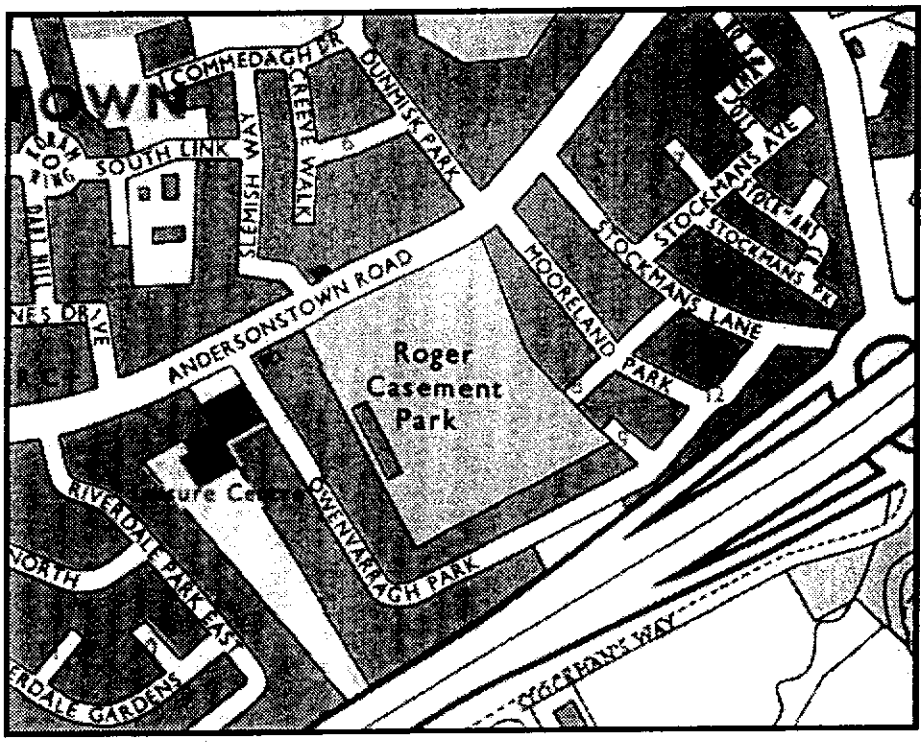


A major miscarriage of justice



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A MAJOR MISCARRIAGE OF JUSTICE

Three men are currently in prison in Northern Ireland serving two life sentences each for murders they did not commit. The authorities allege that Patrick Kane, Sean Kelly and Michael Timmons are guilty of murder because they were present at a violent incident which culminated, in a different location and by two unknown assailants, in the murder of two army corporals. None of the three are accused of direct involvement in the murder; none had direct knowledge as to the actual perpetrators; none are alleged to have any paramilitary connections; none have previous criminal records; all maintain their innocence. Yet the Secretary of State for Northern Ireland recently denied them the opportunity to have their cases reviewed again by the courts.

■ *The facts:*

On 19th March 1988, due to the presence of world media, millions of T.V. viewers watched in horror as they saw a crowd in West Belfast set upon the two occupants of a car which had driven into a large funeral procession. A shot was fired by one of the occupants, the two men were violently hauled from their car, disarmed, taken to Casement Park, stripped and beaten. In the course of these events, it became apparent that the two were soldiers in civilian dress (later identified as Corporals David Howes and Derek Wood). They were subsequently driven some distance away from the initial affray where they were killed by the IRA.

These events took place in a highly charged atmosphere. The funeral into which the soldiers drove was that of Kevin O'Brady. He was one of three people killed a few days earlier after an attack by a loyalist on the funeral of three unarmed IRA members shot dead in Gibraltar by the SAS. No explanation has ever been given as to why the corporals were present, nor why the police did nothing to attempt to rescue them. What is certain is that those attending were apprehensive and feared that the car contained loyalists intent on further attacks.

Much of the incident, and most particularly the final murder, was filmed by an army helicopter, but the two IRA gunmen have never been identified or apprehended.

PATRICK KANE

Patrick Kane was 32 when he was charged in December 1988 with grievous bodily harm and false imprisonment. The charge of murder was added in June 1989. He was found guilty of counselling and procuring the murder of the soldiers because the judge held both that Kane was present at and engaged to a minor extent in the physical beating of the soldiers, and that the accused must have known that one possible outcome of his illegal conduct was murder. Kane was convicted on the basis of controversial identification evidence and on confessions that he is said to have made to the police.



