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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE KING

v

STEPHEN McCOURT

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Mr Desmond Fahy KC with Mr Blaine Nugent (instructed by McCourt Maguire Solicitors) for the Appellant
Mr Sam Magee KC with Mr Simon Reid KC (instructed by the Public Prosecution Service) for the Crown

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Before: Keegan LCJ, Colton LJ and McBride LJ

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal from a conviction for murder on 9 April 2025, brought with leave of the single judge, Humphreys J. The appellant was convicted following a trial at Dungannon Crown Court before Fowler J ("the judge") and a jury. On 28 May 2025 a sentence of life imprisonment with a minimum tariff of 24 years was imposed.

Background facts

[2] This case concerns the murder of Damien Heagney ("the deceased") who was a friend of the appellant. His murder was uncovered following a telephone call on 19 July 2022 to police from Dalriada urgent care regarding Mr Heagney. This call was prompted by the fact that he had not collected his regular repeat medical prescription since May 2022. Upon enquiries being made it also appeared that the deceased had last collected his prescription in person in December 2021. Therefore, the police undertook proof of life enquiries which confirmed that the deceased's bank account and telephone had not been used since 30/31 December 2021. Subsequent enquiries revealed that the last time the deceased was seen alive was on

31 December 2021 and the last activity on his phone appeared to be on 1 January 2022 when he sent a video message to a telephone number linked to the appellant.

[3] The police also examined the movements of the deceased's car and tracked it to Kerr Road/Moylagh Road junction of Beragh where it was recovered in July 2022. The deceased's home was searched on 26 July 2022. From that search it was observed that mail had built up, that there were no indicators of recent activity within the property and no signs of a break-in.

[4] Following from the above, police launched a murder investigation into the disappearance of the deceased on 5 August 2022. Shortly thereafter on 10 August 2022, the partial remains of the deceased were found in a reservoir at Cappagh, Co Tyrone. The body was dismembered and badly decomposed by the time that it was found. Stab wounds were apparent. The remains were confirmed to be those of the deceased following a post-mortem on 11 August 2022 and checks of dental records, DNA and fingerprints.

[5] As a result of police investigations a circumstantial and forensic case was built against the appellant. A police file was submitted to the Public Prosecution Service ("PPS") in March 2023.

[6] At interview, the appellant mainly answered "no comment" to the questions put to him under caution. However, he did provide a prepared statement to police in which he stated that he denied the murder of the deceased, that the deceased had been in his home for different lengths of time between September 2021 and January 2022 and that he was not there during some of this period. The appellant outlined that he had the deceased's vehicle removed from his house because of those the deceased had been associating with. The case proceeded to committal.

[7] Of relevance to this appeal, is that during the preparations for the committal proceedings material regarding other suspects was collated and reviewed. Material that passed the test for disclosure was provided to the defence together with primary disclosure. Furthermore, on 23 August 2023, after the accused had been returned for trial, intelligence material became available to the prosecution and was also viewed. At that time, notes were made of material that should be considered for disclosure. Further correspondence from the defence seeking disclosure drew this oversight to the attention of the directing officer. Therefore, the relevant material was not provided until a review of further intelligence material on 4 September 2024.

[8] The above oversight resulted in a trial date which was set for October 2024 having to be vacated pending resolution of the disclosure issue. A formal application was brought by the defence under section 8 of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act") seeking the disclosure of materials. In a written ruling the judge declined to name the ciphered persons in the disclosed material that had been provided by the police or to look behind the prosecution's

stance on neither confirm nor deny ("NCND") as to the identity or status of these persons. Thereafter, the trial proceeded.

[9] The appellant did not give evidence at trial. His defence statement dated 29 February 2024 contains a denial of murder, assault or other harm to the deceased. In the defence statement, the appellant stated that due to the passage of time, he was unable to say with any precision when he last saw the deceased. He confirmed that the deceased was a regular visitor to his home between September 2021 and January 2022. Also, that he had access to several vehicles and the deceased was in those vehicles during the material timeframe.

[10] The defence statement also set out materials the appellant sought by way of disclosure, in particular, the identity and material in relation to other potential suspects and whether or not they were informants or agents of the Police Service of Northern Ireland ("PSNI") and/or security services.

