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IN THE CROWN COURT IN NORTHERN IRELAND

SITTING IN BELFAST

REGINA

v

DAVID JONATHAN HOLDEN

Mr C Murphy QC with Mr S Magee QC (instructed by the Public Prosecution Service) for the Crown
Mr F O'Donoghue QC with Mr I Turkington (instructed by MTB Solicitors) for the Defendant

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RULING ON ABUSE OF PROCESS APPLICATION
AND APPLICATION FOR DIRECTION OF NO CASE TO ANSWER

O'HARA J

Introduction

[1] The defendant is charged with one count of manslaughter, namely that on 21 February 1988 he unlawfully killed Aidan McAnespie, contrary to common law. In advance of the trial the defence lodged an application that the proceedings should be stayed on the ground that they constitute an abuse of process. By agreement consideration of that application was deferred until the end of the prosecution case, the rationale being that at that point the court will have a clearer picture of the effect, if any, which delay and other factors have had on the trial.

[2] That stage has now been reached so the abuse of process application falls to be dealt with under each of the two limbs which the defence relies on:

A. The defendant cannot receive a fair trial.

B. It is otherwise unfair to try the defendant.

In addition, the defence has applied for a direction that the evidence presented by the prosecution is such that there is no case for the defendant to answer because no reasonable jury (or judge) properly directed on the law could find the defendant guilty.

[3] Before dealing with those applications it is necessary to set out the background to this trial and a summary of the evidence which has been presented.

Background

[4] In February 1988 the defendant was an 18 year old soldier, a Guardsman in the Grenadier Guards. He was born on 20 October 1969 and joined the army on 14 October 1986. He then underwent basic training until July 1987 and further training beyond that, including training on a range of firearms. (The extent and nature of that training is to some degree a matter of dispute, especially in relation to his familiarity with a general purpose machine gun ("GPMG").)

[5] The defendant arrived in Northern Ireland in July 1987 but was confined to duties in barracks until October 1987 when he reached the age of 18. After that he spent time doing such duties as foot patrols, mobile patrols and sangar duties although it appears that Sunday 21 February 1988 was the first time he was ever on duty in a sangar armed with a GPMG.

[6] At Aughnacloy, Co Tyrone, near the border with the Republic of Ireland, there was a permanent vehicle checkpoint ("PVCP"). There were two sangars at the checkpoint, each with an upper and lower level and with openings or observation slits through which soldiers could observe and record people and traffic coming and going.

[7] At approximately 2.45pm Mr McAnespie parked his car on the northern side of the checkpoint. He then walked through the checkpoint on his own, in the direction of the border. He was not armed and posed no risk to anyone. The fact of his presence was drawn to the attention of the defendant who was on the upper level of the sangar by Guardsman Norris because there were suspicions about Mr McAnespie – he was said by military witnesses to be a "person of interest" to the security forces.

[8] According to Norris, the defendant told him that Mr McAnespie was walking along the road which would mean he was walking towards the border with his back to the checkpoint. A few minutes later the defendant discharged three bullets from the GPMG which he was armed with in the sangar. One of these three bullets hit the ground near Mr McAnespie and ricocheted into him, entering his back and going through his body. It caused considerable laceration of the right lung, resulting in severe internal bleeding and death.

[9] It is beyond dispute that the bullet which killed Mr McAnespie was fired from the GPMG held by the defendant.

[10] The defendant was questioned by Detective Chief Inspector C Stewart of the Royal Ulster Constabulary with Detective Inspector M Farr on 22 February 1998. He answered questions and provided a written statement with the assistance of legal representation. On the evening of 22 February he was charged with manslaughter i.e. the unlawful killing of Mr McAnespie. It appears from the sequence of events that at some point soon after that the defendant was granted bail into military custody.

[11] On 6 September 1988 at approximately 10pm a conference took place at the Northern Ireland Forensic Science Laboratory. A note of what was discussed and who was present was prepared the next day by Mr I Morrison of the DPP. With him that night were two other senior representatives of the DPP, DCI Stewart and the firearms expert from the Forensic Science Laboratory, a Mr P Montgomery.

[12] Mr Montgomery had already provided a written report to the DPP which was discussed, explained and expanded upon. Mr Morrison's note of the meeting concludes with a summary of the views reached by all or some of them in attendance in light of the exchanges:

> "1. It is probable that the weapon was mistakenly left in a cocked condition by L/Sgt Peters;
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> 2. Holden would have had no reason to suspect that the gun was cocked and ready to fire;
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> 3. The explanation given by Holden that his wet finger slipped off the tripper guard onto the trigger thus discharging the weapon cannot be ruled out but;
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> 4. The more likely explanation for the discharge is that in grasping the weapon in order to move it Holden's finger pulled the trigger without slipping but without Holden intending to discharge any rounds.
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> 5. The pattern of strike marks does not lead to any certain conclusion as to whether the weapon was firmly aimed at the time it began to discharge or whether it was being moved in the manner Holden claims. In either case it cannot be predicted exactly how the direction of the weapon would have been

> moved by Holden's reaction to a discharge which he did not expect."

[13] On 26 September 1988 the charge of manslaughter against the defendant was withdrawn in Belfast Magistrates' Court and the criminal case came to an end. It then appears that the defendant may have remained in military custody until on or about 22 December 1988. On that date he admitted an offence of conduct to the prejudice of good order and military discipline, contrary to section 9 of the Army Act 1955. The details of the offence were that "at Aughnacloy on 21 February 1988 when on duty at a vehicle checkpoint there [he] so negligently handled a general purpose machine gun as to cause it to be discharged." For this offence his commanding officer imposed a fine of £370.86.

