

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

ANTHONY MICHAEL FOX, KATHLEEN BRIDGET FOX,
RICHARD THOMAS FOX, THOMAS FOX,
PATRICK FRANCIS MARKEY, LEONARD HENRY WARWICK

(RULING No 1-MISJOINDER)

HART J

[1] Richard Thomas Fox is one of a number of defendants charged with various counts in this indictment. He submits that the charges against him had been misjoined in this indictment; or in the alternative seeks an order severing those counts upon which he appears from the remaining counts in the indictment. Mr Ken McMahon QC appears for Richard Fox with Mr McAleer, whilst Mr Terence Mooney QC and Mrs McKay appear on behalf of the prosecution. Upon the hearing of this application Mr Houston, a solicitor in the firm of John J Rice & Company who appear for Anthony Fox, Thomas Fox, Kathleen Fox and Warwick held a watching brief on their behalf. Mr Lindsay, who appears for Markey, explained that his client was unaffected by the application and withdrew.

[2] The papers in this case are voluminous and the evidence complex, and there are a very large number of different counts, but for the purpose of the present application the charges can be described somewhat more succinctly in colloquial terms. The first category of charges may be said to relate to offences relating to the supply of "laundered" diesel and thereby evading duty, and various forms of laundering the proceeds of the sale of the laundered diesel. Thomas James Fox, Anthony Michael Fox, Warwick and Markey are charged with these offences, in some cases jointly and in others individually. There are 77 counts in this category.

[3] The second category consists of 15 counts against Richard Fox, three of which allege that he counselled, procured, aided and abetted Kathleen Fox to dishonestly obtain money transfers, and she is jointly charged in respect of the same counts. Richard Fox is separately charged with various offences relating to applications for mortgages and credit card accounts, and when doing so providing false details regarding his profession, occupation and income, and laundering the proceeds.

[4] The third category consists of four counts against Thomas James Fox relating to mortgage or credit card offences, and two relating to mortgage or credit card offences in relation to Warwick.

[5] Thomas James Fox and Kathleen Bridget Fox are husband and wife, and Richard Fox and Anthony Michael Fox are sons of Thomas and Bridget Fox. Richard Fox does not take issue with being jointly tried with his mother, Kathleen Fox, on the three counts upon which they are jointly charged. However, he objects to being tried on the same Bill of Indictment as his father, his brother, Warwick and Markey. He argues that the charges against him (and by implication those against his mother) are misjoined, or in the alternative the charges against himself and his mother should be severed from the remaining counts and separately tried.

[6] It is common case that the question of whether two or more accused may be joined in the same indictment; whether because they are jointly named on one or more counts, or they are named individually in separate counts, is a matter of practice. The leading authority for this rule is the decision of a five judge Court of Criminal Appeal in England in R v. Assim [1966] 50 Cr. App. R. 224

[7] In Assim Sachs J described the operation of the rules in following passage.

“As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other, than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are on the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together. Such a rule, of course, includes cases where

there is evidence that several offenders acted in concert but is not limited to such cases.

Again, while the court has in mind the classes of case that have been particularly the subject of discussion before it, such as incidents which, irrespective of there appearing a joint charge in the indictment, are contemporaneous (as where there has been something in the nature of an affray), or successive (as in protection racket cases), or linked in a similar manner (as where two persons individually in the course of the same trial commit perjury as regards the same or a closely connected fact), the court does not intend the operation of the rule to be restricted so as to apply only to such cases as have been discussed before it.

If examples are needed, it is sufficient to say that, whilst it would be obviously irregular to charge two men in separate counts of the same indictment with burglary simply and solely because they had purely by coincidence separately broken into the same house at different times on the same night, this court sees nothing in the facts in R v. Leigh & Harrison which in principle prevented the joint trial of such closely related counts for perjury as were there separately laid against the two accused. The last named decision is overruled; whilst it accorded with the two cases that appear in the books of 1731 and which have been consistently cited in Archbold, it was, of course, reached without the trial judge having the benefit of that considerable review of authorities which is so often impracticable on circuit. Save for that case, however, the court has not deemed it necessary as regards each of the many authorities cited to state seriatim whether it does or does not accord with the rules of practice as above formulated.

The court has already emphasised, and desires to repeat, that it is the interests of justice as a whole that must be the governing factor and that amongst those interests are those of the accused. It is essentially a matter for the discretion of the court whether several offenders can properly be tried together at the same time, and it is necessary for the trial judge to scrutinize matters closely with the same degree of care that is applied in dealing with the question

whether a single person can be charged with several offences before the same jury.

[8] When one applies those principles to the circumstances of the present case what are the factors that suggest that the various charges and defendants who presently appear on this indictment should be tried together? The prosecution rely upon a number of matters as indicating that the defendants should all be tried together.

[9] First of all, although Richard Fox is not jointly charged in any count with his father Thomas Fox, both face similar charges.

(i) Both are charged with making false representations as to employment or income in respect of mortgage applications for properties in the Cookstown area. Richard Fox appears on such charges at counts 84, 86, 87, 88, 93, 94 and 96, while Thomas Fox appears on similar counts at counts 79 and 80.

(ii) Both are charged with making false representations as to their employment status or income in order to obtain credit cards. Richard Fox faces such counts at counts 89 and 92, while Thomas Fox faces one such count at count 81, together with a somewhat similar count at count 82 where the alleged misrepresentation was to obtain a bank account.