The circumstantial case against the appellant

[11] The various circumstantial strands of evidence linking the appellant to the murder were not substantially challenged. Specifically, the defence accepted the following matters:

(i) During a search conducted at the appellant's property 3 McGartland Terrace, Dromore, a single smear of Damien Heagney's blood was found.

(ii) A witness on some unspecified date referred to seeing the male occupant of 3 McGartland Terrace place a carpet with a large dark stain into the rear of a white van.

(iii) The white Berlingo van registered to the appellant at the time was sighted at the scene of deposition of Damien Heagney's remains on 6 January 2022 by a member of the public and the police.

(iv) A witness claimed to have dropped Damien Heagney at McGartland Terrace on 31 December 2021.

(v) The appellant was involved in the movement of Damien Heagney's BMW vehicle and was in possession of the key to the vehicle.

(vi) A witness indicated that the vehicle of the deceased was recovered from Clanabogan Road and moved to Kerr Road/Moylagh Road on 18 January 2022 and that the appellant was present in this vehicle.

(vii) A further witness indicated that he was contacted by the appellant to arrange recovery of the Berlingo van on a date unknown from Cappagh Reservoir.

[12] The prosecution summary of evidence also stresses the following salient facts. The appellant was the last known person to see the deceased alive. He met the deceased outside 3 McGartland Terrace in the early hours of 31 December 2021 after the deceased's BMW had broken down. The appellant's own prepared statement accepted that the deceased was at his home around the end of December and the beginning of January. The prosecution also relied on telephone evidence which indicated that the two men spent New Year's Eve together. The deceased messaged the appellant asking whether he had walked his dog and later asked him to bring cigarettes and beer back to the house. Cell site evidence placed the deceased's phone in the area covering 3 McGartland Terrace and showed the appellant returning to that area. Both phones remained in the Dromore area that night. The deceased was never seen alive after this time.

[13] The prosecution also refers to the fact that the deceased's last recorded banking transaction occurred on 30 December 2021. His phone remained around 3 McGartland Terrace over New Year until 3 January 2022. Interactive use of the phone effectively ceased on New Year's Day, with the last such activity approximately at 10:53am that day. His BMW also remained outside the appellant's home until it was moved by the appellant. The prosecution explains that the traces of the deceased's blood were found on the architrave around a bedroom door at 3 McGartland Terrace.

[14] Furthermore, the prosecution references the fact there were periods when the appellant's phone was switched off or ceased communicating with the network. On 2 January, the appellant's phone was off for approximately five hours from 07:43hrs. It was subsequently switched off again from approximately 22:58hrs and the handset he had been using was never used again. The appellant began using a different handset the following afternoon.

[15] The prosecution also refers to the movement and apparent abandonment of the deceased's phone. On 3 January, the deceased's phone moved from the Dromore area to the Fermanagh lakes/Kesh area. At the relevant time the appellant's own phone was switched off. The appellant's Citroen Berlingo was recorded by ANPR travelling back from the Irvinestown area at 12:42hrs while the deceased's phone was communicating with cell sites around the Fermanagh lakes. The deceased's phone remained in that area until losing power shortly after 21:00hrs. Later that night, the appellant's new phone attempted to call the deceased's phone. The following morning the appellant's phone was again switched off for approximately 5½ hours, during which time the deceased's phone briefly powered on in the Fermanagh lakes area before losing power again.

[16] The prosecution points to the fact that the appellant and his vehicle were repeatedly associated with the general Pomeroy/Cappagh Reservoir area in the days immediately following the deceased's disappearance. His phone travelled towards that area on 2 January and was again in the area on 4 January. On 5 January, both the appellant's phone and the Berlingo were recorded in the Beragh/Pomeroy area.

By approximately 07:30hrs on 6 January, the appellant's Berlingo was at Cappagh Reservoir where the deceased's remains were subsequently found. The van was stuck in snow in soft ground at the far end of the site, close to the water, with its rear doors facing towards the water.