[14] That is how matters remained until 2008 when the Historical Enquiries Team ("HET") of the Police Service of Northern Ireland provided a report to the family of Mr McAnespie on the killing. In September 2015 the then Attorney General invited the then Director of Public Prosecutions to review the 1988 decision not to prosecute. (At least in part this appears to have been prompted by what DCI Stewart says is a misinterpretation or misunderstanding by the HET of his conclusion at the end of his investigation in August 1988.)

[15] The outcome of this process was that in June 2018 a decision was issued that the defendant be prosecuted (again) for manslaughter. I heard an application for a "No Bill" and ruled against the defendant on 20 August 2021. In that ruling I allowed the prosecution to proceed on the manslaughter charge, keeping open alternative approaches of either unlawful act manslaughter or gross negligence manslaughter.

[16] After the conclusion of the prosecution evidence at this trial, the Crown confirmed that its only case was of general negligence manslaughter. That case was summarised in the following terms:

> "It will be contended that on any reasonable interpretation of the facts it can be safely inferred that the actions of the accused, which were a substantial cause of Mr McAnespie's death, were (at the very least) so grossly in breach of the duty of care he owed to Mr McAnespie that a jury could safely convict."

The Evidence

[17] It should be noted that ultimately the prosecution accepted that at this trial it is not advancing the case on the basis that there is new evidence which was not known or available in 1988 when the decision was taken not to continue with the prosecution. Rather the prosecution contention is that the 1988 decision was simply wrong.

[18] Much of the evidence was not disputed. In broad terms there is agreement about what happened on 21 February 1988 with the dispute focusing on why and exactly how it happened.

[19] The original GPMG fired by the defendant was available at court for examination and inspection but in the intervening years it had been modified. Accordingly, the prosecution also brought a second GPMG, very similar to the original.

[20] The scene of the shooting has changed completely since 1988 but the prosecution was able to provide the original maps from the scene with markings depicting all relevant information. In addition, the photographs taken at the time were available. They showed the sangar, the spot where Mr McAnespie lay dead and other essential details.

[21] Those maps showed that of the three bullets fired by the defendant one left a strike mark (KD1) on the road 122 metres from the sangar, another (KD2) left a strike mark on the road 283 metres from the sangar and the third (KD3) left a strike mark on the road 299 metres from the sanger. Mr McAnespie's body was between KD2 and KD3, 296 metres from the sangar. It is most likely that he was killed by the bullet which left strike mark KD2 and then ricocheted off the ground into his body. Which of the three rounds that was in order of fire is less certain.

[22] The GPMG was capable of firing 750 rounds per minute. Accordingly, the firing of three rounds would take less than .25 of one second.

[23] The prosecution case was opened on the basis that "the issue of safety was emphasised by standing orders placed on a notice board of the Aughnacloy sangars including the handover/take over drill for the GPMG which set out the procedure to be adopted when assuming control of the gun." This two page drill (Exhibit 4) sets out in detail what is to happen when sentries are posted and relieved, a role which is to be assumed "personally by the Guard Commander or his deputy whenever possible." The precise and elaborate nature of the drill reflects the level of danger which the GPMG represents. It also specifies the training which is to be given to soldiers who are "likely to handle GPMGs in a sangar or elsewhere."

[24] On 21 February 1988 from approximately 8:30am the defendant and Norris were assigned to the north sangar. They took over responsibility at that sangar under the direction of Lance Sergeant Peters. The defendant and Peters went upstairs in the sangar. The soldier coming off duty unloaded the GPMG and Peters counted 150 rounds. In his evidence Peters then said that he told the defendant to take the gun and place a belt with 50 rounds in it. At this point Peters knew that the gun had been cleared by being unloaded by those who were leaving duty. Peters then confirmed with the defendant that he was happy with the gun and with his orders. As Peters agreed in cross-examination, this procedure did not exactly match

the drill referred to in the prosecution opening which had been on the notice board in the sangar. He testified that the end result of what he did with the defendant should be the same but accepted that it was different because the defendant did not personally go through every element of the drill himself.

[25] The evidence given by Norris was that after approximately two hours downstairs in the sangar he swapped places with the defendant who had been upstairs. It was undisputed that when this change over took place there was no involvement from Peters or any other officer and there was no compliance with the drill which requires sentries to be posted and relieved personally by the Guard Commander or his deputy whenever possible.

[26] The circumstances were complicated that day by the arrival for an unannounced inspection of the PVCP of Sergeant Major Beresford and Colour Sergeant Hague. They arrived at approximately 11am and stayed for about 45 minutes. During the inspection Hague went to the north sangar where Norris was in the upper part with the GPMG and Holden was at the lower part. There is some confusion and uncertainty about precisely who else was there at different points.

[27] As part of the inspection Hague appears to have instructed Norris to take the GPMG off the bracket which was supporting it at the north facing observation slit and to unload it. According to Norris, Peters was also there. Hague required the barrel to be removed. When some rust was found on it (possibly because the barrel protrudes from the observation slit and is exposed to the elements) Hague required the barrel to be cleaned.

[28] This was done by the defendant being handed down the barrel, taking it to be cleaned and then returning to the sangar and handing it to someone for the GPMG to be reassembled upstairs.

