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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McManus (Gerard)'s Application [2013] NIQB 104

IN THE MATTER OF AN APPLICATION BY GERARD McMANUS FOR JUDICIAL REVIEW OF A DECISION OF ENNISKILLEN MAGISTRATES' COURT MADE ON 23 AUGUST 2011

Before: Morgan LCJ, Higgins LJ and Girvan LJ

Girvan LJ (delivering the judgment of the Court)

Introduction

[1] Kevin Barry Nolan and the applicant, Gerard James McManus, were on 23 August 2011 committed in custody for trial following a preliminary investigation before a District Judge (Magistrates' Court) under Article 37 of the Magistrates' Courts?? (Northern Ireland) Order 1981. The charges upon which they have been committed for trial are attempted murder of a student police officer contrary to Article 3(1) of the Attempts and Conspiracies (Northern Ireland) Order 1983; possession of a firearm and ammunition with intent to endanger life or cause serious damage contrary to Article 58(1) of the Firearms (Northern Ireland) Order 2004; and making use of a firearm with intent to prevent lawful arrest or detention contrary to Article 59(1) of that Order.

[2] In these proceedings the applicant seeks an order of certiorari to quash the District Judge's decision to commit him to trial on those charges and an order of certiorari to quash the decision of the District Judge the effect of which was to prevent the applicant's counsel cross-examining Crown witnesses. As paragraph 3 of the applicant's Order 53 statement shows the applicant's case is that the District Judge misdirected himself in holding that questions directed to the issue of entrapment were beyond the relevant issues for the committal proceedings and that they were irrelevant because the prosecution had informed the court that it was satisfied that there was no duty of disclosure arising in the circumstances. The

applicant challenges the sufficiency of the District Judge's enquiry on the issue of entrapment. Kevin Barry Nolan ("Nolan") brought separate but similar proceedings which came on for hearing some time ago. Judgment in those proceedings was delivered on 13 December 2011. The judgment in the present proceedings should be read with the judgment in that case.

The evidential background to the charges

[3] The events in question are alleged to have occurred on 21 November 2009 at the home of a trainee police officer. The premises appear to have been under surveillance by two police vehicles. At 18.04 a blue Vauxhall Astra with two occupants drew into the car parking area. A man got out, pulled on a partly rolled balaclava or hat and knocked the door of Flat 2 at the address. He was challenged by police and made off down the side of the property with the police in pursuit. As pursuing officers approached a turn in the path two shots were fired. Police fired a single shot and the response came from a low velocity weapon. The suspect was not apprehended despite a search of a nearby field. The applicant was arrested early the next morning hiding in the garden shed of a nearby house. His face and hands were covered with minor scratches and his dark clothing was wet and torn on one knee. No weapon was recovered.

[4] The police arrested Nolan who was the second man who remained in the front passenger seat of the Vauxhall Astra throughout. When apprehended he was wearing a scarf or bandana over his mouth and nose and a peaked baseball cap, a dark fleece and blue denim jeans. A loaded Glock handgun magazine was found on the seat beside him when he got out of the vehicle on police instructions. In the foot well of the vehicle there was a large quantity of broken firelighters and a green reusable carrier bag on the back seat which contained dark clothing and baseball caps. There were in addition three cigarette lighters, matches and ten cigarettes. The fleece pocket contained an unused, unwrapped bar of Palmolive soap.

[5] When charged the applicant replied: "We were not going to kill any one. We were just going to scare him" in relation to charges 1 and 2 and "no" in relation to charge 3.

[6] In interview the applicant read a prepared statement saying that he intended to frighten the police officer and order him out of the area but not to shoot him. He fired a shot during the chase to scare the police but not to kill them. After several lengthy no comment interviews about the incident and the whereabouts of the gun, when he was interviewed on 24 November he maintained the officers following him were SAS officers with English accents and he fired the shot away from them.

[7] In interview it was put to Nolan that he purchased the blue Astra in Pomeroy on 18 November. He was asked about his associations with the co-accused and with

other named persons and about the planning of the offences but he made no response. On 23 November he stated that the plan (of which he was informed some ten days in advance, by persons whom he declined to identify, stating fear as his reason) was to scare, not to injure and to let a couple of shots off into the air. He stated that the village in which the trainee police officer lived was a Nationalist village and he would not like to see a member of the PSNI or anyone else involved in administering British rule in the area. The written statement furnished by the applicant was read to him. He answered questions elaborating on his statement as to the sequence of events but maintaining that the intention was to frighten, not to kill. He was told that he would be picked up at a certain place and was taken to a car park on the shore of Lough Melvin when he was asked to get into the blue Astra and give the driver directions to the trainee police officer's house. He declined to say by whom he was picked up stating it to be out of fear for his family. He said that he knew there was a gun in the car. It was in the foot well and he picked it up wearing gloves and then put it down. He saw firelighters in the car and knew it was to be burnt out after the job was done. It was put to him that it was an elaborate plan just to frighten someone out of the area and he declined to comment.