[17] Of note is that when the police asked the appellant that day why his van was at the reservoir, he suggested that his father might have been driving it. His father subsequently gave evidence that he had never driven any of his son's vans. The appellant also arranged for the Berlingo to be recovered from the site and possessed the key when it was removed. In addition, bolt cutters were removed from an outhouse leased by the appellant. DNA evidence provided compelling support that the appellant's DNA was present on the cutters. Tool mark examination provided support for the proposition that the cutters had made one of the cut ends of the sheep wire used to wrap one of the packages containing Heagney's remains. Heagney's BMW remained outside the appellant's address after the deceased disappeared. The appellant moved it, ultimately, arranging for it to be left at a location off the Omagh/Ballygawley Road where it remained for months.

[18] Arising from the foregoing, the prosecution highlights the fact that the appellant gave no explanation for the following:

(i) Why the deceased's blood was found at his home;

(ii) Why his phone was switched off during several significant periods;

(iii) Why his vehicle was travelling from the area where the deceased's phone was apparently abandoned;

(iv) Why he repeatedly travelled in the direction of Cappagh Reservoir;

(v) Why his Berlingo was found stuck beside the water at the eventual body deposition site;

(vi) Why he initially suggested his father might have been responsible for the van being there;

(vii) Why he subsequently moved the deceased's BMW; and

(viii) How bolt cutters associated with him came to be forensically linked to wire used to wrap the deceased's remains.

The alternative explanation - Person A

[19] The appellant relied upon the fact that there was a viable alternative suspect, Person A. In this regard the following agreed facts were placed before the jury in the course of the trial:

(i) Police hold information which suggests that in 2020 there was an ongoing dispute between Damien Heagney and a male individual, Person A. The information referred to in this paragraph was assessed by police and was unable to be verified or corroborated.

(ii) Person A was never designated as a suspect by police in the course of their enquiries into the disappearance and murder of Damien Heagney. In information provided to police, Person A was one of a number of persons named as a person who was involved in the murder. The information relating to Person A claimed that the murder had been made to look like a republican related murder, but it had to do with drugs. Information was also received that Person A is known to the appellant. The information referred to in this paragraph was assessed by police and was unable to be verified or corroborated.

(iii) A mobile telephone handset which was in the possession of Person A on 22 June 2022 was seized by police on that date for reasons unrelated to this police investigation.

(iv) Analysis of the telephone handset from Person A conducted by police after court proceedings commenced in this case, identified that by 22 June 2022 Person A had blocked Damien Heagney on Facebook at an unknown prior date and time.

[20] During the trial Detective Superintendent Wilson, the senior investigating officer, was tendered to give evidence in relation to Person A. We have read the transcript of her evidence. From that we can see that the appellant's counsel had the opportunity to explore the alternative suspect question in some detail. As is apparent from the agreed statement of facts, the issue of Person A was also before the jury and forms part of the judge's charge.

The ***grounds of appeal***

[21] The grounds of appeal have been distilled into three points as follows:

(i) That the judge erred in law in the way he dealt with the evidence of Person A and the other ciphered individuals named and information received by the PSNI pertaining to involvement in the murder of Damien Heagney;

(ii) The judge erred in refusing on two occasions, defence applications to stay the proceedings as an abuse of process of the court because of the unfairness to the appellant that resulted from the prosecution failures in the statutory disclosure process; and

(iii) That the judge erred in the way he directed the jury in relation to telecommunications evidence.

Consideration of the grounds of appeal

[22] It is within the above factual matrix that we must determine the grounds of appeal. Grounds 1 and 2 relate to the discovery matters and are inter-related. The nub of argument advanced by Mr Fahy is that NCND applied by the PPS to the material related to Person A affected fair trial rights and, as such, the judge was wrong to refuse the abuse of process/stay applications. The second substantive ground of appeal Ground 3 relates to two alleged errors in the judge's charge in relation to the evidence that was before the court.

Ground 1 – The evidence in relation to Person A and other ciphered individuals

[23] In relation to this ground of appeal it is common case that disclosure was not dealt with in the timely way that it should have been. This is illustrated by the following sequence of events. The alternative suspect issue was clearly raised in the defence statement. The reply to the defence statement that was initially given by the prosecution dated 7 May 2024 did not adequately address this issue. Then it appears that the defence sent an email to the PPS dated 16 July 2022 which clearly put in issue the disclosure requested because the queries concerned potential suspects apart from the appellant in relation to this murder. There was a holding response provided in September 2024. Further reminders were raised until the next substantive correspondence received was 3 October 2024.