[29] The details of this process which culminated in the GPMG being reassembled would almost certainly not have appeared to anyone involved as having any significance at the time. However, when Mr McAnespie was killed a few hours later they assumed significance because this was potentially the last important interaction with and movement of the gun before the shooting took place.

[30] The evidence gave no clear picture as between Beresford, Hague, Norris and Peters as to who did exactly what with the gun during this exchange. Furthermore, there was undoubtedly some role played by Peters' second in command, Guardsman Docherty, but by reason of illness he was unable to give oral evidence. His witness statement was submitted and read as evidence but it is silent on the question of cleaning and reassembling the gun because he was not asked about that issue at the time by the police. (Mr O'Donoghue conceded that this was the only omission in an otherwise flawless investigation of events by the RUC under Detective Chief Inspector Stewart.)

[31] What is not in dispute is that the defendant was not involved in reassembling the GPMG after it had been cleaned or in checking that it had been made safe. The defendant and Norris (and others) had lunch between approximately 12 noon and 12:30 at their stations. At this point Norris was still upstairs with the GPMG mounted at the south facing observation slit with the defendant downstairs. After lunch more cleaning up was done in and around the sangar by them and other soldiers. There is at least a possibility, if not more, that one or more soldiers went upstairs to help with the clean up during this period.

[32] At some point, probably around 2pm, the defendant and Norris swopped places once again. On the evidence these changes took place to minimise the risk of boredom from soldiers being on duty in the same place during their entire shift. In any event this left the defendant upstairs and Norris downstairs.

[33] As with their change of positions at around 10am there was no handover drill as required by the formal procedure. The defendant would have been entitled to believe that the GPMG had been made safe but in the absence of a drill or anything said or done to confirm that he could not have been certain that it was.

[34] The fatal shooting occurred at approximately 2:45pm. On the defendant's case, which was largely accepted by Norris and other witnesses, he had been alerted by Norris to the fact that Mr McAnespie had parked his car on the northern side of the PVCP and had walked through the checkpoint. There appears to have been nothing unusual about that. The defendant saw him through the north facing observation slit and then moved to the south facing slit on foot of an enquiry from downstairs about where Mr McAnespie had gone. The defendant had a clear view and was able to report that Mr McAnespie was walking on his own on the road and had passed by a garage. These exchanges were easily made and audible because the soldiers were only a few feet away from each other.

[35] On the defendant's case, as put to Norris and others, the GPMG was on a pintle i.e. a pivot on which the gun could turn. Since the weight of the gun is in the butt and the barrel is lighter, the barrel was pointing skywards. According to the defendant the barrel was pointing to his right across the PVCP. He decided to centre the gun and to do so he took it in his right hand with his right index finger along the outside of the trigger guard.

[36] On his case, as put in cross-examination of witnesses, his finger slipped off the guard as he did so and accidentally pulled the trigger. As a result of this the three rounds were discharged. According to this version the defendant's hands were "slightly wet" from washing walls with a wet cloth a little while earlier. Given that only three rounds were discharged the contact between his finger and the trigger must have been extremely short.

[37] After the shots had been fired, Norris looked up and saw the defendant who appeared shocked. The defendant did not reply when he was asked what had

happened. Peters then ran upstairs to the defendant and found him standing with his back to the wall of the sangar. He appeared to Peters to have a pale pallor and to be upset. When asked what had happened he told Peters "I squeezed the trigger." Peters saw three empty cases on the floor. He immediately believed that this was "just" a negligent discharge. Remarkably he did not look through the observation slit to see if anyone had been injured by one of the bullets.

[38] As indicated at para [10] above, the defendant was interviewed by Detective Chief Inspector Stewart and Detective Inspector Farr on the day after the shooting. He gave an oral account of what had happened and a written statement. In the written statement he said:

> "… I lifted the gun with my right hand with a loose grip and moved it to the centre of the window. That's when my finger slipped onto the trigger. That's when the rounds went off. As soon as the first round went I released the trigger and fired another two rounds straight after. That's what it felt like. My hand slipped because they were still wet from doing the cleaning. The gun was heavy because I moved it with one hand.
>
> I told Sergeant Peters that I had been moving the gun from right to centre of the window when my hand slipped onto the trigger."

[39] This statement was similar, but not identical, to what was said during his interview. Mr Stewart formed the impression during five hours of interviews that the defendant was a scared young man who made a consistent case that he did not cock and aim the gun to fire it and that what had happened was an accident.

[40] Colonel Aubrey-Fletcher was a Major in the Grenadier Guards in 1988, the Officer in Command of the company to which the defendant was assigned. He had some personal knowledge of the defendant for approximately six months up to February 1988. The Colonel testified about the training which all soldiers were provided with in his experience, training in safe handling and weapon skills generally. From this soldiers learn how to load a weapon, make it safe, cock it and prepare to fire, dismantle and unload it. Before "passing out", as the defendant had done, a soldier must be proficient on a range of weapons.

[41] The Colonel was able to confirm from the defendant's training records that he had received further training in Northern Ireland and that this included training on a GPMG. The GPMG, he said, was routinely used in sangars but not in built up areas. This was because it was a weapon which would cover an area or a zone – it was not a highly accurate weapon to the point that he would only expect the first round to land where it was aimed.

[42] He accepted that the defendant would probably have had no specific training in handling a GPMG on a pintle in a sangar but said that he would not expect such training and it was the same weapon whether used in the open or from a sangar.

