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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **27/05/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

EUNAN McCAFFREY

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Mr MacCreanor QC with Mr Harvey (instructed by PPS) for the Prosecution
Mr Fahy QC with Mr Turkington (instructed by Fahy Corrigan Solicitors) for the Defendant

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Before: Morgan LCJ, Maguire LJ and Scoffield J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an application by the prosecution for leave to appeal pursuant to Article 17 of the Criminal Justice (Northern Ireland) Order 2004 ("the 2004 Order") the decision of Judge Rafferty QC made on 16 May 2019 to stay criminal proceedings on 16 counts of money-laundering, theft and fraud as an abuse of process on the basis that the defendant could not receive a fair trial by reason of delay and failures in the investigation.

Background

[2] There is no dispute about the fact that the defendant conducted financial transactions on behalf of Bernard John Brazil with his consent. The prosecution case is that he also engaged in multiple fraudulent and dishonest activities in relation to monies belonging to Mr Brazil. Mr Brazil is a widower and former fisherman and in late 2006 he sold his home and invested £200,000 in a South African bank because of the high interest rates provided.

[3] He lived off the money invested in South Africa. In order to get access to the money he had to telephone the bank in South Africa and request a transfer. He would then have to answer a number of security questions and fax a copy of his

passport on each occasion. The transfer took about 10 days. Money was transferred to his Halifax account.

[4] Mr Brazil found the process difficult and subsequently says that he asked the defendant to do the transfers for him. He supplied the defendant with the answers to his requisite security questions. In July 2009 when Mr Brazil went to buy a home in the Philippines he asked the defendant to arrange the transfer of £10,000 to his Halifax account. The transfer was not made and the defendant advised Mr Brazil that the money had been seized by the South African tax authorities but that he (McCaffrey) would approach solicitors in order to help.

[5] At the end of July 2011 Mr Brazil was house-sitting for the defendant and while staying at the defendant's home he came upon a Santander bank statement in the name of Bernard Brazil linked to an address at 32 Silverhill Park, Enniskillen. Mr Brazil was immediately suspicious as he did not believe that he ever held such an account and noted that the name of the account was not how he would use his name. He contacted the police and the investigation began.

[6] A Financial Analysis Report made the following findings:

(a) On multiple occasions when Mr Brazil was out of the country there were transfers from South Africa to this Santander account;

(b) There were 16 cheques drawn from the Santander account, 13 to the defendant when Mr Brazil was out of the country;

(c) There were a large number of transactions relating to the Santander account which occurred when Mr Brazil was not in Northern Ireland;

(d) Between 30 October 2007 and 30 July 2009 Mr Brazil was in Northern Ireland for around 10 weeks but during this period there were 278 separate cash machine transactions, 260 of which occurred when he was not in Northern Ireland;

(e) Card payments were made at local Enniskillen businesses when Mr Brazil was not in Northern Ireland, with the pattern suggesting extensive use for daily life;

(f) PayPal payments were made to online sellers when Mr Brazil was in Thailand;

(g) There were payments made to NIE or DVLA in 2008 from the Santander account when Mr Brazil was not in Northern Ireland;

(h) There were two holidays booked in the name of the defendant and his family to Tenerife in 2008, departing on 22 March 2008 and again in 27 June 2008.

Payments for both came from the Santander account when Mr Brazil was in Thailand.

[7] The conclusion of the report in respect of the Santander account was as follows:

(a) A total of £81,856.91 was transferred from the South African (Nedbank) account into the Santander account in 13 separate transactions. For all but one of these occasions Mr Brazil was in various countries in Southeast Asia. On 27 October 2008 identical amounts of £9949.49 were transferred, one to Mr Brazil's Halifax account and the other to the Santander account.

(b) 16 cheques to the value of £10,640 were written and drawn on the Santander account; 13 were made payable to the defendant and cashed in Currency Extra (a bureau de change). One was made payable to Currency Extra, one to the Ford Lodge Hotel, and a third appears to have been made out to Henry Sherwin. That may refer to Sheerin. The owners of the Ford Lodge Hotel at the time were the Sheerin family. All were written and cashed on dates when Mr Brazil was in Southeast Asia.