[24] When it came the substantive response included an attachment headed "Disclosure from intelligence material" and a form of words referred to as FOW1. The accompanying email indicated that all material had been reviewed in August 2023 but that through oversight there was failure to revisit the material and an error had been made. The response further stated that, "no further duty of disclosure arises from the material contained in this document or lines of investigation considered, known in relation to the specific queries raised by your office below."

[25] We can see that the content of the disclosure from intelligence material summarised in FOW1 detailed eight separate instances where the police hold information relating to the deceased and/or the murder of Damien Heagney. Unnamed individuals ciphers A-H were referred to and also specific references to Person A were made. The defence in this case, in their skeleton argument highlight some aspects of this material regarding Person A who was the primary target for the alternative suspect argument, as follows:

> "IRA link to drugs and is a gun for hire. Has been named as being involved in Heagney's murder which was made to look republican related but it has to do with drugs – police hold information which suggests that in 2020 there

> was an ongoing dispute between Person A and Damien Heagney – police hold information from October 2022 that Damien Heagney had made death threats towards Person A's nieces. Person A is connected to the male that was arrested for the murder, Reggie McCourt [a name by which the appellant was known], possibly to do with drugs and he may have been involved with one of Person A's nieces."

[26] There were further requests made by the defence in relation to this material and specifically, requests made in relation to any intelligence material given a reference to C3 which is an intelligence branch within the PSNI.

[27] This led to the disclosure of a form of words 2 ("FOW2") which essentially advised on other suspects and stated that no further duty of disclosure arose.

[28] Following from this the appellant continued to press for further disclosure and specifically raised the following matters:

(i) In addition to Persons A-H referred to in FOW1, there are now references to three further individuals in FOW2, I, J and K.

(ii) In keeping with the submissions made at paragraph 10 in the original section 8 application, Person A remained a person of considerable interest. In the context of this application the cumulative information held by police is that he was a person who had connections with both the deceased and the appellant. Person A is now described as a close associate of the deceased, in addition to the connections to the appellant which have already been set out. The significance of Person A is, in fact, amplified by the further information provided. It is now known that Person A:

> "Has a criminal record spanning 25 years. Person A has a total of 12 convictions including – taking part in an unnotified procession – wearing clothing or having articles as a member or supporter of a proscribed organisation – managing a meeting in support of a proscribed organisation and aiding and abetting, possession of a firearm or ammunition in suspicious circumstances – possessing explosives with intent to endanger property."

[29] Thereafter, a section 8 application was brought under the 1996 Act. This formally brought the disclosure issue into the court arena. By this stage, the prosecution had confirmed in correspondence who Person A was to the defence legal team however he remained cyphered in the proceedings.

[30] The judge also directed an immediate examination of Person A's mobile phone which was available. That examination revealed that due to the passage of time, specifically the period of 12 months beyond which mobile phone providers do not retain cell site data, no cell site data was available for the phone for the period of time relevant to the murder of Damien Heagney. The mobile phone attributed to Person A was switched off and removed from the network between 29 December 2021 and 7 January 2022. There was also, the defence say, some evidence of Person A and Damien Heagney being mutual contacts on Facebook and of Person A blocking him, Heagney, as a friend at some unspecified time. These matters were all ventilated in two defence applications to stay proceedings as an abuse of process. However, in parallel with this, the prosecution agreed a form of words which were put to the jury.

[31] The nub of the case advanced by Mr Fahy began as criticism of the disclosure process summarised above and evolved into a more discrete argument that the appellant was denied a fair trial due to the prosecution applying NCND to the information it held by way of disclosure in relation to Person A. Specifically, the defence disclosure requests included a query as to whether any of the ciphered individuals in FOW1 and FOW2 had any associations with criminal gangs or terrorist groupings or were an informant or agent for the PSNI and/or MI5. In response, the prosecution stated:

> "In accordance with well-established principles, the prosecution can neither confirm nor deny the involvement of a human source in any investigation."

The defence further argue that the anonymisation of Person A is related to the reliance by the prosecution on NCND in response to defence requests.