[43] Training records were put to the Colonel showing that the defendant had some, but limited, training on a GPMG including the firing of live rounds on a limited number of occasions. The Colonel accepted that the training was limited but said it was no more so than in the case of other soldiers of the same age as the defendant. He further accepted that all of the training which was given to him had most probably been in the context of lying prone on a range, not standing.

[44] In terms of the written drill with which the soldiers appeared to be unfamiliar, the Colonel could not say why that was so because it had clearly been designed for a purpose. He confirmed that he would expect the drill to be followed at each change-over of soldiers, not just at the start and end of a shift.

[45] In terms of the defendant personally, the Colonel said that he did not stand out for good or for bad and that he had no concerns about his character of conduct.

[46] The forensic firearms expert who reported in 1988 was a Mr Peter Montgomery – see paras 11 and 12 above. By the time of this trial Mr Montgomery was retired and too ill to give evidence. Accordingly, the prosecution applied to have his report admitted in evidence. I allowed that application in respect of which I gave a written ruling in 2021. In addition, the prosecution engaged a Mr Mastaglio and a Ms Shaw to report. Mr Mastaglio also gave oral evidence.

[47] Before summarising their evidence it is important to note that with the possible exception of an issue about the safety catch, there is no significant difference between the experts. And while the defence was obviously aware of all of the reports well in advance of the trial no other expert's opinion was put to Mr Mastaglio in cross-examination.

[48] The issues on which there is no expert dispute included the following:

- Nobody can tell whether a GPMG is cocked and ready to fire just by looking at it.

- A GPMG should not be in a cocked position except when it is being fired or just about to be fired.

- For the GPMG to be fired, it must have been cocked and the trigger pressed.

- The pressure required on the trigger to discharge a round in 1998 was nine pounds.

- The shape of the entry wound in Mr McAnespie's body showed that he was killed by a ricochet.

- If the discharge was inadvertent, as the defendant contends, three rounds is probably the least number that would be discharged by accidental trigger pressure.

- The difference in distance between KD1, on the one hand, and KD2 and 3 on the other hand, suggests either that the gun was not held securely or that it was moving.

- Forensic expert witnesses cannot comment on the issue of intent.

- Mr Mastaglio added that the golden rules with guns are to always ensure that the gun is safe, never aim unless you intend to fire and never increase the risk of negligent or inadvertent discharge. He suggested that plain common sense tells you not to handle a deadly weapon such as a GPMG with wet hands because that increases the chance of the weapon or finger slipping.

- Mr Mastaglio testified that one way to check if a weapon is cocked and therefore ready to be fired is to press the safety catch because it can only be applied after the weapon has been cocked. This echoes Mr Montgomery's report at page 4 when he wrote:

> "The design of the weapon is such that the safety catch can only be applied after the weapon has been cocked."

Abuse of Process Application

[49] There is no real dispute between the parties as to the law which applies to the two separate limbs of the application to stay the proceedings. Those limbs are not to be conflated. Considerations which are relevant to one limb may not be relevant to the other.

[50] The overarching principles are clearly established from a long line of authorities. As a starting point it is clear that the exercise of a stay is both a discretionary and an exceptional remedy. In *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42 at page 74 Lord Lowry said:

> "I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in

order to express the court's disapproval of official conduct."

[51] The imposition of a stay can only be justified in exceptional circumstances. However, the statement that stay applications only rarely succeed is of limited help in any individual case as was noted in *R v T, B and F* [2011] Cr App R 13 at para 38.

[52] The Northern Ireland Court of Appeal has set out core principles in *R v McNally and McManus* [2009] NICA 3:

> "***The Principles***
>
> [14] The general principles governing the grant of a stay of proceedings on the basis that to continue them would amount to an abuse of process are now well settled. There are two principal grounds on which a stay may be granted. The first is that if the proceedings continue, the accused cannot obtain a fair trial … The second is that, even if a fair trial is possible, it would be otherwise unfair to the accused to allow the trial to continue.
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> [15] These grounds require to be separately considered. They should not be conflated for the prosaic and obvious reason that considerations that will be relevant to one are not necessarily germane to the other. The first ground requires a careful analysis of the circumstances which are said to give rise to the possibility that a fair trial cannot take place and a close examination of whether the trial process itself can cater for the shortcomings of the prosecution or police investigation. These inquiries should be informed by two important principles. They were set out in paragraph 25 of *Ebrahim* as follows:
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> > '(i) The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; 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 on which applications for a stay are founded.'

[16] The principles governing the grant of a stay in circumstances where a fair trial is possible but it would be unfair that the defendant should be required to stand trial were summarised by this court in *R v Murray and others*. In that case we referred to the judgment of Lord Bingham of Cornhill in *Attorney General's reference (No 2 of 2001)* and made the following observations on it at paragraph [23] et seq:

> '[23] It is, we believe, important to focus carefully on what Lord Bingham said about the category of cases where a fair trial is possible but some other species of unfairness to the accused makes a stay appropriate. We therefore set out in full paragraph [25] of his opinion:
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> > 'The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which *Darmalingum v State* (2000) 8 BHRC 662 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (*Martin v Tauranga DC* [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would

adequately vindicate the defendant's Convention right.'

[24] The first thing to observe is Lord Bingham's acceptance of the proposition that this category extends beyond those cases where there has been bad faith, unlawful action or manipulation by the executive. Secondly, the examples that he gives of other cases (gross delay and breach of a prosecutor's professional duty) are merely illustrative of the type of situation that will warrant this course. Thirdly, he considers that while it is not profitable to attempt to list all types of case where this disposal will be appropriate, this type of case will be obviously recognisable – no doubt because of their exceptional quality. Finally, he makes an emphatic statement that where any lesser remedy to reflect the breach of the defendant's Convention right is possible, a stay will never be appropriate.

