the courts recognized that the high level of anxiety at the time of the incident was an important factor in the development of the events. This anxiety had been further exacerbated by the violence of the preceding 13 days. A principal question to be considered by the courts, with respect to the initial assault and beating of the two men, was whether those taking part did so in the belief that they were overpowering and disarming Loyalist assassins. The establishment of criminal responsibility for events after the two men were taken from the street into Casement Park, in turn, derive from the argument that those involved at an early stage of the incident had as a common purpose the murder of the men or foreknowledge that this would occur. (None of the accused were alleged to have been armed or to have shot the two men.)

FAIR TRIAL CONCERNS

Amnesty International is concerned that the trials of the 41 people which have taken place to date have not been conducted in accordance with the dictates of international standards. Those detained in conjunction with this incident were not promptly presented before a judicial authority after their arrest; many detainees were not afforded prompt access to their counsel; detainees were denied access to counsel during police questioning; and prosecution and defence had unequal access to evidence and experts. Further, the prosecution's case against many of the accused rested on confession evidence, the reliability of which in some instances was contested and which was admitted into evidence during the trials pursuant to the lower standard of admissibility permissible in "Diplock Courts". The prosecution also presented a controversial compilation of video evidence. Inferences of guilt were drawn against some of the accused for remaining silent in the face of police questioning and/or at trial, and the doctrine of common purpose (see below on page 8) was applied broadly and inconsistently.

Those arrested in conjunction with the incident were detained for questioning without charge in some instances for up to seven days before they were presented before a judicial authority, in violation of international standards.

Some of the people detained in connection with this incident were denied prompt access to their lawyers upon their arrest, in accordance with the Northern Ireland (Emergency Provisions) Act, which permits, under certain circumstances, the deferral of the right to consult with counsel for multiple periods of 48 hours. This practice and law violates international standards, including Principle 18(3) of the United Nations (UN) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which guarantees "the right of a detained or imprisoned person to be visited by and communicate with [a lawyer] without delay or censorship" (emphasis added). The right to access to legal counsel without delay is an important safeguard against ill-treatment and coerced confessions in particular and for the protection of human rights in general.

All of the people detained in conjunction with the Casement Park incident were denied access to their counsel during interrogation. This practice, which is not provided for by law and is only applied to people detained under emergency legislation in Northern Ireland (and not elsewhere in the United Kingdom), violates international standards including Principle 1 of the UN Basic Principles on the Role of Lawyers which guarantees to "all persons the right to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings".

On 30 March 1990, Patrick Kane, Sean Kelly and Michael Timmons (who were apparently previously unknown to each other) were all convicted, after trial in a "Diplock Court" presided over by Justice Carswell, of the murders of Corporals Wood and Howes and of two counts of false imprisonment and grievous bodily harm. Each of them is currently serving two life sentences, two sentences of 15 years and two sentences of 10 years for each of these crimes, respectively. At their appeal hearing in July 1991 the convictions were upheld. Amnesty International believes that the proceedings against them may not have satisfied international standards, and that their resulting convictions may be unsafe and unsatisfactory.

Pursuant to international standards, everyone suspected of or charged with a criminal offence has the right to be presumed innocent until proven guilty according to law in a trial at which the accused has been afforded all the guarantees necessary for his or her defence. The UN Human Rights Committee, in its General Comment on Article 14 of the International Covenant on Civil and Political Rights, explained that:

"By reason of the presumption of innocence, the burden of proof is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond a reasonable doubt. Further the presumption of innocence

implies a right to be treated in accordance with this principle. It is therefore the duty of all public authorities to refrain from prejudging the outcome of a trial."

According to international standards and jurisprudence, the presumption of innocence applies to pre-trial treatment and procedures, as well as the conduct of a trial and the evaluation of evidence.