[32] The thrust of Mr Fahy's submissions was that the prosecution reliance on NCND in a criminal law trial is incompatible with the fair trial provisions of article 6 of the European Convention on Human Rights ("ECHR"). He submitted that to the best of his knowledge and research, this issue had not been determined previously by this court. On this issue it is important to understand that the prosecution was not relying on NCND to refuse to provide material which met the disclosure test. That would be a different matter entirely.

[33] The judge's ruling on the section 8 application deals with this matter in the following way. First, the judge cited the test under section 3 of the 1996 Act which contains the duty of disclosure upon the prosecution as follows:

> "**3 Initial duty of prosecutor to disclose**
>
> (1) The prosecutor must—

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining] the case for the prosecution against the accused or of assisting the case for the accused, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

(2) For the purposes of this section prosecution material is material—

(a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or

(b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.

(3) Where material consists of information which has been recorded in any form the prosecutor discloses it for the purposes of this section—

(a) by securing that a copy is made of it and that the copy is given to the accused, or

(b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;

and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.

(4) Where material consists of information which has not been recorded the prosecutor discloses it for the purposes of this section by securing that it is recorded in such form as he thinks fit and—

(a) by securing that a copy is made of it and that the copy is given to the accused, or

(b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.

(5) Where material does not consist of information the prosecutor discloses it for the purposes of this section by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.

(6) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(7) Material must not be disclosed under this section to the extent that it is material the disclosure of which is prohibited by section 56 of the Investigatory Powers Act 2016].

(8) The prosecutor must act under this section during the period which, by virtue of section 12, is the relevant period for this section."

[34] The judge then referred to the fact that Mr McHugh KC, who was prosecution counsel at the time, had personally consulted with police attached to C3 and inspected the intelligence material available in this case. The judge records Mr McHugh's confirmation that he had reviewed the material made available to him and carried out the appropriate disclosure analysis and nothing further arose which met the test for disclosure under the 1996 Act. Furthermore, this was not a circumstance where material held by the prosecution could not be disclosed due to public interest immunity ("PII") which would have required an application to the court to decide if the material should be withheld on public interest grounds.

[35] The judge goes on to find that the form of words provided to the defence designated as FOW1 and FOW2 were consistent with the background intelligence and were disclosed out of an abundance of caution. The prosecution confirmed that all material reasonably capable of assisting the defence case or undermining the case for the prosecution had been disclosed. In providing that assurance it was outlined to the court that the prosecution was mindful of the duty to provide material, not only where it could be used to explain the accused's actions, support his case, have a bearing on scientific evidence, or provide material for cross-examination of prosecution witnesses, but also might support submissions that it could lead to the exclusion of evidence, a stay of proceedings, or finding any public authority had acted incompatibly with the accused's rights under the ECHR.

[36] The judge accepted that the defence statement was sufficient to trigger disclosure and, in fact, disclosure of intelligence documentation was given by the PPS after it was served on the prosecution. The judge relied on the dicta of Lord Bingham in *R v H, R v C* [2004] 1 All ER 1296 at para [35] which states as follows:

> "… neutral material or material damaging to the appellant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling and the disclosability of material in its hands."

[37] The judge found that in the circumstances that pertained where senior counsel has made an assessment and assured the court that no further material required to be disclosed, the fact that the appellant had served an application under section 8(2) of the 1996 Act is insufficient to require the court to consider the disputed material. He reached this conclusion on the basis that section 8(2) requires the accused to have reasonable cause to consider that there is material in respect of which there is a duty of disclosure. Most pointedly the judge also said that it is insufficient that the defence is interested in ciphered persons or is concerned that there might be something to be gained from the disclosure of further intelligence or documentation arising from the intelligence material. Instead, to succeed the appellant must be able to point to something that gives reasonable basis for suggesting that the material exists and will assist the appellant or undermine the prosecution case. In that regard the judge found that "in light of counsel's assurances, who has a statutory obligation to carry out the disclosure exercise, I do not consider that such a foundation has been established." Hence, the judge ruled that there was no further disclosure that needed to be provided and declined to name the ciphered persons or to look behind the prosecution's stance on the limited application of NCND to an ancillary question.