[25] We do not consider that Lord Bingham sought to confine this category of cases to those where to allow the trial to continue would outrage one's sense of justice. It is absolutely clear, however, that he considered that such cases should be wholly exceptional – to the point that they would be readily identifiable. The exceptionality requirement is, in our judgment, central to the theme of this passage of his speech and it is not surprising that this should be so. Where a fair trial of someone charged with a criminal offence can take place, society would expect such trial to proceed unless there are exceptional reasons that it should not."

Limb 1 – No Fair Trial

[53] The defence seek a stay on this basis with particular focus on the following:

(i) Prejudice caused by the trial only taking place in 2022 for events which occurred in 1988 – it is contended that this delay is inevitably and indisputably prejudicial, both generally and in particular as a result of the loss of important witnesses (such as Mr Montgomery and Mr Docherty to name but two), the frailties in the recollection of the available witnesses, the loss of original exhibits and the inability of the defence to examine what is now the much changed scene or examine the original GPMG.

(ii) As the trial went on the importance of detailed and complete training records emerged more clearly. For example, the available 1988 records were less complete and informative than those from 1987.

(iii) In short, the defence contended that there were far more missing exhibits than there were exhibits which still existed and that is incompatible with a fair trial.

(iv) The fact that the prosecution opened and ran its case on two different grounds (unlawful act manslaughter and gross negligence manslaughter) was prejudicial to the defendant who more than 30 years after the killing could not be sure of what case he had to answer until after the prosecution opted for gross negligence manslaughter after its case had closed.

[54] Mr O'Donoghue sought to distinguish this case from cases involving allegations of historical sex abuse in which complainants only come forward to the authorities years or decades later. He submitted that this case has to be seen differently because the events were known about and investigated at the time.

[55] I accept that this case is quite different from those involving historic allegations of sex abuse but that does not really assist the defence. Mr Murphy submitted that the Court of Appeal in England and Wales correctly identified the proper approach in *R v S (SP)* [2006] 2 Cr App R 23 in which the court identified the following principles at para 21:

> "1. Even where delay is unjustifiable a permanent stay should be the exception rather than the rule.
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> 2. Where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted.
>
> 3. No stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held.
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> 4. When assessing possible serious prejudice the judge should bear in mind his or her power to regulate the admissibility of evidence and that the trial process itself should ensure that all relevant factual issues arising from today will be placed before the jury for their consideration in accordance with appropriate direction from the judge.

5. If having considered all these factors a judge's assessment is that a fair trial will be possible, a stay should not be granted."

[56] Applying that approach in this case, the application to stay the case as an abuse of process on the first limb must fail. As the evidence went on it became increasingly clear that the scope of the dispute in this case is unusually narrow. In large part that is due to the quality of the original RUC investigation. Mr O'Donoghue was correct to concede that the investigation was of a very high standard, the only concern he had being about the failure to interview Mr Docherty about the reassembly of the GPMG after it had been cleaned.

[57] It does not, of course, follow from the high quality of an investigation that a trial 34 years later cannot be unfair. But in this case it seems to me that the absence of the missing witnesses is far from being significant. It would or might be different if there was a dispute of substance between Mr Montgomery and Mr Mastaglio but there is not. On the contrary, Mr Mastaglio was respectful of Mr Montgomery and of his reputation, of the work which Mr Montgomery had done in this case and of many of the conclusions which Mr Montgomery had reached.

[58] To the extent that there are frailties in memories or gaps in training records or other materials, that can all be accommodated when I come to consider the substantive issues bearing in mind the onus on the prosecution to prove its case beyond a reasonable doubt.

[59] On my analysis the defence simply cannot identify any serious prejudice it has encountered in this case. In fact, as Mr Murphy submitted, or conceded depending on how one looks at it, this is not a new case at all but still the 1988 case on both sides. Concerns such as continuity of evidence which might be important in other cases are simply absent here.

[60] In these circumstances the application to stay the trial because the defendant cannot receive a fair trial must fail.

Limb 2 – It is otherwise unfair to try this defendant

(i) Legitimate expectation and related matters

[61] The fact that in my judgment a fair trial can take place does not mean that there is not some other species of unfairness to the accused which makes a stay appropriate – see *R v McNally and McManus* at para [52] above.

[62] In its original submission on this issue the defence focused on what was described as "the legitimate expectation of the defendant" that he could rely on the abandonment of the original prosecution in September 1988. It was contended that it was likely to be unfair to prosecute when there had been an unequivocal

representation that a defendant would not be prosecuted and he had acted to his detriment on foot of that representation. And the longer he was led to believe that he would not be prosecuted, the more unjust it becomes for the prosecution to renege on that promise or resile from their position.

[63] The defence then scrutinised the background to the change of mind by the PPS. It contended that the Attorney General had referred the case to the DPP on foot of a HET report which had misunderstood or misrepresented Detective Chief Inspector Stewart's conclusion at the end of his investigation. On this approach, the whole reconsideration of the case was undermined and it is repugnant to justice to allow the trial to proceed any further.

[64] The flaw in that submission, however, is that no matter how the reconsideration of the case started, the position of the PPS is that the original decision to abandon the prosecution was wrong. That does not depend on what the HET or Attorney General said. Rather the position is taken by the prosecution that the trial should proceed because it is emphatically in the interests of justice that the defendant should be tried for a crime of which he might be guilty in circumstances where he cannot show that he has acted to his detriment in any meaningful way or that he is prejudiced in any significant manner beyond the fact that he runs the risk of being convicted.

