

THE BLOODY SUNDAY INQUIRY

STANDARD OF PROOF

RULING

1. In the course of hearing the closing submissions of the interested parties to this Inquiry an issue arose as to the standard of proof which the Tribunal should apply before making findings in its report. On the one hand it was argued that the Tribunal should apply the criminal standard of proof before making any findings implying criminal conduct on the part of an individual, and what was described as the enhanced civil standard of proof (said to mean the balance of probabilities modified to take account of inherent improbability and likely consequences) before making any finding of serious misconduct falling short of criminality on the part of an individual. On the other hand it was argued that the Tribunal should not be obliged to apply these standards, provided it made clear in its Report the degree of confidence or certainty with which it reached its conclusions and gave its reasons for coming to those conclusions. The former approach was urged on us mainly (though not exclusively) by those representing the soldiers in this Inquiry, who have asked the Tribunal to make a ruling, before publishing its final report, by stating in principle the approach which it intends to adopt.
2. The point has arisen in the present Inquiry because we are looking into an event where British soldiers shot and killed or wounded a number of civilians and where there has ever since been a debate as to whether or not they were justified in so doing.
3. According to those submitting that the former approach should be adopted, this would entail that the Tribunal would be precluded from making any findings implying criminality or serious misconduct unless satisfied to the criminal or enhanced civil standard as the case might be, notwithstanding that the evidence and reasoning supported a finding based on a different or lesser standard.

4. Counsel cited a number of authorities for the proposition that as a matter of law we were constrained to act in this manner.
5. The first group of cases cited were **In Re H [1996] AC 563**, **B v Chief Constable of Avon and Somerset [2001] 1 WLR 340**, **Gough v Chief Constable of the Derbyshire Constabulary [2002] QB 1213**, **R (McCann and others) v Crown Court at Manchester [2003] 1 AC 787**. These were cases in which the Courts discussed the standard of proof required in, respectively, proceedings where a local authority were seeking to take children into care on the basis that a child had been sexually abused, where a chief constable was seeking a sex offender order, where a chief constable was seeking a football banning order and where a chief constable was seeking anti-social behaviour orders.
6. The point sought to be made from these cases is that the more serious the allegation, the more cogent must be the evidence to prove it. Thus the approach of Lord Nicholls in the first of these cases was that though the standard of proof to be applied in care proceedings is the balance of probabilities, the court must have in mind, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities. In the second of these cases Lord Bingham considered that although the standard of proof to be applied was the balance of probabilities, this was a flexible standard and that the allegation that an individual was a sex offender was so serious that for all practical purposes the standard of proof was the same as the criminal standard. Much the same was said by the court in the third of the cases cited, namely that while technically the civil standard of balance of probabilities applied, that standard is flexible and must reflect the consequences that will follow if the case for a football banning order is made out, so that the standard of proof will be in practice hard to distinguish from the criminal standard. Finally, in the last of these cases, the House of Lords

held that although applications for anti-social behaviour orders were civil in nature, the seriousness of the allegation and of the consequences for the person concerned were the order to be made meant that it was only fair to require the allegation to be proved to the criminal standard of proof.

7. In the context of the cases cited no one could seriously quarrel with the approach adopted by the courts. In each of these cases to make the orders sought would have the most serious consequences for the individuals concerned, by removing or diminishing in a substantial way the rights, liberties and freedoms to which they would otherwise be entitled. Thus it is hardly surprising that in such cases the courts require cogent and compelling evidence in the same or much the same way as in criminal cases, where a conviction can also have like consequences.

8. In the context of the present Inquiry, there is no question of the Tribunal having any power to remove or diminish the rights, liberties or freedoms of anyone. It is not the function of an Inquiry of the present kind to determine rights and obligations of any nature. Its task, set by Parliament, is to inquire into and report upon the events on Sunday 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day. The Inquiry cannot be categorized as a trial of any description. Unlike the courts it cannot decide the guilt (or innocence) of any individual or make any order in its report. Our task is to investigate the events of Bloody Sunday, to do our best to discover what happened on that day and to report the results of our investigations. It accordingly follows that the considerations that led the courts in the cases cited to require proof to a very high standard before making orders that affected the rights, liberties and freedoms of individuals are no guide to the task entrusted to the Tribunal.

9. We should add at this point that we were also referred to the recent case of **Lu v LB** in the Court of Appeal [2004] **EWCA (Civ) 567** as well as the observations on the question of standard of proof made in the reports of a number of inquiries, but we were not persuaded that these take the matter any

further or provide us with any additional assistance. However, after the oral hearings, our Counsel drew our attention to what Dame Janet Smith in the Shipman Inquiry had to say on the topic in question:

“9.43 *In an inquiry such as this, there is no required standard of proof and no onus of proof. My objective in reaching decisions in the individual cases has been to provide an answer for the people who fear or suspect that Shipman might have killed their friend or relative. I have also sought to lay the foundation for Phase Two of the Inquiry. My decisions do not carry any sanctions. Shipman has been convicted of 15 cases of murder and sentenced appropriately. He will not be tried or punished in respect of any other deaths. Nor will my decisions result in the payment of compensation by Shipman. It is possible that relatives might recover damages from Shipman if they can show that Shipman has killed their loved one, but my decision that he has done so will not automatically result in an award of compensation against him. Accordingly, I have not felt constrained to reach my decisions in the individual cases by reference to any one standard of proof.*”

10. We consider that these observations are apt in our consideration of the events of Bloody Sunday.
11. The second group of cases cited to us related to the standard of proof to be applied in cases of coroner’s inquests.
12. The first of these cases is **R v West London Coroner, ex parte Gray [1988] 1 QB 467**, where the Divisional Court held that the correct standard of proof before a verdict of unlawful killing could be returned was that of proof beyond a reasonable doubt and expressed the view that the same standard applied to any verdict that entailed that a criminal offence had been committed. In the course of his judgment Watkins LJ cited the words used by Lord Lane CJ in the earlier case of **R v South London Coroner, ex parte Thompson** reported in the Times of 9th July 1982. These were:

“Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use.”

13. The other coroner’s inquest cases cited to us were **R v Wolverhampton Coroner, ex parte Mcurbin [1990] 1 WLR 719** and **R v HM Coroner for the County of Hampshire, ex parte HM Attorney-General**, in respect of which we were provided with a transcript of the judgment delivered on 21st June 1990. In the latter case Leggatt LJ simply stated that it was plain upon authority that for practical purposes to support a verdict of unlawful killing proof is necessary beyond reasonable doubt. In the former case Woolf LJ accepted that there may be force in the submission that in the case of a coroner’s inquest the standard of proof was a very high one indeed though based on the civil rather than the criminal standard, but held that since the result would almost inevitably be the same whichever standard was applied, the practical guidance given by Watkins LJ was correct.
14. It is clear from the remarks of Lord Lane CJ cited by Watkins LJ in **R v West London Coroner, ex parte Gray (supra)** that a coroner’s inquest is inquisitorial in nature and thus has this in common with the present Inquiry. However, there are other features that are quite different.
15. A coroner’s inquest is limited in the verdicts that it can return, and where there is a jury it is obviously necessary for the jurors to be given clear and simple directions as to the degree of certainty with which they can reach particular verdicts. Unless there were different and specified degrees of certainty, it would be difficult if not impossible to reach a particular verdict, for example between unlawful killing and death by misadventure. Furthermore, as

Woolf LJ pointed out in **R v Wolverhampton Coroner, ex parte Mcurbin** (*supra* at page 724), before a change in the law in 1977 a jury could under Section 4(3) of the Coroner's Act 1887 return a verdict that named a person or persons as guilty of murder or manslaughter, which in his view still provided considerable assistance in considering the question of the standard of proof which was applicable, "*since that section made clear the importance of the decision of the coroner's jury and the gravity of the issues which they had to determine which could result in a person being at that time arrested and in due course tried for murder or manslaughter*". There are accordingly both practical and historical reasons for requiring a high standard of proof before making a finding of unlawful killing, reasons that do not apply to an Inquiry of the present kind, which does not have to select and give a particular verdict, but instead has to provide a report on the matters referred to it.

16. It is also important to note that in the same case (at page 727) Woolf LJ made clear that in different proceedings there are different considerations which lead to what is the appropriate test which it is useful to apply, having regard to the role of the decision making body that has the task of coming to a conclusion on the facts. To our minds this is a clear indication that the Court in that case was not seeking to lay down any rule or principle applicable to all kinds of inquisitorial inquiry or which are apt in our consideration of the events of Bloody Sunday.
17. In our view therefore the cases cited to us do not provide any support for the proposition that as a matter of principle we cannot make any findings implying criminality unless we are satisfied to the criminal standard of proof or of serious misconduct unless we are satisfied to the enhanced civil standard.
18. As we have said earlier, since we are an Inquiry and not a Court (criminal or civil) we cannot give a verdict or pass a judgment on the question whether an individual was guilty of a specific crime or legally recognised serious wrongdoing. For the same reason the terminology and requirements of the criminal or civil law are largely inapplicable. Thus it seems to us that we can

and should reach conclusions without being bound by rules designed for court cases, such as who has the burden of proof and the strict rules of evidence.