(c) Mr Brazil continued to use his Halifax account for periods when he was abroad as well as in Northern Ireland.

(d) The pattern of usage on the Santander account was for daily living activities.

(e) The transactions in Tenerife correspond with the dates when the defendant was there and stop when he returned to Northern Ireland. Conversely there were no transactions made in Tenerife during the time that Mr Brazil was actually there.

[8] When interviewed the defendant denied committing any fraud or stealing from Mr Brazil. He said that he had driven Mr Brazil to Omagh some time ago to open an Alliance & Leicester account, which subsequently became a Santander account. He claimed to know nothing about £100,000 going to the Santander account between January 2008 and June 2009. He said that Mr Brazil had given him £50,000 over the years. He claimed this was because Mr Brazil lived with him while he was in Northern Ireland.

[9] When presented with the cheques made payable to the defendant he said that Mr Brazil would have given him the money. He said that Mr Brazil could not write and could hardly sign his name. He was asked about the Tenerife holiday payments coming out of the Santander account and said that it was up to Mr Brazil. Although he denied transferring money out of the South Africa account, he was aware of the process for doing so.

[10] The prosecution also sought to rely on the defendant's previous convictions. He was convicted of using a false instrument with intent in 2000 and 4 counts of obtaining by deception in 2005.

The abuse of process application

[11] Mr Fahy represented the defendant in the trial. He noted that the police were able to establish that a Santander account was opened on 9 October 2007, a week before Mr Brazil travelled to Thailand. The account number was xxxx xx83. The account was initially opened with Alliance & Leicester which then became Santander. Police were unable to establish whether the account was opened in a branch or by post. The application form contained a signature which Mr Brazil confirmed was similar to his, although he told police that it was not his. In his depositions Mr Brazil says that he does not remember opening the account.

[12] It was submitted to the trial judge that the circumstances surrounding the creation and activity in and out of the Santander account represent the core of the prosecution case against the accused. The offences are alleged to have been committed between 7 December 2007 and 28 February 2009. The defendant was interviewed in relation to the offences in 2011 and 2012. The committal did not take place until January 2019 and the abuse of process application was dealt with in May 2019. Mr Fahy noted that at the committal hearing the PPS prosecutor accepted that there had been delay and that he was the thirteenth prosecutor dealing with the case.

[13] It was submitted on behalf of the defendant that there had been a breach of the reasonable time guarantee in Article 6 of the ECHR. It was further submitted that prejudice and detriment had been sustained by the defendant which was sufficient to justify a stay of the proceedings. There was a conflict in the evidence of the complainant and the defendant in relation to the circumstances of the creation of the Santander account and the documentation in relation to its creation was no longer available.

[14] The learned trial judge gave his written ruling on 16 May 2019. He noted that in his last interview the defendant had stated that he had taken Mr Brazil to Omagh to open an Alliance & Leicester account because he was talking about transferring his money out of South Africa because it was unstable. The defendant did not remember when that was but said that there would be evidence that he sat down in the branch with Mr Brazil and that he took him down to open the account. He denied, therefore, that he, the defendant, had opened the account.

[15] The indictable summons in this case was served on the defendant in November 2018 and, although the issue of delay was raised at the committal stage, the court considered that it was a matter for the Crown Court. The judge noted that the defendant was advised by police in April 2012 that he would be reported to the PPS during his last interview. The file was submitted to the PPS by police in May 2013. The judge set out a series of dealings by the PPS beginning on 24 May 2013

and leading up to the issue of the statement of complaint on 3 November 2018. He noted that there was a period between 1 February 2016 and 9 May 2018 during which simply nothing had happened. It was submitted that relevant officers had been deployed to other cases.