[65] In this context issues raised about delay, absent witnesses, frailties in memory and missing records are again relevant. However, as I have already ruled this is a case in which they are of limited significance and can all be accommodated in my consideration of the evidence.

[66] In my judgment, to the extent that the application to stay the case is based on legitimate expectation and related matters, it must fail. This is not one of those exceptional cases in which it is somehow contrary to one's sense of justice or propriety to try this defendant for manslaughter.

[67] Nor can it be said that it will undermine public confidence in the criminal justice system for the trial to proceed. There are some in our society who protest about former soldiers, such as this defendant, being tried for what they did many years ago. There are others who complain that it has taken far too long for many people, not just soldiers, to be tried and held to account for deaths during our years of conflict and killings. Those are matters for our society and leaders to resolve. They do not form part of my consideration in this court.

(ii) The effect of the conviction of an offence contrary to the Army Act 1955

[68] During the course of the trial the prosecution applied to have admitted in evidence a document showing that the defendant had admitted in December 1988 that on 21 February 1988 he was guilty of conduct to the prejudice of good order and military discipline, contrary to section 69 of the Army Act 1955. The particulars or

details of that offence were that at Aughnacloy on 21 February 1988 when on duty at a vehicle checkpoint he so negligently handled a general purpose machine gun as to cause it to be discharged. The person who heard the case was the defendant's commanding officer who fined him £370.86.

[69] The prosecution submission that this was relevant evidence which should be admitted at trial included reference to the fact that the defendant had elected not to be tried by court martial but instead chose to be dealt with by his commanding officer. It was contended that the finding in respect of this offence could not have been arrived at unless the commanding officer was satisfied that the defendant was satisfactorily trained and that he had acted negligently.

[70] The admission of the finding was resisted by the defence on the basis that:

(i) The matter clearly proceeded after the DPP decided not to prosecute. Now that the PPS has reviewed its decision and decided to prosecute, it would be wholly unfair for the prosecution to be able to rely on the record of a regimental conduct procedure which only took place after the DPP September 1988 decision.

(ii) As was clear from the witness statement of Major Aubrey-Fletcher, this procedure would have been conducted without the defendant (who was then only 19 years old) having received any legal advice.

(iii) There is no evidence from the record as to how the tribunal concluded that the conduct amounted to negligent handling of the GPMG. These are issues that the Crown Court will have to consider in due course and the fact that a regimental conduct hearing presided over by a commanding officer determined that it did amount to negligent handling of the gun is really of no probative value. There is no evidence that the defendant admitted the charge. There is no evidence as to what he said in his own defence.

[71] Following oral submissions I exercised my discretion not to admit this evidence at trial. I held that the form provided little or no context about what had occurred, that it was significant that the defendant did not have access to legal advice and that in the context of the trial for manslaughter the finding was significantly more prejudicial than probative.

[72] In the context of the abuse of process application the issue has taken on a new life in that the defence now submits that since the defendant has already been charged, convicted and punished for the Army Act offence it is unfair to try him for manslaughter in the Crown Court when the core allegation, that he was grossly negligent in his handling of the GPMG and thereby caused the death of Mr McAnespie, is so similar to the section 69 offence.

[73] It is necessary to start by considering the format of the 1955 Act:

(i) Part 1 from sections 1-23 deals with "Enlistment and terms of Service."

(ii) Part 2 from sections 24-143 deals with "Discipline and trial and punishment of military offences."

(iii) Within Part 2 the various "military offences" are typically defined in terms such as "any person subject to military law", making it clear (as in section 69) that they are (in broad terms) offences committed by soldiers, not civilians.

(iv) Section 70 headed "Civil Offences" provides as follows:

> "70.-(1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section.
>
> (2) In this Act the expression 'civil offence' means any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law; and in this Act the expression 'the corresponding civil offence' means the civil offence the commission of which constitutes the offence against this section.
>
> …
>
> (4) A person shall not be charged with an offence against this section committed in the United Kingdom if the corresponding civil offence is treason, murder, manslaughter, treason-felony or rape."

The effect of this section was that soldiers could be tried by court martial for non-military offences but not for manslaughter if committed in the United Kingdom.

(v) Section 133 provides as follows:

> "133.-(1) Nothing in this Act restricts the offences for which persons may be tried by any civil court, or the jurisdiction of any civil court to try a person subject to military law for any offence.
>
> (2) Where a person is tried by a civil court for any offence, and he has previously been sentenced by court martial to a punishment for any act or omission

> constituting (whether wholly or in part) that offence, or in pursuance of this Act he has been punished for any such act or omission by his commanding officer or the appropriate superior authority, the civil court shall, in awarding punishment, have regard to his punishment in pursuance of this Act."

The effect of these provisions was that the defendant could not have been tried within the military discipline system for the manslaughter of Mr McAnespie. He could however be tried, and was tried, under section 69 as a person subject to military law for conduct to the prejudice of good order. If he was convicted by a Crown Court for any offence then, by reason of section 133, that court would have to have regard in punishing him to any punishment imposed on him by his commanding officer or court martial for "any act or omission constituting whether wholly or in part that offence."

