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Our Ref: JR/26088/PJM

Public Prosecution Service
Belfast Chambers
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Dear Sir

KEVIN McELHINNEY, DECEASED 30 JANUARY 1972 - BLOODY SUNDAY

We represent the family of Kevin McElhinney, who was shot dead on Bloody Sunday, Derry, 1972.

Kevin was seventeen years old when he was shot as he crawled in a southerly direction along the western side of Block 1 of the Rossville Street Flats, in the direction of its main doors. He sustained five gunshot wounds, the fatal wound entering the inner side of the left buttock, causing injury to the abdomen and fragmenting before exiting the body.

The Tribunal do not rule out the possibility that an abrasion on Kevin McElhinney's left thigh was caused by a bullet which had grazed him, fired before the fatal injury was sustained.

We would refer you in particular to Chapter 86.365 to Chapter 86.469 (Volume V) of the Report of the Bloody Sunday Inquiry, in which the Tribunal review *inter alia* the medical and scientific evidence, photographic, and the evidence of civilian and media eye-witnesses concerning Kevin's death.

The Tribunal are of the view that it is possible to draw three firm conclusions from the civilian evidence:

1. The Tribunal are sure that Kevin McElhinney was shot when he was crawling or moving in a crouched position in a southerly direction from the area of the rubble barricade and when he had come close to Block 1 of the Rossville Flats. The evidence of the eye-witnesses that he was moving in this manner is supported by the medical and scientific evidence
2. The Tribunal are **sure** that Kevin McElhinney was posing **no threat** to soldiers when he was shot. He was simply trying to crawl to safety. In the Tribunal's view he is likely to have been throwing stones towards the soldiers, but this activity was posing no serious threat and had ceased by the time he was seeking to escape and was shot. The Tribunal are **sure** that Kevin McElhinney did not have a rifle or any other form of weapon with or near him when he was shot.
3. The Tribunal reject any suggestion that there was an unidentified casualty shot and taken into Block 1 of the Rossville Flats

The area of the Bogside in which the shootings occurred on Bloody Sunday was divided by the Inquiry into five broad areas, known as sectors.

The area of Rossville Street in which Kevin McElhinney was shot is in Sector 3.

The Tribunal are sure that Kevin McElhinney was shot by Private L or Private M, members of the Composite Platoon of Support Company of 1 Para.

Sergeant K, also a member of the Composite Platoon also fired a live round over the rubble barricade, in the direction of where Kevin McElhinney was crawling.

Private L

The Tribunal have found that Private L was responsible for firing an unjustifiable shot, in breach of the Yellow Card, when arresting a civilian in a derelict building in Rossville Street before the shooting of Kevin McElhinney.¹

Private L did not mention that incident in any of his previous statements.

¹ Chapter 79.1-79.31

In his first statement to the Royal Military Police, after referring to the incident involving the arrest of a civilian (but in which he omitted reference to having fired his weapon), Private L stated he had rejoined his unit in Rossville Street, and advanced towards the rubble barricade. He stated that they were met with sporadic gunfire from the direction of the barricade. He stated, falsely, that up until that point he had not fired his rifle.

Private L stated that when his unit had reached a point 150 yards from the barricade, they took cover behind a wall at the side of the road.

From this position Private L claimed to be able to see two men lying on the ground behind the barricade. He stated that he could see two men start to leopard crawl away from the barricade, apparently cradling rifles in their arms. Private L states that Colour Sergeant 002 ordered [us] to fire at the two men and Private L states that he aimed his rifle at one and fired. He was sure that he hit the man he aimed at, but after lurching forward, the man crawled away with the other man. Private L states that as the man was making for a doorway, he again fired a single shot and thinks that he hit him.

Private L further states that the second man, who had been fired on by other members of his unit had reached the shelter of the doorway of the flats, and pulled the first man into the doorway with him. A few seconds later, a shot was fired from the doorway into which the two men had vanished. Private L considered it possible that the second shot he fired struck both targets.

As Private L withdrew with his unit, he fired a further two single shots towards a derelict building west of Rossville Street.

In the statement Private L gave for the purposes of the Widgery Inquiry, (and in addition to the alleged gunmen he witnessed and recorded in his RMP statement), he also witnessed a man behind the rubble barricade whom he ordered to come out; a man with a pistol at a window on the sixth floor of Rossville Flats and a man who had come out from the corner at the entrance to the Rossville Flats carrying a rifle which he thought was a short carbine.

Significant portions of Private L's written and oral evidence to the Saville Inquiry was rejected by the Tribunal as 'fantasy', and 'figments of his imagination'.²

In the course of his oral evidence, Private L agreed that "*possibly*" he was suffering from some illness that would cause him difficulties with his recollection or memory".

Private M

Private M made his first statement to the RMP at 1235 hours on 31 January 1972.

He described taking up position on the right hand [western] side of Rossville Street, approximately 200 yards from the Rossville Flats. He stated that a crowd of around 1500 people had built a barricade, and that his position came under fire from snipers located in the flats and from the main crowd behind the barricade.

As he neared the rubble barricade, the soldiers came under fire from nail and petrol bombs; throughout this time weather conditions were good and visibility clear.