[8] Committal proceedings were first listed for hearing on 26 July 2010 but they were adjourned on a number of occasions. On 27 October 2010 the applicant and the co-accused indicated that they wished to raise the issue of entrapment at the hearing of the committal proceedings. The District Judge, who was not the District Judge who ultimately conducted the preliminary investigation, asked for skeleton arguments. Counsel for the applicant submitted a skeleton argument on 16 November 2010 in which he declined to provide any factual basis for the alleged entrapment because he considered that it would be wholly inappropriate for the defence to set out detailed submissions relating to the facts of the case in advance of any evidence being called.

[9] On 19 November the PPS asked the defence to confirm the nature of the alleged entrapment; the name of any individual(s) allegedly involved in the said entrapment; the nature of the defendants' relationship with any individual involved in the entrapment; and the nature of any contact in terms of dates, times and location and??? means of contact; and whether anyone else saw or heard any contact. They asked if the defendants would be willing to be interviewed by the police regarding this matter.

[10] By letter of 23 November 2010 Nolan's solicitors replied stating that the name of the individual was AK and that he caused or commissioned the offences. He declined to answer questions about the nature of the applicant's relationship with AK or the nature of the contact because those questions did not assist the PPS in assessing their pre-committal disclosure duties. The solicitors stated that Nolan would only be willing to be interviewed by the police regarding the matter "upon confirmation that the charges against the applicant would be dropped". It is the defendants' case that they were led to believe that it was not necessary to plead their

case in detail at that stage as the purpose was to allow the PPS to carry out the disclosure obligations.

[11] The Crown skeleton argument dated 1 December 2010 stated that the prosecution had considered its duty of disclosure and confirmed that no duty of disclosure arose. The skeleton asserted that there was no evidence that the accused were entrapped.

[12] When the matter was next listed on 15 March 2011 defence counsel stated that no disclosure at all had been received after provision of the name of the alleged informer. Counsel argued that the prosecution's statement that no duty of disclosure arose was ambiguous. It might mean that the prosecution after proper enquiry found no disclosable evidence. It might also mean that the Crown were denying a duty of disclosure at that stage of the proceedings. The District Judge gave directions which were repeated in a letter to the PPS from the applicant's solicitors. These directed the prosecution to review all the material in its possession in respect of the allegation of entrapment and all materials relating to AK. The prosecution should then reply to the defence providing such material or stating that it did not exist. The review of the evidence was to be carried out by 5 April 2011 and the prosecution was to provide the material, if any, by 12 April 2011.

[13] On 14 April 2011 the PPS sent a letter stating that the issue of entrapment was not raised in any "after caution" interview but only before the District Judge by means of a skeleton argument. The PPS asserted that no duty of disclosure arose but that the matter would be kept under review in accordance with the prosecution's disclosure duties.

[14] At the hearing on 21 April 2011 prosecuting counsel informed the court that the prosecution had reviewed the papers in line with the duty of disclosure pursuant to the Attorney General's guidelines and that it was after having taken that step that the prosecution had indicated to the defence that no duty of disclosure arose. The applicant in his grounding affidavit accepted the statement of counsel and indicated to the court that as prosecution counsel had now clarified the basis of their failure to provide disclosure and had accepted that a review of material had taken place on the basis of the name which had been provided, the defence could not and would not challenge the statement of counsel on the issue of disclosure. Because of a problem relating to witness availability the preliminary investigation was then adjourned to 23 August 2011.

[15] The preliminary investigation commenced before a fresh District Judge on 23 August in Enniskillen. In the skeleton argument presented by the defence on behalf of the applicant it was stated in paras 2.1 to 2.4 that a crucial aspect of the applicant's case was that AK from K coerced, cajoled and lured the applicant into attending at the home of the trainee police officer who it was alleged was the proposed victim. It was alleged that AK was working for the police and that AK did what he did in his capacity as a police agent and that the applicant would not

otherwise have been at the property. It was further alleged that the police and law enforcement agencies had knowledge of, approved of and directed the activities of AK. The applicant alleged that he was present at the property in question but was not there to carry out the deeds that are reflected in the summons and the authorities were well aware of that.