[74] Section 26 of the Armed Forces Act 1966 amended section 133 of the 1955 Act by entirely replacing that section with the following provision:

> "Where a person subject to military law –
>
> (a) who has been tried for an offence by a court martial or has had an offence committed by him taken into consideration by a court martial in sentencing him; or
>
> (b) has been charged with an offence under this Act and has had the charge dealt with summarily by his commanding officer or the appropriate superior officer,
>
> a civil court shall be debarred from trying him subsequently for an offence substantially the same as that offence; but except as aforesaid nothing in this Act shall be construed as restricting the jurisdiction of any civil court to try a person subject to this Act for an offence."

[75] The effect of this was that any soldier who was convicted of an offence by his commanding officer could not be tried by a civil court (including the Crown Court) for an offence which was substantially the same as that offence.

[76] That provision was in force in 1988 when the defendant was initially prosecuted by the DPP and then came before his commanding officer. On the defendant's argument it means that he could not have been prosecuted for manslaughter by the PPS after the December 1988 adjudication on negligent

discharge of his firearm because that military offence is to be construed as substantially the same as manslaughter on the basis that it arose from the same facts.

[77] The next statutory change came with the passage of the Armed Forces Act 2006. This involved a complete overhaul of the system within all of the branches of the armed forces for trying and punishing various offences.

[78] Part 1 of the Act is headed "Offences" it includes at section 19 an offence which is in almost identical terms to section 69 of the 1955 Act.

[79] Section 42 headed "Criminal Conduct" provides:

> "(1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that –
>
> (a) is punishable by the law of England and Wales; or
>
> (b) if done in England and Wales would be so punishable.
>
> (2) A person may be charged with an offence under this section even if he could on the same facts be charged with a different service offence."

[80] Part 2 of the Act is headed "Jurisdiction and Time Limits." Section 50 provides for the jurisdiction of court martials. The effect of this provision is the abolition of the section 70(4) prohibition on a soldier being tried by court martial for manslaughter within the United Kingdom.

[81] Section 64 which is headed "Service proceedings barring subsequent civilian proceedings" is as follows:

> "(1) This section applies where a person –
>
> (a) has been convicted or acquitted of an offence under section 42 (criminal conduct); or
>
> (b) has had such an offence taken into consideration when being sentenced.
>
> (2) A civilian court in a relevant territory may not try that person for any offence for which under the law of that territory it would be debarred from trying him if he had been convicted or (as the case may be) acquitted by a court in England and Wales of the relevant offence.

> (3) "The relevant offence" means the offence under the law of England and Wales which the act (or alleged act) constituting the offence under section 42 amounted to.
>
> (4) Where that act (or alleged act) would amount to an offence under the law of England and Wales if it had been done in England and Wales, for the purposes of sub-section (3) it shall be assumed to amount to that offence."

[82] For the defendant, Mr O'Donoghue, submitted that:

(i) The section 69 proceedings involving the defendant and his commanding officer were conducted in good faith after the DPP dropped the manslaughter charge. There can be no suggestion that they were in any way contrived in order to prevent any reconsideration by the DPP/PPS of the manslaughter case.

(ii) The finding under section 69 is a conviction even if it is "only" for a service offence – see Blackstone D12.28 and references in the record of the 1988 proceedings to the Rehabilitation of Offenders' legislation.

(iii) The amendments made to section 133 of the 1955 Act extended the protection to people such as the defendant by making the test the question of whether the manslaughter offence is "the same or substantially the same offence" as the section 69 offence.

(iv) In asking that question the court must focus on the circumstances of the alleged offending which are identical. No matter what label is attached to what the defendant did, whether it is a "service offence" or a "civil offence" his actions were the same.

(v) Within section 42 of the 2006 Act the service offence (section 69 of the 1955 Act or section 19 of the 2006 Act) constitutes criminal conduct.

(vi) That being the case the prosecution for manslaughter can only proceed if the court is satisfied that there are special circumstances justifying that course because a person should not face two separate trials for offences (however described) arising out of the same events – see *R v Elrington* 121 ER 870; *R v Beedie* [1998] QB 356; *R v Forest of Dean Justices ex parte Farley* [1990] RTR 228 and *Connelly v DPP* [1964] AC 1254.

(vii) In this case there are no special circumstances.

(viii) Accordingly, the trial should be stayed.

[83] For the prosecution, Mr Murphy submitted:

(i) Neither the service offence under section 69 of the 1955 nor its equivalent, section 19 of the 2006 Act, amounts to criminal conduct within the meaning of section 42 of the 2006 Act because conduct prejudicial to good order and military discipline is not something which is recognised by the civil courts and therefore punishable by the law of England and Wales as required by section 42.

(ii) The consequence is that within the meaning of section 64 of the 2006 Act the defendant was not convicted by his commanding officer in 1988 of conduct which was criminal within the meaning of section 42.

(iii) Even if that submission is wrong there are special circumstances in this case which are such that the prosecution for manslaughter should be allowed to proceed, in the court's discretion.

(iv) The defendant still has a protection which he is entitled to in that in the event of him being convicted for manslaughter this court would have to take into account, when passing sentence on him, any punishment which was imposed on him by his commanding officer in 1988.

[84] I will deal first with the question of whether the service offence proved against the defendant in December 1988 is a criminal offence within the meaning of section 42. In my judgment it is not because it is not an offence known to the criminal law which could be prosecuted before the civil courts. It is by its own definition an offence which can only be committed by a person who is subject to military (or service) law. While I accept that it involves the same circumstances as the manslaughter charge, I do not accept that this somehow makes it a criminal offence within section 42.