[38] We consider the judge's reasoning to be sound. The overarching principle is that unused material will fall to be disclosed if and only if it satisfies the test for disclosure in the 1996 Act. As the House of Lords stated in *R v H* if material does not weaken the prosecution case or strengthen that of the defence there is no requirement to disclose it. The corollary is that any material that weakened the prosecution or aids the defence must be disclosed. The prosecution is under a duty to disclose relevant material, and prosecution counsel is under a duty to independently verify the position to the court. In this case there was no basis upon which a court would look behind the assurances given.

[39] Furthermore, Mr Fahy had the opportunity to cross-examine the relevant police witness at trial about this issue. He asked the witness a series of questions about Person A. The complaint raised is simply that the judge would not allow questions in relation to the matters covered by NCND, namely whether A was an

informant protected by police or the security services. This prohibition was, of course, consistent with the judge's ruling which we have explained above.

[40] The limited number of cases relied upon do not detract from what we have just said. *Beth and the Security Service* [2024] UKIPTrib 3 a case from the Investigatory Powers Tribunal sets out some general principles, namely the strong public interest in protecting the anonymity of informers and of undercover officers and, thus, permitting them and their superiors neither to confirm nor deny their status. However, it is for the court to balance the public interests in the NCND policy against any other competing public interests which may be applicable. Reference is also made to two other cases, namely *Marks v Beavis* (1890) 25 QBD and *R v Agor* (1990) 90 Cr App R 318. However, these cases simply refer to the principle that revealing the identity of the informer or the undercover officer may be necessary to avoid a miscarriage of justice.

[41] Accordingly, there was nothing unlawful about the application of NCND in this case. The judge rightly disallowed the question Mr Fahy wanted to ask about Person A's status as this would have introduced speculation about whether A was an informant which was not an issue in the case. The issue was whether A could have committed the murder. The defence was able to raise this issue fairly and squarely in cross examination of the police witness and the jury were also given information in the agreed note which covered this issue. Furthermore, in his charge the judge dealt fairly with the defence contention that the evidence adduced at trial in relation to Person A was evidence which pointed away from the guilt of the appellant. Therefore, we are satisfied that no breach of fair trial rights has occurred.

[42] For completeness sake we also record the fact that no ruling was sought that the name of Person A should go before the jury. There is therefore no valid argument on appeal in relation to anonymisation. Accordingly, the first ground of appeal inevitably fails.

Ground 2 - Abuse of process

[43] Two applications were made to the judge to stay the proceedings based on alleged abuse of process. The law in this area is summarised in *Blackstone's Criminal Practice 2027* D3.51-3.98. The defence placed reliance on *Re DPP for Northern Ireland's Application* [1999] NI 106 which sets out the underlying principles which were subsequently affirmed in *R v Maxwell* [2010] UKSC 48. This is now a lead authority on abuse of process applications which were also summarised in *Warren v A-G for Jersey* [2011] UKPC 10 (at para [22]), where Lord Dyson highlighted the two categories of case in which the court has the power to stay proceedings for abuse of process as follows:

> "It is well established that the court has the power to stay proceedings in two categories of case, namely (i) where it will 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. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will offend the court's sense of justice and propriety (per Lord Lowry in *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 (at 74G)) or will undermine public confidence in the criminal justice system and bring it into disrepute (per Lord Steyn in *Latif* [1996] 1 WLR 104 (at 112F))."

[44] In *R v Crawley* [2014] EWCA Crim 1028, Sir Brian Leveson P also summarised the scope of abuse of process at paras [17]-[18] and reiterated that:

> "… there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort."

[45] The defence bears the burden of establishing abuse of process on the balance of probabilities. The law also provides that there is effectively, a presumption that the trial should go ahead unless there is a compelling reason for stopping the trial from taking place which may be as a result of fairness issues which arise under limb 1 or to protect the integrity of the justice system under limb 2.