Mr Kane is said by one of the country's leading psychologists to have had the intelligence of an 11 year old; he suffers from a serious hearing disability; and at the time of his arrest he was unable to read or write (apart from his name). Despite this, and in contravention of his rights and natural justice, he was interviewed five times on the first day of his detention (from 10.30 am until late into the night) in the absence of a solicitor, or any other "appropriate adult" as is provided for by law in cases such as his. He asserts that the statements he made to the police are false and were made out of fear and confusion. Given Mr. Kane's intelligence and disability the detail and style of his alleged confession support his claim that it was constructed by the police. Furthermore, the claims made to the police that he kicked one of the soldiers, and escorted a priest away from the scene of the attack, are entirely inconsistent with the video evidence of events.

Instead, scores of people were arrested, and more than 40 charged, in connection with their activity in and around the halting of the car, and the grievous bodily harm inflicted on the soldiers prior to them being taken away by taxi to be murdered by the IRA. While there are concerns about other cases, the focus of this paper is on three of the men who have been found guilty of murder. Each of the cases raises important questions that suggest a grave miscarriage of justice has taken place. This paper presents the arguments as to why the Secretary of State should reverse his decision and return these cases to the courts.

■ **Access to legal advice**

The case of Mr Kane in particular highlights a number of fair trial concerns. Like many others held under emergency law, Mr Kane was denied access to counsel both before and during police questioning. Speedy access to legal advice is a basic right of all, promoted in both international and domestic law. The provision of such advice is all the more urgent and necessary for those in detention who, by reason of age or incapacity, are especially vulnerable and suggestible.

Mr Kane is severely intellectually impaired - with a low IQ, serious hearing difficulties, and was essentially illiterate. Northern Ireland legislation requires that in applying emergency law an "appropriate adult" be notified if a person brought to a police station is known or appears to be mentally handicapped, or is unable to read or is deaf, and it further mandates that no questioning take place in the absence of such "appropriate adult". This safeguard, was disregarded in the case of Patrick Kane. Moreover, the trial judge chose neither to rule any statements made to the police by Mr Kane inadmissible on the grounds that they had been improperly obtained, nor to condemn police failure to abide by the prescribed safeguards. To justify his own reliance on this improperly-obtained material, the judge chose to decide that Kane "was deliberately trying ... to give an appearance of being more unintelligent than he is".

While Mr Kane's predicament is particularly disturbing, it should be noted that neither Mr Kelly nor Mr Timmons had speedy access to legal advice.

In the BBC documentary series entitled *Rough Justice*, Mr Kane's case was examined in detail and John Ware, its investigative reporter, concluded that the conviction and life sentences accorded to Mr Kane were perverse. Interviewed for the programme, Peter Thornton, QC, agreed that a jury trial might well have reached a very different conclusion to Mr Justice Carswell who, as a Diplock Court judge, was sitting alone.

MICHAEL TIMMONS

Michael Timmons, 31 at the time of his arrest, was also charged with murder, grievous bodily harm and false imprisonment. Alone of the three defendants at the trial, he admits to having been present in Casement Park where the soldiers were beaten. He like the other defendants, however, also denies that he intended to engage in serious criminal activity, still less in a conspiracy to murder.



Mr Justice Carswell concluded, on the basis of the evidence, that Mr Timmons had kicked one of the soldiers and lent encouragement to the other attackers. Although Mr Timmons was not accused of direct involvement in the murder of the two soldiers, or even of transporting them to the place where they were murdered by others, he was found guilty of murder. The appeal judges concurred with Justice Carswell's finding.

■ *Right of Silence*

Mr Kelly, once he did receive legal advice, made a short statement to the police about his movements and, thereafter, exercised his right to silence. In doing so he was following accepted wisdom current on the streets of West Belfast. Mr Justice Carswell decided to draw adverse inferences from this silence and these contributed very directly to Mr Kelly being convicted.

Presumption of innocence is the bedrock of all justice systems and a suspect's right to remain silent is integral to this. Any limitation on a person's right to remain silent undermines the basic premise of "innocent until proven guilty" - a premise enshrined in international, European and domestic law. Mr Kelly's case underlines the pernicious dangers of tampering with this fundamental protection. In the opinion of Amnesty International, the court was able to use the adverse inferences created by the accused's decision to remain silent "to bolster the otherwise weak and inconclusive evidence against Kelly...(and shift) the burden of proof from the prosecution to the defence". Ironically, if Mr Kelly had been charged a few months earlier, this legislative provision of drawing adverse inferences from silence - introduced in November 1988 - could not have been used against him. The case would have fallen for want of evidence.