[16] Having considered a number of relevant authorities, the learned trial judge set out the prejudice and detriment upon which the defendant relied and then concluded as follows:

> "Having reviewed the papers and considered the relevant case law I have come to the regrettable conclusion that a stay should be granted in this case. I have considered whether any aspect of the delay and prejudice occasion could be dealt with fairly within the trial process. I considered a modified "delay" charge. Sadly, it became clear that any adequate charge dealing with the delay; the loss of material; the defendant's making clear in interview that the opening of the account would be disputed; would effectively be in such forceful terms that it would in effect be a direction to acquit the defendant. The initial investigator failings coupled with the delay in this case lead me to the conclusion that the individual defects in their collective effect are such that it is proper to grant a stay."

Consideration

[17] There was no real dispute between the parties about the legal principles governing the determination of an application to stay proceedings as an abuse of process. In R v Maxwell [2011] 1 WLR 1837 Lord Dyson stated at paragraph [13] that it was well established that the court had power to stay proceedings in two categories of case, namely (i) where it would be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. The decision in this case was made on the first basis and it is clear that this case falls far short of satisfying the requirements of the second test.

[18] In cases of delay the position has been clear since Attorney General's Reference (No 1 of 1990) [1992] QB 630 and was reaffirmed in R v F (S) [2012] QB 703. An application to stay proceedings for abuse of the process of the court, made on the grounds of delay, cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice occasioned by the delay which cannot fairly be addressed in the normal trial process.

[19] The approach concerning allegations of investigative failure or missing evidence was established in R (Ebrahim) v Feltham Magistrates' Court [2001] 1 WLR 1293. From Brooke LJ's judgment five propositions can be derived:

> "(i) The ultimate objective of the discretionary power to stay proceedings is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution… It requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.
>
> (ii) The trial process itself is equipped to deal with the bulk of the complaints in which applications for a stay are founded.
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> (iii) Where a stay on the grounds of abuse of process was sought on the basis that the relevant material was no longer available the court should first determine whether the police or prosecutor had been under any duty to obtain and/or retain that material.
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> (iv) If there had been a breach of such a duty any unfairness resulting from it should normally be dealt with in the course of the trial.
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> (v) A stay should not be imposed unless the defendant showed on the balance of probabilities either that by reason of such a breach he would suffer serious prejudice to the extent that it was impossible for a fair trial to be held or that there had been such bad faith or serious fault on the part of the police prosecutor that it was not fair that the defendant should be tried."

[20] In another case which was opened to us, R v F (TB) [2011] EWCA Crim 726; [2011] 2 Cr App R 13, Jackson LJ set out, at paragraph [37], a range of propositions derived from the court's review of authority, the following of which appear relevant in the present context:

> "(i) The court should stay proceedings on some or all counts of the indictment for abuse of process if, and only if, it is satisfied on balance of probabilities

that by reason of delay a fair trial is not possible on those counts.

(ii) It is now recognised that usually the proper time for the defence to make such an application and for the judge to rule upon it is at trial, after all the evidence has been called.

(iii) In assessing what prejudice has been caused to the defendant on any particular count by reason of delay, the court should consider what evidence directly relevant to the defence case has been lost through the passage of time. Vague speculation that lost documents or deceased witnesses might have assisted the defendant is not helpful. The court should also consider what evidence has survived the passage of time. The court should then examine critically how important the missing evidence is in the context of the case as a whole.

(iv) Having identified the prejudice caused to the defence by reason of the delay, it is then necessary to consider to what extent the judge can compensate for that prejudice by emphasising guidance given in standard directions or formulating special directions to the jury. Where important independent evidence has been lost over time, it may not be known which party that evidence would have supported. There may be cases in which no direction to the jury can dispel the resultant prejudice which one or other of the parties must suffer, but this depends on the facts of the case."

[21] Turning to this case, the starting point is to examine the Bill of Indictment. Count 1 alleges the offence of concealing criminal property contrary to section 327(1)(a) of the Proceeds of Crime Act 2002 in that between 10 January 2008 and 11 January 2009 the defendant concealed criminal property namely £81,856.91. The allegation is that there were 13 lodgements to the Santander account from the South African bank during this period made by the defendant.