[16] Counsel for the applicant sought to cross-examine the first Crown witness, P C Allen, one of the interviewing officers. He was asked if the incident happened close to the border (which it had). He was then asked whether there had been Garda involvement in the operation. Prosecuting counsel objected contending that the question of Garda involvement was irrelevant. He said that the defendants had already been told that no duty of disclosure arose in relation to the named alleged informant and the question was one that sought to go behind the prosecution statement that no duty of disclosure arose and it amounted to a fishing expedition.

[17] The District Judge was then addressed by counsel for the applicant who submitted that the questions being asked were relevant to the issue of abuse of process and that prosecution counsel was conflating the issue of disclosure with that of relevance. A witness may have relevant knowledge on the issue of entrapment or the involvement of an informer without that information ever having made its way into a disclosable document. The absence of a disclosable document on the issue of entrapment did not prevent the raising of questions that sought to go behind the prosecution statement that no duty of disclosure arose.

The District Judge's ruling

[18] The District Judge did not give a written ruling. However the applicant in paragraphs 17 and 18 of his uncontradicted affidavit purports to set out the effect of the District Judge's ruling:

> "17. The District Judge then said the following. He said that he had to address the following issue: whether the questions asked sought to go behind the prosecution statement that no duty of disclosure arises. He said that prosecuting counsel said that it did and that the questions were therefore not relevant. He said that he accepted that the Magistrates' Court could consider an abuse of process within the rules of that Court. He said that the previous District Judge had considered the prosecution duty of disclosure to be discharged. He said that there was not prejudice to the defendants in making their abuse of process point in the Crown Court and that this was simply a pre-trial proceeding and its function was to ensure that there was a prima facie case. He said that there was nothing wrong with

> the rules of the Magistrates' Court being so constrained. There was no prejudice to the defence because all of these issues could be raised in the Crown Court. He ruled that he would not allow any question that seemed to go behind the prosecution duty of disclosure.
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> 18. He said that his decision was that any question about joint operations with the Garda or the identity or involvement of an informant would be disallowed. He said that the nature of the operation that led up to the arrest of the defendants was a matter that went beyond the issues of that court. He said that while he had the power to consider any abuse of process application he would consider it only on the evidence which was disclosed on the papers. He said that the questions sought to go beyond the available evidence before the court would not be allowed as there had been no disclosure on the issue of joint operations. No questions on that issue would be allowed."

Thus, the effect of the District Judge's ruling was to disallow all questions about the nature of the operation which led to the arrests, the issue of cross-border co-operation on the operation and the involvement of the named individual. Following the District Judge's ruling the applicant and the co-accused concluded that the abuse of process point could not be advanced before the Magistrates' Court and that there was no further purpose in proceeding with the matter by way of a preliminary investigation. By agreement the District Judge considered the remaining papers and in effect he conducted it as a preliminary inquiry. The prosecution submitted that on the papers there was a prima facie case. No contrary submission was made by the applicant or the co-accused. The District Judge committed the applicant and Nolan for trial.

The decision in Nolan's application

[19] The Divisional Court in Re Nolan [2011] NIQB 128 reached the following conclusions:

The first ground for dismissing the application

In the case of Ex parte Bennett [1994] 1 AC 42 the House of Lords gave guidance as to the role and function of magistrates at committal stage when allegations of abuse of process are raised by the defence. The House affirmed the power of magistrates, whether sitting in committal proceedings or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. This power should be strictly confined to matters directly affecting the fairness of the

trial of the accused such as delay or unfair manipulation of court procedure. In cases falling outside that narrow confine the proper forum to decide whether the alleged abuse of process should affect the continuation of proceedings is the High Court. There was a difference of view between the majority and Lord Lowry who considered that magistrates had no power to stay proceedings for abuse of process (approving the Australian decision to that effect in Grassey v R 168 CLR 1). All were agreed that it was undesirable for magistrates to be drawn into reaching determinations on abuse of process allegations in cases other than those strictly related to the procedural fairness of exposing the accused to trial. A case of alleged entrapment by state agents is not a case relating to procedural fairness of the kind referred to in Bennett. If there is a challenge on that ground, the defendant would have to proceed to the High Court for judicial review. The court in paragraph [31] of its judgment set out the reasons why it would be undesirable for a magistrate to become embroiled in deciding an application to stay proceedings in a case of alleged entrapment. The magistrate's function is not to resolve questions of fact but to determine whether there is a prima facie case. Preliminary investigation proceedings do not provide a satisfactory forum to reach definitive conclusions on whether entrapment occurred and, even if so, whether this should lead to a stay of proceedings which results in no trial at all. The procedure is not apt to enable a magistrate to make a finding of fact that entrapment had occurred. At best he may find that there is a triable issue of the point but that means that a trial is the proper forum for ultimate determination of the issue.