[46] These were limb 1 applications to stay proceedings for abuse of process due to alleged unfairness. In ruling upon these applications, the judge expressly reminded himself that the stay jurisdiction is to be exercised carefully and sparingly and only for very compelling reasons and that it is not a disciplinary jurisdiction employed to express disapproval of official conduct. In this sense, it was not enough to say that the disclosure had been conducted in an unsatisfactory manner which caused delay. Rather, the court had to look at the substance of matters. The judge identified the defence case; he decided that a fair trial was possible given the disclosure and the matters that had now been provided and that this could be all encompassed with appropriate directions being given to the jury. We find nothing wrong with this analysis. Rather, this analysis chimes with the law that applies when disclosure failings prompt an abuse of process application.

[47] We acknowledge that failure on the part of the prosecution to comply with the disclosure obligations created by the 1996 Act may (in appropriate cases) amount

to an abuse of process. However, that will be a rare occurrence which will necessarily depend on the particular facts. Some of the relevant factors to be taken into account when deciding whether non-disclosure amounts to abuse of process were considered in *R v Salt* [2015] EWCA Crim 662, and included the gravity of the charges, the denial of justice to the complainants, the necessity for proper attention to be paid to disclosure, the nature and materiality of the failures, the conduct of the defence, the waste of court resources, the effect on the jury and the availability of sanctions other than halting proceedings. In *R v Ahmed* [2021] EWCA Crim 927, the Court of Appeal also set aside a stay granted based on failings in disclosure as it did not amount to "gross executive misconduct."

[48] It is not suggested that this case is in the category of gross executive misconduct. What was in issue was whether the appellant could get a fair trial. In our view, the trial judge confronted the relevant issues, applied the correct legal test and decided that there was no question of a fair trial being compromised. There may have been lost investigative opportunities resulting from some of the decision making by the police, not least the failure to fully undertake phone analysis in relation to Person A. This, in our view, did not render the judge's decision to refuse a stay one that fell outside the bounds of his discretion. Therefore, we conclude that ground 2 must fail.

Ground 3 - The judge's charge on telecommunication evidence

[49] Ground 3 is an attack on the judge's charge in relation to how he dealt with the telecommunications evidence. Within a long and detailed charge, Mr Fahy has picked out two brief portions which he says are inaccurate and had the potential to prejudice the jury. The first portion is where the judge said, "you will recall that the evidence was that the appellant made his way in the general direction of Kesh." The second portion is where the judge referred to Person A's phone being blank during a period when the murder occurred being adverse to his client.

[50] There was a requisition which the judge considered. The transcript records the exact terms of the Mr Fahy's complaint as follows:

> "The other issue, My Lord, is in relation to your treatment of the telephone evidence. My Lord, the – the manner in which the direction has been given to all of the telephone evidence, bar one issue, and I take no argument with, it is in relation to the way in which he dealt with the placing of – well – first off the travelling of the deceased's phone from Dromore to Kesh, in that portion of your charge and then when you suggested one of the questions that might likely to be asked by my learned friend was a penetrating question as to why he travelled to Kesh. My Lord, that is simply not in evidence and, in fact, the notion that Stephen McCourt has travelled to Kesh has only come

> legitimately from the closing speech, but that is not evidence, because the evidence is that at all points during that time, McCourt's phone remained in Dromore."

[51] The judge corrected other directions in relation to hearsay but declined to make any alteration as regards the telecommunication evidence. We must therefore consider whether leaving the charge as it stood after the requisition occasioned prejudice to the appellant.

[52] In assessing the merits of this remaining ground of appeal we repeat what this court has emphasised on numerous occasions - that a summing up is to be read as a whole when assessing whether an error occurred concerning the facts which could have misled the jury, see for example *R v Sloan* [2008] NICA 46 at para [8].

[53] With this principle in mind, we have considered Mr Fahy's criticism of part of the judge's charge. Having done so, we acknowledge that the judge's use of the word "evidence" in relation to what he said about Kesh emanated from the prosecution submission rather than from direct evidence. It was therefore an inference the prosecution wished to draw. Upon examination of the passages in which the judge dealt with the question of the telephone evidence, it is reasonable to assume that the judge was referring to the prosecution case as supporting the inferences it was asking the jury to draw. We must consider his reference to "evidence" in the context of the case and reading the charge in its entirety.