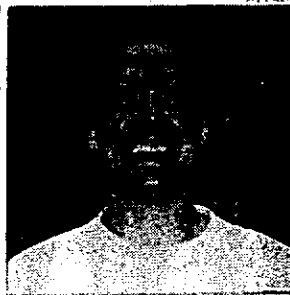
■ *Common Purpose*

All three men were found guilty of murder under the principle of "common purpose." No-one has alleged that any of them were involved in the actual murder, or were present when the soldiers were murdered, or that their involvement in the lead-up to the murder was anything but relatively minor, yet all three were convicted of murder and received mandatory life sentences.

Mr Justice Carswell determined that the accused were guilty either: because there was a plan to murder the two soldiers and the accused knowingly agreed to and gave support and assistance to this joint enterprise; or if the purpose of the joint enterprise was not to commit murder, that it was foreseeable that a murder might be committed in the course of an agreed-upon illegal joint enterprise in which the accused knowingly and intentionally took part. Given the unpremeditated nature of the incident, there has been no suggestion of a preconceived plan to murder the

SEAN KELLY

Sean Kelly was 20 at the time of his arrest (some eleven months after the murder of the two soldiers). He made one statement to the police giving an account of his movements that day and denied any involvement in the murder or beating of the two men. Thereafter, he chose to exercise his right to remain silent both in response to further police questioning and at the trial itself. Mr Justice Carswell (the Diplock Court Judge who acted in the joint trial of these three accused) found inconsistencies between Mr Kelly's statement to the police and the video evidence, yet also had "reservations about accepting the identification of Kelly from the hell-tele film on its own, because of the quality of the film". Nevertheless, Mr Justice Carswell determined that although the video evidence was uncertain, it, in combination with the adverse inference of guilt which he was able to draw from the accused's silence, gave him sufficient grounds to find as a fact that Sean Kelly was in Casement Park and that he was guilty of murder.



On appeal, the judges decided that the video evidence was sufficiently strong on its own to secure Kelly's conviction and that Justice Carswell had not needed to draw any adverse inferences to justify the finding of guilt. This ruling highlights the controversy surrounding the identification of individuals by means of the video - with one judge finding the identification uncertain, and three others finding it compelling "beyond reasonable doubt". It also suggests that the appeal court judges had altered the grounds for Mr Kelly's conviction and adopted the role of identification witnesses on behalf of the prosecution.

soldiers. Some of the judges in other "Casement Park Trials" specifically discounted this possibility. Carswell J., therefore, was obliged to find "beyond reasonable doubt" that all three accused participated knowingly in an illegal joint enterprise and that they each foresaw that it might end in murder.

On these grounds precisely, independent observers have determined that all three convictions are unsafe and unsatisfactory. A crucial concern is due to the inappropriate case-law relied upon by Carswell J. in his ruling. In all but one of the precedents he cites regarding the law of common purpose, it is clear that the co-accused planned an illegal enterprise in advance. In such cases, the courts have determined that any consequence of a pre-planned illegal enterprise - in these particular cases, murder - should be held to be the responsibility of all those engaged in the initial planning. This was clearly not the situation in which Messrs Kane, Kelly and Timmons found themselves. They did not know each other in advance; they did not plan to attend the funeral together; they could not have known that an incident would occur involving British soldiers; they did not plan - as individuals or in a group - to engage in any illegal enterprise, still less murder.

One precedent alone cited by Carswell J. allowed for the possibility that someone who joined in an illegal enterprise at a later stage could be found guilty under the law of common purpose. However, this precedent would only allow the judge to determine that by joining in the beating of the soldiers (if they did) the three accused could also be found guilty of what the other people at the scene were doing - inflicting grievous bodily harm. The case cited gave no grounds for going on to claim that the three accused could also be found guilty of the subsequent murder of the soldiers since this took place at a different time, in a different venue and at the hands of different people.

The exercise of justice is not, however, merely about the application of appropriate case-law. In determining that the accused were guilty of "common purpose", the judge had to determine what the state of mind of the accused was at the time. The law is clear that, when assessing guilt under a common purpose doctrine, the court must decide not what the accused might have contemplated, or even what he/she should have contemplated, but what he/she actually did contemplate. A CAJ report comments: "When considering Kane, Timmons and Kelly, it is crucial that their entire alleged involvement lasted only a few minutes. It is also crucial to recall the panic and chaos of the situation. One might well ask whether, given that they were acting as a part of a frenzied mob the three accused had considered anything at all".