The case of Patrick Kane illustrates some of Amnesty International's concerns about the questioning of detainees. The organization has been informed that Patrick Kane had the intelligence equivalent of an 11-year-old, though he was 29 at the time of his arrest in December 1988, some eleven months after the incident. He suffered from a serious hearing disability, was unable to read and could only write his name. Notwithstanding the above, he was detained and questioned in the absence of a lawyer or "other appropriate adult", though both the "Guide to the Emergency Powers" and the Draft Codes of Practice of the N.I. (Emergency Provisions) Act 1991 require that an "appropriate adult" be notified if a person brought to a police station is known or appears to be mentally handicapped, unable to read or deaf, and mandates that no questioning take place in the absence of such "appropriate adult".

Further, as a result of the lower standard of admissibility of confession evidence in the "Diplock Courts", which has long been a concern of Amnesty International, the statements that he is alleged to have made during interrogation (four oral statements and one written statement which was alleged to have been read aloud to him by the police and then signed) were admitted into evidence at trial and formed a major part of the prosecution's case against Patrick Kane. This was notwithstanding the fact that the voluntariness of these statements was at issue, as Patrick Kane testified that they were made out of fear of the police and confusion. In addition, it is evident that Kane's statements to the police, that he kicked one of the soldiers in Casement Park, and that taking the priest by the shoulder he escorted the priest out of the gates of the park, were inconsistent with the video evidence, and that they were false. The organization believes that reliance on these statements has led to a miscarriage of justice in this case.

The other major part of the prosecution's proof in these trials was a compilation video tape, which both distorted the length of the incident and did not show all of the incident. The quality of the "heli-tele" footage, taken from the police helicopter, which was hovering overhead from a distance of 500-1000 feet, was so poor that in the case of Sean Kelly, the trial court and Appeals Court disagreed as to the reliability of this evidence. Justice Carswell stated that he had doubts as to whether he could identify Sean Kelly as being present in Casement Park from the tapes; the Court of Appeal, however, rested its decision to uphold Kelly's conviction on the basis of this video evidence. In addition, defence counsel may not have had equal access to the video and media evidence and to equipment and experts to interpret it, in violation of the guarantee in international standards of equality of arms.

The case of Sean Kelly also illustrates the organization's continuing concern about the drawing of inferences of guilt against an accused who has exercised his or her right of silence in the face of police questioning or at trial.

Sean Kelly was arrested in February 1989, 13 months after the incident. He refused to answer the questions put to him by police during the course of his first interview, which lasted one and a half hours, stating that he wished first to consult his solicitor. Following a consultation with his solicitor which lasted less than an hour, Kelly made a brief statement to the police during the second interrogation session. Thereafter he exercised his right to remain silent, not responding to questions put to him by police during the next four interview sessions held on the day of his arrest and the one interrogation session the following day. Sean Kelly also exercised his right not to testify during trial. Applying the Criminal Evidence (NI) Order 1988, which went into effect between the time of the incident and his arrest, Justice Carswell drew inferences of guilt against Sean Kelly for remaining silent at trial. Stating "reservations about accepting the identification of Kelly from the heli-tele film on its own, because of the quality of the film", the Court relied on these adverse inferences in finding Sean Kelly guilty of murder.

Amnesty International believes that the application of the Criminal Evidence (NI) Order 1988 is inconsistent with the guarantees of the right not to be compelled to testify against oneself or confess guilt and the presumption of innocence, which are enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), to which the United Kingdom is a party and is therefore bound to comply. (Amnesty International's paper, **UNITED KINGDOM Fair trial concerns in Northern Ireland**, AI Index: EUR 45/02/92, sets out the organization's concerns about the Criminal Evidence (Northern Ireland) Order 1988.) The drawing of inferences in Sean Kelly's case resulted in lowering the standard of proof necessary to be adduced by the prosecution at trial, in violation of the guarantee of the presumption of innocence. The Court used this inference to bolster the otherwise weak and inconclusive evidence against Kelly. The drawing of inferences against Kelly for his failure to testify also shifted the burden of proof from the prosecution to the defence and amounted to a sanction against his exercise of the right not to be compelled to testify against oneself, in violation of international standards.