As he reached 130 yards from the barricade Private M stated that he could see the barricade and the crowd behind it and that the soldiers were being heavily stoned, bottled and shot at.

Private M stated that he could see two males crawling in a southerly direction, trying to get into the flats, and that they were both pushing long black stick shaped objects in front of them.

Private M stated that they were acting in a suspicious manner, and that the door location they were moving towards provided a good sniper location from where they could have shot a number of troops advancing towards the barricade. He cocked his rifle and fired two aimed shots at each man. Two other members of his Section fired, but he could not recall who they were.

² Chapter 84.71

On firing, both men jerked and rolled over. They were then removed by the crowd and taken into the flats. Private M was certain that he had hit both men.

In his statement for the Widgery Inquiry, Private M stated that it was Corporal 039 who pointed out the two alleged men with rifles.

In his written statement to the Saville Inquiry, Private M stated that he could no longer remember coming under fire “from snipers located in the flats, and from behind the main crowd contained behind the barricade”, as described in his first RMP statement.

Sergeant K

In his RMP statement dated 1 February 1972, Sergeant K stated that a riot was taking place in and around the Rossville Street area; the rioters numbering between 400-700.

Sergeant K moved to a position near Kells Walk on the western side of Rossville Street, and from that position claimed to see two men crawling from behind the rubble barricade; the rear man appeared to have a weapon in his hands. Sergeant K claims to have cocked his weapon and fired an aimed round. He did not observe a strike and the gunman disappeared into the flats. Sergeant K thinks he may have hit the gunman when he fired at him. He was also aware that Private L and Private M fired at “this gunman”.

In his statement recorded for the purposes of the Widgery Inquiry, Sergeant K stated that he could clearly see that the rear man had a rifle. In his oral evidence to Widgery, Sergeant K believed the rifle to be a .303 but could not state why his belief was so.

In his oral evidence to the Saville Inquiry, when asked whether he had complied with the provisions of the Yellow Card in firing at someone who was not posing any immediate threat, Sergeant K stated that as far as he was concerned “*there was a possible intention to use*” the weapon, and relied upon Rule 13(b) of the Yellow Card, which permitted firing “*against a person carrying a firearm if you have reason to think he is about to use it for offensive purposes.*”

Corporal 039

In his statement to the Royal Military Police at 1630 on 2 February 1972, Corporal 039 stated he had witnessed two men crawling on their bellies towards the base of the [Rossville] flats and then crawl on towards a door at the south end of Rossville Flats. One was carrying what appeared to be a Thompson machine gun and the other appeared to be trailing a weapon, although Corporal 039 could not say what it was. He stated that he pointed out the gunmen to Private L, who was on his left, and to Private M, who was on his right, and ***“told them to fire at the gunmen.”***

Corporal 039 gave a similar account in his statement to the Widgery Inquiry but did not give oral evidence to that Inquiry.

In his statement to the Saville Inquiry, Corporal 039 recollects identifying the alleged gunmen, however he states it would be unusual for him to give an order to fire, as he would have expected his colleagues to act of their own initiative in such circumstances. However, he further told the Tribunal that where conflicts arose between his 1972 evidence and current recollection, he preferred to rely on the former account as he had no reason to believe his statement to the RMP would be inaccurate.

Colour Sergeant 002

Colour Sergeant 002 in his statement to the Royal Military Police confirmed that he had given an order to Private L and Private M to fire at *“a male person dressed in dark jacket and trousers doing a leopard crawl towards the south end of No 1 Block”*, who had a rifle *“in the crook of his elbow”*.

He recorded that each of these soldiers fired two rounds at this man, who was hit.

In his statement to the Widgery Inquiry, Colour Sergeant 002 stated that Sergeant K had told him that he had fired one round at two men crawling from the barricade towards the far corner of the flats, and he then gave a similar account to that in his RMP statement of seeing a man with a rifle and ordering Private L and Private M to open fire.

Evidence of other military witnesses

The evidence of the soldiers as to what the two men crawling south along the western side of Block 1 of the Rossville Flats, varies:

1. Sergeant K, Sergeant 014 and Private 032 described the man crawling after the other as carrying a rifle
2. Colour Sergeant 002 described the leading man as having a rifle and could see no weapon on the man following the leading man
3. Private L and Private M described both men as having rifles
4. Sergeant 035 described both dragging objects that looked like rifles
5. Corporal 039 described the leading man as having something that looked like a Thompson Sub Machine Gun, and the second man as having some sort of weapon

The Tribunal have reached the following significant conclusions:

1. The Tribunal are sure that Kevin McElhinney was shot by either Private L or Private M; they are not sure which firing resulted in the casualty
2. The evidence of the military witnesses about the firing by Private L and Private M is confusing, however there is a common thread running through this evidence which is that there were two men who were crawling away from the rubble barricade towards the entrance to Block 1 of the Rossville Flats.
3. The Tribunal are **sure** that neither Kevin McElhinney, nor anyone near him as he tried to make his escape from the rubble barricade, was carrying anything that could be mistaken for a rifle or a Thompson sub-machine gun
4. The Tribunal cannot accept that either Sergeant K, Private L or Private M, (or Corporal 039 or Colour Sergeant 002 who ordered them to fire) could have been certain that he had identified a gunman or gunmen, as opposed to believing or suspecting that such a target might have been identified
5. The soldiers were looking at two men crawling south from the rubble barricade and away from the soldiers, probably by that stage some 100 yards away. Even if they

were expecting to see paramilitary activity and mistakenly thought that they might have seen one or two men crawling away with rifles, in the Tribunal's view, at that distance they could not have been certain that they had done so. Accordingly, the Tribunal do not accept the evidence of these soldiers that they had been certain that they had identified a man or men with rifles.