■ **Identification Evidence**

Apart from these legal questions, there are a number of other issues which give cause for serious concern. There is the important question of identifying the suspects on the basis of video evidence. The quality of the video evidence is highly questionable if one judge remains uncertain about the identification of Mr Kelly but three appeal court judges are able later to use the same material to satisfy themselves beyond any reasonable doubt. The very fact that the video evidence was subject to multiple viewings, to fast and slow replays, to image-enhancement, to the use of arrows to highlight particular figures, and that it was shown to more than 1500 police officers - risking a contamination of identification evidence - is worrying. Furthermore, the defence did not have access to the same sophisticated video and screening equipment as the prosecution. This denied the principle of "equality of arms."

Moreover, the defence had to seek a judicial ruling to get access to the video evidence in order to prepare their case - they were not granted such material as of right. Indeed, they were only supplied with materials that the prosecution intended to use in the case against the client; in one instance, video evidence crucial to the defence of a particular client (none of the three accused discussed here) only became known to defence counsel by accident. The defence did not have access to all the footage but only to that which the prosecution were relying on. The weight accorded to the video evidence also varied between cases and even within the same case. For example, in the Kane case, Carswell J. accepted as true the written statements Kane made to the police, and he also relied upon the video evidence to prove that defendant was somewhere he claimed not to be; the judge chose to disregard the major discrepancies between the video and written evidence.

■ **Judicial Inconsistencies**

Inconsistencies in judicial rulings went beyond the issue of video recordings. In another Casement Park case, Kevin McCaughley was found guilty by Mr Justice MacDermott of transporting the soldiers to the place of the murders and helping to subdue the soldiers immediately before they were shot, but he was acquitted of murder. The judge imposed a seven year sentence for what would appear to be a much greater level of involvement than that alleged of Messrs Kane, Kelly or Timmons. Another accused (David McConnell) actually confessed to the fact that he at some point thought the soldiers would be killed, but Mr Justice McCollum acquitted him of murder claiming that McConnell did not know what he was saying and that he (the judge) believed that no one could have been thinking so clearly in such a situation. These findings are clearly in stark contrast to those of Carswell J. with respect to the three accused. In two other unrelated but similar cases (Abbott and Gamble & Others), Justice Carswell followed a completely different line and acquitted the men of murder even though there was clear evidence of their agreed participation in criminal acts which led to the death of four people. It was for these reasons that in its 1992 report CAJ concluded that "the attitude of the particular judge hearing the case was sometimes just as important as what the accused did".

■ **Psychological Evidence**

Finally, concerns have been expressed about the failure of the Northern Ireland courts to seek independent expertise on the social and psychological factors which would have been at play throughout the incident. The awfulness of what happened to the soldiers should not be excused but the actions of those in the funeral cortege cannot be understood at all if the context is ignored. Three unarmed IRA members had been killed by soldiers in highly disputed circumstances ten days previously in Gibraltar; at their funeral in West Belfast, an indiscriminate loyalist attack was launched on the mourners, resulting in three more dead and sixty-eight wounded; two other men from the community had been shot in the intervening period (one by the army, and one by loyalist paramilitaries). Corporals Wood and Howes drove into a crowd which was extremely tense and feared attack - mayhem ensued.

Defence counsel argued that the circumstances meant that the "mens rea" (the necessary criminal intent) could not have been present, but Carswell J. in condemning Messrs Kane, Kelly and Timmons to life sentences gave little weight to the defence claim that participants in the crowd were in the midst of a frenzied reaction to what they perceived to be an attack on the funeral. Research on crowd psychology highlights the extremes to which individuals in a crowd can be driven and illustrates that actual reactions in such circumstances differ from what would be expected if one analysed the situation using only a "common sense" approach.

■ **Conclusion**

This litany of serious concerns has caused many individuals and groups from across the community and internationally to express grave reservations about these cases. These three men have not had a fair trial. They are not guilty of murder. Justice demands that their case is referred back to the Court of Appeal as a matter of urgency.

We would ask you to write outlining your concerns to the Secretary of State regarding these cases and asking him to reconsider his decision not to refer them back to the Court of Appeal. His address is:-

Sir Patrick Mayhew
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Belfast
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