[22] The prosecution case is that the defendant made a dishonest transfer. It is not suggested in this count – or indeed in any of the 16 counts alleged against the defendant – that he *opened* the Santander account. The dates on which each of the transfers was made is apparent from the documentation available from Santander. The defendant himself accepted in interview that he had received some £50,000 from

Mr Brazil, which he says was voluntarily given to him for the provision of accommodation and other services.

[23] There appears to be an issue as to whether or not the account was opened by Mr Brazil. The documentation in relation to the opening of the account was no longer available in October 2013, nor was it possible to identify the personnel involved. Santander had taken over Alliance & Leicester. The judge was correct to recognise that he might have to close the case to the jury pointing out the absence of documentation and the assertion by the defendant from an early stage that he had accompanied Mr Brazil to Omagh in order to open an Alliance & Leicester account. It seems likely that Mr Brazil's recollection on all of this is rather hazy.

[24] We do not accept, however, that the circumstances surrounding the creation of the account are at the core of the prosecution case. The core of this case relates to whether the defendant made the transactions which are identified in each of the 16 counts on the indictment and whether he was entitled to do so. The relevant material in relation to that will be the evidence relating to the bank transactions themselves, the evidence of Mr Brazil, the defendant's admissions and any evidence that the defendant may lead.

[25] It is common case that there has been delay in the prosecution of this matter. That is a matter upon which the judge will also have to advise the jury at the trial. It is regrettably not uncommon to have to do so. Nonetheless, we are entirely satisfied that the directions necessary in relation to count 1 are well within the competence of the learned trial judge and that with proper direction there is no reason why this trial should be unfair on that count. We do not consider that the trial judge identified any specific prejudice on this count that could arise on the issue of whether the defendant was entitled to make the transfers, much less any specific prejudice which could not be dealt with fairly in the course of the trial process itself.

[26] The remaining 15 counts relate to individual transactions in respect of which it is alleged that the defendant acted dishonestly. Documentation is available in relation to the date on which each transaction occurred and the issue for the jury will be whether they are satisfied that the defendant engaged in the transaction and that he acted dishonestly. The issue over who opened the account is plainly marginal in respect of those counts.

[27] Article 26 of the 2004 Order provides that the Court of Appeal may not reverse the ruling on appeal unless it is satisfied:

(a) that the ruling was wrong in law;

(b) that the ruling involved an error of law or principle; or

(c) that the ruling was a ruling that it was not reasonable for the judge to have made.

[28] The ruling of the learned trial judge focused on the potential dispute as to who opened the Santander account. He did not specifically examine the counts on the indictment, nor did he then identify the unfairness (if any) arising in relation to each of those counts, nor the specific ways in which any such prejudice might be addressed. In our view, that was an error of law. Mr Fahy did not seek to stand over the learned judge's suggestion that the only adequate direction would effectively be a "direction to acquit." Having reviewed the case, we also consider that this was a ruling that it was not reasonable for the judge to have made. The matters raised in the application can clearly be dealt with by direction. It is for the jury to decide how any direction guides their decision.

[29] As Fulford LJ observed in R v PR [2019] EWCA Crim 1225; [2019] 2 Cr App R 22, a case in which the court had to consider whether the trial judge was right to allow the case to proceed when evidence relevant to the defendant's defence had been destroyed and was unavailable, at paragraph [65]:

> "… there is no rule that if material has become available, that of itself means the trial is unfair because, for instance, a relevant avenue of inquiry can no longer be explored with the benefit of the missing documents or records. It follows that there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses. In some instances, this opportunity exits; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many accused whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested."

Conclusion

[30] For the reasons given, we grant the prosecution leave to appeal; allow the appeal; reverse the trial judge's ruling; and order that a fresh trial may take place in the Crown Court for the offences.