

IN THE CONSISTORY COURT OF THE DIOCESE OF NEWCASTLE

ST JOHN'S CEMETERY, ELSWICK

RE: THOMAS EDWARD MCKENNA DECEASED.

JUDGEMENT

1. This is a petition by Moira McKenna, the daughter in law of the late Thomas Edward McKenna, for his remains to be temporarily disinterred for the purposes of obtaining a DNA analysis from bone fragments to be taken from the remains. His remains are interred in Grave 58, consecrated section ENG of St John's cemetery, Elswick, Newcastle upon Tyne.
2. The reason behind the petition is that the petitioner contends that her husband, Eric McKenna the son of the deceased, has been wrongly convicted of two offences of rape, committed in 1983 and 1988 and in respect of which he has been sentenced to a total of 23 years imprisonment. That sentence was imposed on 16 March 2018 following a trial that had taken place earlier in the year.
3. The passing of the sentence on her husband was widely reported on the news on television and that prompted Mrs Eileen Hutton, the sister of Eric McKenna and daughter of the deceased, to contact the legal team of Eric McKenna seeking to be put in touch with her brother and the petitioner; she having lost contact with her brother many years previously.
4. Mrs Hutton contacted the petitioner and informed her that she did not believe that her brother had committed the offences of which he had been convicted but that her father might well have been the perpetrator. She alleged that he was a violent person, particularly towards women and had served terms of imprisonment. Her father had died on 23 April 1993 of a heart attack at the age of 62.

5. I received a petition dated 31 August 2018 which contained consents from Eric McKenna and Eileen Hutton, the only two children of the deceased, to his disinterment and a consent from Newcastle City Council Bereavement Services Manager agreeing to the exhumation and re-interment, subject to a faculty being granted and certain other conditions. The petition was accompanied by a statement from the petitioner stating that her husband had been convicted solely on the basis of DNA evidence and that other aspects of the evidence had pointed away from his being the perpetrator of the offences.
6. On 12 September 2018 I gave the Directions annexed hereto in order that I should be provided with as much information as possible relating to the case against Eric McKenna so as properly to be able to consider the merits of the petition.
7. I have now received a considerable amount of information, including the statements of the complainants in the case against Mr McKenna, DNA statements and the advice on appeal against conviction and sentence from the barrister who conducted the defence of Mr McKenna. I do not propose to outline the entirety of the case against and for Mr McKenna, other than to state that, in reality, the entire case against Mr McKenna relied upon the DNA evidence against him. There were areas of the evidence upon which the defence relied as suggesting that someone other than Eric McKenna was the perpetrator.
8. Within the advice on appeal, which I immediately say stated firmly that there were no grounds for appealing the conviction, was the statement:-

“It was discussed with Mr McKenna that the statistically most likely scenario was that his father had committed the offences if it was not him. Mr McKenna was clear that he did not wish me to pursue this.”

The advice also said that an appeal might possibly be pursued if fresh evidence came to light, but that that evidence would have to deal with the DNA evidence on which the Crown had relied.

9. It is perhaps of some slight significance that that advice was given quite independently of and prior to Eileen Hutton contacting the defence team and raising the suggestion that her father might have been the perpetrator of the offences.
10. Having considered all of the material with which I have been provided I consider that the petitioner has made out a case for the temporary disinterment of the remains and sampling of bone fragments for DNA analysis. I hasten to say that the granting of this faculty should not in any way be taken as support for the contention that Eric McKenna has been wrongly convicted or that the deceased might be the perpetrator of the offences of which Eric McKenna has been convicted. However, I consider that if there is even a slight, but real, possibility that there has been a serious miscarriage of justice then it is wholly proper that everything be done to ensure that that is not the case. If, as may well be the case, ultimate DNA analysis establishes that the deceased could not possibly have been the perpetrator then that will put an end to any untoward allegation that he might have been guilty of the offences. I am entirely satisfied that these circumstances are sufficiently compelling to justify exhumation.
11. This is an entirely different situation from those envisaged in **Re Blagdon Cemetery [2002] Fam. 299** or the numerous other authorities dealing with petitions for exhumation and transfer of remains on a permanent basis. I have seen the detailed report of 12 October 2018 from Linda Ainscough a Forensic Anthropologist employed by Cellmark Forensic Services which has been commissioned to deal with the practicalities of the exhumation and examination. It is, in view of the length of time for which the coffin and remains have been buried, impossible to say prior to the opening of the grave what will be the state of either coffin or remains and equally impossible to say whether it will be necessary to exhume all of the remains or whether it will be possible to take bone fragments in situ. In either instance Linda Ainscough's report sets out a clear methodology and proper arrangements that are to be made involving Newcastle City Council

Bereavement Services and Cellmark Services dealing with the extraction, retention and re-interment of such of the remains as require removal, including any samples removed and tested which have survived the testing process. All of the remains will be re-interred within the same burial plot in which the deceased is currently interred. I am satisfied that the arrangements set out will be seemly and discreet.

12. I accordingly grant the requested faculty on the basis of the directions which I attach, namely payment of the appropriate costs and that the temporary exhumation and re-interment take place in accordance with the report of Linda Ainscough dated 12 October 2018 and in conjunction with Newcastle City Council Bereavement Services.

Euan Duff
Chancellor

12 December 2018.

ANNEX 1.

DIOCESE OF NEWCASTLE

In the Consistory Court

Euan Cameron Duff
Chancellor

In the Matter of

Petition for a Faculty to disinter the remains of Thomas Edward McKenna.

In order properly to consider this Petition I need further information and confirmation of some of the matters set out in the unsigned statement of the Petitioner.

DIRECTIONS

The Petitioner is to supply, as soon as is practicably possible, the following:

- 1) A letter from the solicitors who acted for Eric McKenna at his Crown Court trial giving details of the trial and setting out in summary form all of the evidence relied upon by the Crown and, insofar as it is consistent with their duty of confidentiality, the defence relied upon and any defence evidence called at trial.
- 2) Letters from Keith Borer Limited and Cellmark confirming their instructions in this matter and the proposed course of action.
- 3) Clarification of precisely what is proposed in relation to those matters which Newcastle City Council queried in its letter of 30 August 2018 and a detailed proposed timetable and methodology of the processes proposed.
- 4) The Petitioner is at liberty to supply any further material which she feels may assist her application (e.g Any settled Grounds of Appeal or other material of that type shedding light on the miscarriage of justice which it is claimed has taken place),

Euan Duff

12 September 2018.