The second ground for dismissing the application

Even if the magistrate had jurisdiction and was wrong to exclude cross examination and to commit the applicant for trial, the court would have declined to quash the committal for trial and to grant the relief sought. The applicant had adduced no material laying a meaningful basis for persuading the District Judge that the proceedings should be brought to an end by reason of alleged entrapment. Speculative cross examination could never allow such a final determination resulting in no trial at all. Nowhere in his police interview did he allege anything approximating to a case of entrapment.

Discussion

[20] Mr Coll drew the court's attention to the decision of the Privy Council in Panday v Virgil [2008] 1 AC 1386, an authority not opened to the court in Nolan. Lord Brown at paragraph [33] said:

> "Their Lordships have already mentioned the entrapment cases and as an example of the Bennett principle and action. On one reading of Lord Griffiths speech those cases too like the unlawful extradition cases could be said to involve the 'wider supervisory jurisdiction' rather than matters directly

> affecting the fairness of the trial. It is the Board's clear view, however, that if the defence of entrapment is raised before magistrates rather than adjourn the proceedings for a judicial review application to be made they should themselves decide in which side of the Loosley line the case falls i.e. whether the defendant was incited to commit the offence or merely given the opportunity to do so. So too it would be for the trial court (whether magistrates or a judge) to decide whether a charge had been instituted in bad faith or oppressively for example in breach of an executive undertaking or indemnity."

Panday was not a case of committal proceedings, rather being a case of a summary trial. Nor was it strictly a case of alleged entrapment. Nevertheless, in view of that albeit only persuasive rather than binding authority, the court in Nolan may have been in error in stating that entrapment cases fall within the category of cases which must be the subject of the supervisory jurisdiction of the High Court according to the Bennett principle and, contrary to what is said at paragraphs [29] and [30] of Nolan, it is within the District Judge's jurisdiction to entertain an abuse of process application even in cases of entrapment.

[21] This conclusion, however, does not affect the correctness of the actual decision in Nolan which, in any event, also failed on the ground 2 referred to in paragraph [19] above. As stated by Auld LJ in Ex parte Finch and Ex parte Bossino (referred to in paragraph [29] of Nolan), stays by any court should only be granted in the most exceptional circumstances and where the defendant is able to demonstrate that he has suffered prejudice. Auld LJ concluded that this is particularly so in committal proceedings where the final airing of the evidence and decision on trial are yet to come. As Lord Lowry pointed out in Bennett, the ultimate decision whether a defendant stands trial does not rest with the magistrate. In a stay application in an entrapment case the onus is on the applicant to lay a sound evidential basis for concluding that it would be wrong to try the defendant. In such a case this involves careful scrutiny of the relationship between the actions of the defendant and the alleged entrapper and between the entrapper and the state. At committal stage the function of the District Judge is to determine whether there is a prima facie case that the defendant committed the offence sufficient to return him for trial, not to determine whether he did commit the offence. If an issue of entrapment is raised, it could only be in the clearest of circumstances that a District Judge could consider that a stay for abuse of process would be appropriate. If the issue of entrapment is raised, unless the circumstances are clear cut, there will be at best, from the defendant's point of view, a triable issue on the question. If, however, for example, disclosure by the Crown established clearly that the defendant had been wrongfully entrapped by state agents it might be open to the District Judge to consider staying the proceedings. Even if he did so, the decision would not be final

since a voluntary bill might be presented or alternatively the Crown might challenge the District Judge's assessment of the case by means of a judicial review application.

[22] Thus taken at its very height the appellant's case of alleged entrapment would at best have raised a triable issue on the question. The Crown (which must at this stage be presumed to have acted in good faith) has disclosed no material suggestive of entrapment. The appellant made no case of entrapment in his interview with the police. The entrapment now alleged provides no possible justification for the firing at officers to prevent arrest. At the height of the appellant's case it is alleged that he should have had the opportunity to explore the issue at the committal proceedings. Since it was inevitable that all that could be established at the height of the appellant's case was that there was a triable issue on the question of entrapment, the appellant has suffered no injustice or prejudice in the event of a trial when the evidence establishes a prima facie case that he committed the offences charged. As made clear by the court in Nolan the issue of entrapment can be fully explored through the trial process. There is no breach of Article 6.

[23] Since this case must be determined within its own factual matrix and since we have concluded that this is a case in which relief would be inappropriate for the reasons given, we do not consider that this case raises a point of general public importance and, accordingly, we decline to certify a point.