Amnesty International is also concerned about the application of the doctrine of common purpose in these cases. Pursuant to applicable national law and international fair trial standards, no guilt can be found unless the prosecution has proved each essential element of the offence charged beyond a reasonable doubt. As the Human Rights Committee has stated, this is a heavy burden. Since it was never alleged that any of the 41 defendants tried actually shot either of the soldiers, the five convictions for murder, including the convictions of Patrick Kane, Sean Kelly and Michael Timmons, must have rested solely

on the application of the doctrine of common purpose. Pursuant to this doctrine, a guilty finding of murder could only properly be made if the prosecution had proved beyond a reasonable doubt that:

- there was in existence a plan to murder the two soldiers and that the accused knowingly agreed to and gave support and assistance to this joint enterprise to murder;
- or if the purpose of the joint enterprise was not to commit murder, that it was foreseeable to the accused that a murder may be committed in the course of an agreed-upon illegal joint enterprise in which the accused knowingly and intentionally took part.

The actual intent of the accused (to kill or to engage in an illegal activity with the knowledge that murder was a reasonably foreseeable outcome) must be proved beyond a reasonable doubt. Pursuant to existing case law, membership in a paramilitary organization which frequently carried out murders could have been used as evidence of such state of mind.

In this case, however, the pandemonium in the crowd when the soldiers intruded into the funeral cortege, and the pervasive atmosphere of fear and anxiety in the funeral procession must be taken into account. It has not, in any case, been shown beyond doubt that the soldiers were victims of a pre-formulated plan, and some of the judges expressly discounted this in their rulings. Most recently, Justice McCollum found in the case of William Silcott, et al., that people acted under the honest yet mistaken belief that they and the crowd were in danger of another Loyalist attack, and got carried away in the hysteria of the circumstances. This is not to say that representatives of the IRA present at the scene may not have had their own contingency plans, which may have gone into operation once the two men came into their hands in Casement Park; but this was not the basis of the charges against the individuals convicted of murder. It is striking in this regard that none of the accused were claimed or proven to be members of the IRA, nor was it thereby established beyond doubt that they knew or could reasonably have foreseen that the soldiers would be shot. Similarly, none of the accused were alleged to have been armed or present at the time the soldiers were shot.

The doctrine of common purpose, moreover, has been applied inconsistently in the Casement Park trials. Justice Carswell concluded (despite conflicting evidence) that Patrick Kane, Sean Kelly and Michael Timmons were each present in Casement Park when the soldiers were beaten and stripped and from this presence inferred that they knew of a plan to shoot the soldiers and possessing this knowledge assisted therein and found them each guilty of aiding and abetting the murder. In doing so, with the benefit of hindsight he concluded that each of the defendants knew beyond a reasonable doubt what the consequences of their actions would be. Amnesty International believes that the Court improperly concluded that Patrick Kane, Michael Timmons and Sean Kelly each knew what the end result would be. Justice McDermott, in contrast, found Kevin McCauley, who drove the soldiers in the taxi from Casement Park to Penny Lane where they were shot, not guilty of the murder. (In the

unrelated but similar case of William Abbott, Justice Carswell found that Abbott, who admitted to hijacking the car used in the killing of three people while knowing that it was to be used by the Ulster Volunteer Force (UVF) for an operation, could not have known that it was the UVF's intention to murder someone.)

CONCLUSION

On 10 May 1993, Amnesty International wrote a letter to the Government outlining the foregoing concerns. By the end of June the organization had not yet received a response from the government.

In light of its concerns over the fairness of the trials, Amnesty International is calling on the government to initiate a wide-ranging independent inquiry into the events of 19 March 1988 which would also carefully review the cases of all of those who have been convicted in the Casement Park trials in order to ensure that no one has been wrongly convicted. In addition, Amnesty International urges the government to refer immediately the cases of Patrick Kane, Sean Kelly and Michael Timmons to an appropriate judicial body for further review.