19. In this connection we have found assistance in the approach taken by the Supreme Court of Canada in **Canada (Attorney-General) v Canada (Commission of Inquiry on the Blood System) 1997 3 S.C.R. 440**, a case concerned with the Krever Inquiry into the blood system in Canada after many had contracted HIV and Hepatitis C from blood or blood products. Although the Act under which this Inquiry was being conducted differs in many respects from the Act under which we are operating, the observations of Cory J (who gave the judgment of the Court) at paragraphs 34-54 seem to us to have general application. As he pointed out, the findings of a commission of inquiry relating to an investigation are simply findings of fact and statements of opinion reached by the commission at the end of the day; and though they may affect public opinion, they are not and cannot be findings of criminal or civil responsibility.
20. We now turn to the suggestion that it would be unfair to the individual to make findings implying criminal or other serious wrongdoing without applying the suggested standards of proof.
21. What was said on this was that the consequences of a finding implying wrongdoing on Bloody Sunday would be extremely serious for the individuals concerned, particularly so having regard to the standing of the Inquiry, the fact that it is charged to report to Parliament, the widespread publicity which its findings will undoubtedly rightly attract and the possibility that an individual may, as a result of the outcome, be exposed to the risk of prosecution.
22. We have found it difficult to follow this submission. The Inquiry is indeed concerned with matters of the greatest seriousness. The question whether the shooting of civilians by soldiers was or was not justified is central. The very subject matter of the Inquiry raises the possibility that individuals may be the subject of the most serious criticism and there may well be wide publicity, though it should be noted that most of those concerned have been granted

anonymity. But for the Tribunal to conclude that while it was not sure, nevertheless it seemed probable that a particular shooting was deliberate and unjustified (objectively and subjectively) could hardly create or increase a risk of prosecution; indeed it would be more likely to have the opposite effect. Furthermore, apart from the reference to the possible risk of prosecution, no attempt was made to explain what “*serious consequences*” would follow were the Tribunal not to apply the suggested standards of proof, save that it was also suggested that the media would be likely to misrepresent the views of the Tribunal, and categorize the individual as being guilty without reference to the degree of confidence or certainty expressed by the Tribunal in making any findings implying criminality or serious misconduct. The fact (if such it be) that the media may misrepresent the views of the Tribunal does not seem to us to be a sound or satisfactory basis for requiring the Tribunal to refrain from expressing those views.

23. In our view, provided the Tribunal makes clear the degree of confidence or certainty with which it reaches any conclusion as to facts and matters that may imply or suggest criminality or serious misconduct of any individual, provided that there is evidence and reasoning that logically supports the conclusion to the degree of confidence or certainty expressed, and provided of course that those concerned have been given a proper opportunity to deal with allegations made against them, we see in the context of this Inquiry no unfairness to anyone nor any good reason to limit our findings in the manner suggested. Thus, to take an example, we cannot accept that we are precluded in our report from analysing and weighing the evidence and giving our reasons for concluding that in the case of a particular shooting, we are confident that it was deliberate, that there was no objective justification for it, and though we are not certain, that it seems to us more likely than not that there was no subjective justification either. Of course we would have in mind the seriousness of the matter on which we were expressing a view, but that is not because of some rule that we should apply, but rather as a matter of common sense and justice.

24. It was also submitted that there would be no point in reaching conclusions on matters implying criminality or serious misconduct, unless we were sure beyond a reasonable doubt. We do not understand this submission. We are asked to investigate and report on an event that took place some three decades ago, where on any view soldiers of the British Army shot and killed (and wounded) a number of civilians on the streets of a city in the United Kingdom and where the question whether or not they were justified in doing so has been the subject of such debate ever since that it led to the institution of this (the second) Inquiry some thirty years later. It seems to us that it would be quite wrong to confine ourselves in relation to this central part of the Inquiry to making findings where we were certain what happened. On the contrary, it is in our view our duty to set out fully in our Report our reasoned conclusions on the evidence we have obtained and the degree of confidence or certainty with which we have reached those conclusions. We are not asked to report only on these central matters on which the evidence makes us certain.

25. In this context it is important to note where the application of specific standards of proof could lead. In one of the Treasury Solicitor's letters seeking to persuade the Tribunal to apply those standards, the following reply was given to a question by the Tribunal about the ramifications of the submissions being made:

"If the Tribunal thought that it was only highly probable that Y was shot in circumstances where there was not and was not thought to have been any justification, and that on the balance of probabilities the shooter was either A, B or C, the Tribunal should make the following findings:

- (1) The Tribunal is not satisfied that Soldier A fired without subjective justification.*
- (2) The Tribunal is not satisfied that Soldier B fired without subjective justification.*
- (3) The Tribunal is not satisfied that Soldier C fired without subjective justification*
- (4) The Tribunal concludes that it is highly probable that Y was doing nothing which objectively justified his being shot.*

(5) The Tribunal concludes that it is more likely than not that Y was shot by one of Soldiers A, B or C, but cannot be sure that he was not shot by somebody else.

(6) The Tribunal cannot conclude that Y was killed without subjective justification”

26. To our minds, to express our conclusions in this way would be the antithesis of a proper report.

27. For these reasons we are not persuaded by the arguments that seek to impose on us the criminal or enhanced civil standard of proof in relation to findings implying criminality or serious misconduct falling short of criminality. We should emphasise, as we have made clear on numerous occasions during the course of the Inquiry, that this does not mean that we shall entertain or allow to be pursued allegations of this kind which have no sensible foundation at all or in respect of which the individual concerned has not been given a proper opportunity to answer, for to do so would offend one of the principles of justice referred to by Lord Diplock in **Mahon v Air New Zealand [1984] AC 808**.

Lord Saville

The Hon. William Hoyt

The Hon. John Toohey

11th October 2004