[85] That finding makes it unnecessary for me to deal with the question of special circumstances. However, in case I am wrong in my interpretation of section 42, I turn to consider whether special circumstances exist in the present case. The defence relied significantly, though not exclusively, on the case of *R v Beedie* in which the authorities are helpfully and fully analysed. That was a case in which the defendant was a landlord of a property in which a young woman died of carbon monoxide poisoning because a gas fire was defective. The landlord was prosecuted before justices for various offences under the Health and Safety at Work Act and the Housing Act. Subsequent to that, at the inquest into the death, the coroner required him to give evidence on the basis that since he had already been prosecuted he could suffer no prejudice by answering questions which tended to incriminate him. The verdict from the inquest was one of unlawful killing. Within two months the police notified the Crown Prosecution Service about the case for the first time and in March

1995 the defendant was charged with manslaughter. At his trial the judge rejected an application by the defence to stay the indictment on the ground of autrefois convict. The defendant then pleaded guilty and appealed to the Court of Appeal.

[86] The Court of Appeal held that the judge had erred in law in rejecting the plea of autrefois convict. It was held that the doctrine of autrefois convict or acquit was to be defined narrowly and applied only where the same offence was alleged in the second indictment as in the first; that although as a general rule charges founded on the same facts should be joined in the same indictment, a second trial on the more serious charge might be justified in special circumstances and it was for the judge to decide in the exercise of his discretion whether there were such special circumstances; that the public interest in a prosecution for manslaughter and the concerns of the victim's family did not amount to special circumstances; and that accordingly, no new facts having been alleged, a stay should have been ordered since the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions and gave rise to a prosecution for an offence of greater gravity.

[87] At page 366 Rose LJ stated:

> "A stay should have been ordered because the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions and gave rise to a prosecution for an offence of greater gravity, no new facts having occurred, in breach of the principle in R v Elrington."

[88] Adopting that analysis to this case I am satisfied that the following special circumstances exist which justify me exercising my discretion to allow this trial to proceed even if, contrary to what I have ruled, the defendant has already been convicted of an offence of criminal conduct:

(i) This case is quite unlike the circumstances in *Beedie* where the charges could all have been brought before the civil courts. The defendant could not have been charged before the same court in 1988 on both the section 69 service offence and the common law offence of manslaughter. Section 70(4) prevented that.

(ii) Whereas the defendant in *Beedie* was prejudiced (potentially) by the prosecution having available to it the evidence he was required to give at the inquest, this defendant has suffered no such prejudice. Indeed, I excluded from the evidence at trial the fact of the section 69 service offence. Similarly, the defendant in this case faces no unfairness as per *ex parte Farley* where the reversal of the burden of proof featured prominently in the reasoning of the court.

(iii) There is no other unfairness or prejudice which the defendant cannot be protected from in the trial process.

(iv) There has been no misconduct on the part of the prosecuting authorities who were not in any way involved in the 1988 section 69 service offence proceedings.

(v) While the section 69 service offence and the manslaughter charge arise out of the same facts, there is a fundamental distinction between them in that the manslaughter offence involved the killing of Mr McAnespie whereas the service offence did not.

(vi) Not allowing a trial for manslaughter to proceed because the defendant was subject to disciplinary sanctions by his commanding officer would undermine rather than protect the integrity of the criminal justice system.

[89] In my judgment, the application to stay the case based on the effect of the section 69 service offence must fail.

[90] Accordingly, the application to stay the case for abuse of process fails.

Application for a direction of No Case to Answer

[91] In view of the decision which I have reached in this application, and with no disrespect to the outstanding quality of the extensive submissions from counsel, I will restrict what I have to say at this stage of the trial.

[92] The test at this point is whether a reasonable jury properly directed on the law could convict the defendant of gross negligence manslaughter.

[93] For the defence it was submitted that:

- The current case is speculative.
- There is no evidence that the defendant knew that the gun was cocked and ready to fire.
- Gross negligence manslaughter is reserved for the worst cases of negligence – see Blackstone B1.61 onwards.
- If the defendant had opened the gun on his own to check whether it was safe he would have been in breach of the drill which he was supposedly trained to follow.

- The failure to prove both knowledge and safe operation of the drill (which the prosecution relied on in its opening) is fundamental when assessing the nature and extent of the duty of care owed by this defendant.

- The indisputable fact that the Ministry of Defence is liable in tort for the death of Mr McAnespie does not lead to criminal liability being imposed on the defendant.

[94] For the prosecution it was submitted that:

- The defendant while only 18 years old was a trained soldier.

- He had at least some training on a GPMG.

- He knew the weapon entrusted to him was deadly in the extreme.

- The very fact that he handled it with wet hands is evidence of gross negligence.

- When he was redirecting the barrel he had no need to touch or be near the trigger.

- His police interviews showed a level of understanding of how the gun was to be handled.

- Some of his statements are capable of being understood to implicate him in the crime alleged e.g. saying to Peters "I squeezed the trigger."

- The shooting of Mr McAnespie, a "person of interest", occurred very soon after the defendant's attention had been drawn to Mr McAnespie and the defendant had been asked where Mr McAnespie was.

- It is not enough for the defendant to say that he thought the weapon was safe – even if he did think that, his wet fingers should still not have been on or near the trigger.

[95] The summaries above are not intended to convey the full complexity of the issues which fall to be considered and the analysis which has been presented to me by counsel. It is, however, my conclusion that at this stage of the trial there is a case for the defendant to answer. Accordingly, the application for a direction is refused.