6. Private L, Private M, and Sergeant K fired at a man or men who were crawling away. In the Tribunal's view it is probable that they did so after being given an order to that effect by Colour Sergeant 002, Corporal 039 or both. [On the evidence of 002 and 039, both gave evidence to that effect].
7. None of those soldiers could have believed that their target or targets, crawling away from them in an obvious attempt to get away from the rubble barricade, were posing at that moment an immediate threat of causing death or serious injury to them or to others.

The evidence and foregoing conclusions reached by the Tribunal point unmistakably towards the evidential test for a successful prosecution being satisfied concerning the murder of Kevin McElhinney on Bloody Sunday.

In our view, Sergeant K, Private L and Private M, who all fired live rounds, in conjunction with Colour Sergeant 002 and Corporal 039 who ordered that shots be fired at him, acted in joint enterprise to murder Kevin McElhinney. It is clear that each of those who opened fire, did so in order to kill, in accordance with their training and the orders given to them.

Colour Sergeant 002 and Corporal 039, as senior Non Commissioned Officers, gave orders to the soldiers who opened fire to shoot their target, in the clear contemplation that they would be shot and killed, in accordance with their training, and without any proper justification.

In light of those conclusions there is sufficient evidence to charge Sergeant K, Private L and Private M with murder. In *R v Rahman & O'rs* [2008] UKHL 45, the House of Lords addressed the issue of joint enterprise, Lord Brown formulated the approach to determining whether an accused had the *men's rea* for murder in the following terms:

"If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in

the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B.*" (The italicised words are designed to reflect the *English* qualification).■ (68)

Sergeant K, Private L and Private M each fired live rounds over the rubble barricade either in the belief that no one in the areas towards which they were firing was posing a threat of causing death or serious injury, or they fired not caring whether or not anyone there was posing such a threat. Each soldier was acting together in firing live rounds from Rossville Street in circumstances where they knew, or did not care, that no one behind the rubble barricade was posing any threat of causing death or serious injury.

Applying Lord Brown's formulation, Sergeant K, Private L and Private M fired across the rubble barricade knowing that each and everyone of them might kill or inflict serious injury to those behind the rubble barricade and each continued to participate with the others in the venture. As per Lord Brown, "that will amount to a sufficient mental element" for Sergeant K, Private L and Private M to be guilty of the murder of Kevin McElhinney. In those circumstances each of the aforementioned soldiers should be prosecuted for the murder of Kevin McElhinney.

In addition, there is sufficient evidence to prosecute Sergeant 002, and Corporal 039 for murder, in furtherance the orders which they gave to open fire. Archbold (2009) at Chapter 18.7 states:

"It is not necessary that a principal should be actually present when the offence is committed: *R v Harley* (1830) 4 C. & P. 369. Nor is it necessary that the act should have been perpetrated with his own hands; for if an offence is committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal: *R v Manley* (1884) 1 Cox 104; *R v Bull and Schmidt* (1845) 1 Cox 281; *R v Butt* (1884) 15 Cox 564, CCR . . .

In circumstances where the State, by its agents, are responsible for the death of one of its citizens (in this case, an unarmed youth, crawling for safety on his hands and knees) by the use of lethal force, clearly the public interest limb for bringing a prosecution has also been met.

In addition, it is clear that the evidential and public interest test is met to prosecute Sergeant K, Private L and Private M, Colour Sergeant 002 and Corporal 039 for perjury in respect of the untruthful evidence that each gave on oath to the Bloody Sunday Inquiry.

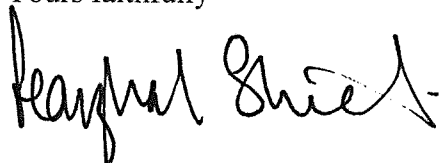
Accordingly, we should be grateful if you would consider the contents of this correspondence, submitted on behalf of the father and siblings of Kevin McElhinney, in advance of issuing a direction in respect of the prosecution of Sergeant K, Private L, Private M, Colour Sergeant 002 and Corporal 039 for the murder of Kevin McElhinney and for perjury in relation to their subsequent conduct before the Tribunal.

On behalf of the family of Kevin McElhinney's family, we invite you to prosecute the above mentioned soldiers for the murder of Kevin and for their subsequent untruthful evidence before the Inquiry.

In the event that you decide not to prosecute all of the above, we should be grateful if you would provide your substantive written reasons for your decision.

We await hearing from you by return.

Yours faithfully



 Peter Madden

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