[54] When the requisite holistic exercise is undertaken it becomes clear that the case being made by both prosecution and defence is amply explained by the judge. This is illustrated by the following portion of the charge:

> "Now, the prosecution relies heavily on cell site analysis to place the appellant in various locations, on the significance of the powering on and off of the mobile phones, as the prosecution would have you believe as being suspicious activity, that you should look at and rely upon. However, Mr Fahy makes the case based on his expert report from Mr Hope and from the cross-examination of Detective Constable Deeny, that cell site analysis and the powering on and off of phones had significant weaknesses and limitations. … Cell site analysis can only show the general area or vicinity a mobile phone is in and the cell is that it was using, it can't say that a phone or a person holding a phone is in a specific location."

[55] Furthermore, we are satisfied that the prosecution was not inviting the jury to find as a fact that Person A had innocently changed his telephone while simultaneously treating the prosecution theory concerning the appellant as proved

in fact. Rather various inferences were suggested. The judge was rehearsing a prosecution inference which had been openly and extensively advanced in closing, rather than supplying the jury with evidence that did not exist or directing them that the journey to Kesh was an established primary fact. Overall, we do not consider that the claim of prejudice is made out by virtue of the criticisms made of the parts of the judge's charge highlighted by the defence. Therefore, ground 3 must also fail.

Conclusion

[56] In reality, there was a strong circumstantial case against the appellant. Thus, while disclosure was late regarding Person A and incomplete regarding A's phone, those features of the case do not detract from the safety of this conviction. Neither does the judge's misdescription of the appellant travelling towards Kesh as evidence. This case must be assessed in its entirety. When done so, we consider that the proceedings were fair. The jury was clearly sighted on an alternative suspect A. The judge dealt with this issue adeptly. We find no fault in his dismissal of the stay or abuse of process application.

[57] Furthermore, the judge was right to rely upon the fact that prosecution senior counsel had provided a verification as to disclosure. The judge's summing up to the jury also made it clear that it was for the jury to decide questions of facts and what inferences it was proper to draw. He fairly summarised the cases put forward by the prosecution and set out the counter arguments raised by the defence.

[58] When considered cumulatively, the strands of evidence in this case were a solid foundation upon which the jury could find the appellant guilty. Specifically, the appellant did not give evidence at trial to explain why the deceased's blood was found at his home, why his phone was switched off during significant periods, why his vehicle was travelling from the deceased's phone was abandoned, why he travelled in the direction of Cappagh Reservoir where the deceased's remains were found, why his Berlingo van was found stuck beside the water where the deceased's body was found, why bolt cutters associated with him came to be forensically linked to the wire used to wrap the deceased's remains and why he made suggestions that his father might have been involved with the van.

[59] The judge also gave a classic direction as to how the jury should treat a circumstantial case. In the course of his closing, he said:

> "And then taking all these pieces of circumstantial evidence together as a whole and then, again, stress test in the circumstantial case, it had made all the strands of circumstantial evidence, looking at all that has been described to you, I think, possibly by both counsel, as the building blocks of the case against the appellant. And, as I say, I must warn you that you must not engage in guess work or speculation about matters that have not been laid

> in evidence before you, because there is a real significant difference between coming to common sense conclusions based upon evidence, reasonable inference based upon facts and evidence, as established in court as opposed to guesswork or speculation about what if there was evidence about something else.
>
> You do not speculate. A real risk of injustice in a circumstantial case is the danger that speculation might become a substitute for the drawing of sure inferences of guilt and that you, the jury, might neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt. You can only rely and act upon circumstantial evidence if it necessarily leads to only one conclusion in that you can reject all other reasonable explanations, pointing away from guilt that weaken or destroy any inference of guilt. It will be for you to weigh up all the evidence in this case and decide whether the prosecution, at the end of this case, had made you sure that the appellant is guilty."

[60] The fact that a case is circumstantial does not make it any less potent. As several authorities such as *R v Courtney* [2007] NICA 6 have said:

> "In a case depending on circumstantial evidence, it is essential that the evidence be dealt with as a whole because it is the overall strength or weakness of the complete case rather than the frailties or potency of individual elements by which it must be judged. A globalised approach is required not only to test the overall strength of the case but also to obtain an appropriate insight into the interdependence of the various elements of the prosecution case."

[61] Accordingly, we consider that the conviction is safe. The appeal is dismissed.