[10] The second matter upon which the prosecution rely is the link between Thomas Fox, Anthony Fox and Richard Fox in relation to property at 38 Burn Road, Cookstown. Exhibits 165 and 166 are relied upon as showing that Thomas and Anthony (who are of course father and son) purchased 38 Burn Road on 4 July 2002, and then sold it to Richard Fox on 5 December 2003. Richard Fox is charged with making false representations as to his employment status or income when applying for a mortgage for 38 Burn Road and this is the subject of count 88. Thomas Fox is charged in count 78 with converting criminal property representing his proceeds of criminal conduct in connection with the purchase of 38 Burn Road.

[11] The third matter is that at count 54 Richard Fox faces a count of transferring the proceeds of criminal conduct to the account of a firm called Parmenides Ltd. Parmenides Ltd. is alleged by the prosecution to be a front company set up by Thomas Fox and used by him for the purchase of cat litter to be used as a component in diesel laundering, but it is important to bear in mind that there are no charges relating to the seizure or operation of a diesel laundering plant, or to the production of laundered diesel as such. The charges relate solely to the sales of laundered fuel and to the money laundering of the proceeds of such sales.

[12] Fourthly, it is alleged in count 85 that Richard Fox transferred the proceeds of criminal property in the sum of £30,000 to the account of his father Thomas James Fox.

[13] The involvement in the same indictment of similar allegations against different defendants of making fraudulent mortgage applications for properties in the Cookstown area, or for credit card or bank accounts, does not of itself do anything more than create suspicion that members of the Fox family were engaged in not merely similar forms of criminal activity, but were acting in some way either in concert with, or at least in imitation of, other members of their family. However, there are no charges other than those to which I have referred where they are together alleged to have been connected with particular offences. Assim establishes that because defendants commit unrelated offences of the same type that is not of itself a proper basis for joining defendants in separate counts on the same indictment. This is illustrated by the example given by Sachs J in Assim where he said that -

“ . . . it would be obviously irregular to charge two men in separate counts of the same indictment with burglary simply and solely because they had purely by coincidence separately broken into the same house at different times on the same night . . . ”

The same objection in my opinion applies to the first ground upon which the prosecution resist the misjoinder application.

[14] The third ground, which is that Richard Fox at count 54 faces a charge of transferring the proceeds of criminal conduct to the account of Parmenides Ltd, is in my opinion insufficient in itself to justify a joint trial for the same reason, although it may be a factor which justifies a such a decision when all of the circumstances are looked at together. In effect the prosecution are saying that because two members of the same family make use of the same account to commit criminal offences, where that account is set up by one defendant, that is of itself sufficient to justify a joint trial. However, I am of the opinion that even if Parmenides Ltd was set up by Thomas Fox, and that the payment made by Richard Fox into that account was used for the purchase of cat litter, this single count constitutes a very tenuous link between the large number of diesel and money laundering charges which Thomas Fox and his co-accused face on the one hand, and the other completely unconnected charges, principally charges of mortgage and credit card fraud, which Richard Fox faces on the other. The same can be said of the allegation which gives rise to count 85, namely that Thomas Fox benefited from a transfer of the proceeds of criminal property to his account by Richard Fox where there is plainly a link.

[15] This leaves the final matter relied upon as creating a connection between the two sets of counts, namely the allegations relating to 38 Burn Road,

Cookstown. On count 78 Thomas Fox is charged with converting criminal property representing his proceeds of criminal conduct in connection with the purchase of 38 Burn Road. There is documentary evidence at exhibits 165 and 166 which show that Thomas Fox and his son Anthony purchased 38 Burn Road in July 2002, and sold it to Richard Fox in December 2003. Richard Fox is charged on count 88 with making false representations as to his employment or income in respect of his application for a mortgage for 38 Burn Road.

[16] What is the connection therefore between Thomas Fox purchasing Burn Road with the assistance of the proceeds of criminal conduct and the charge against Richard Fox of making a fraudulent mortgage application when he purchased the property some 18 months later from his father and brother? So far as counts 78 and 88 are concerned, if they were looked at in isolation, I am satisfied that it could be said that they are properly joined because there is a clear connection of a factual nature between Richard Fox and his father Thomas Fox through their respective purchases of this property.

[17] Nevertheless, I have to consider whether it is in the interests of justice as a whole that there should be a joint trial of such a large number of charges, the great majority of which relate relating to allegations of selling laundered diesel which are not connected by either the charges or the evidence with the remaining 15 charges against Richard Fox and Kathleen Fox. The only connections between the charges or the facts are that at count 78 Thomas Fox is alleged to have converted the proceeds of criminal conduct to purchase 38 Burn Road, and that Richard Fox transferred £30,000 by way of proceeds of criminal conduct to Thomas Fox at count 85.

[18] Apart from these two counts, Mr Mooney QC for the prosecution was unable to point to any evidence to show that all of the remaining offences were related in any way other than that they were offences of the same type. Whilst there may be suspicion the members of the Fox family were acting in concert in carrying out different types of criminal activity, suspicion without more cannot be a proper basis of joining a large number of counts relating to completely different charges and completely different forms of criminal activity on a single indictment when those charges involve different individuals.

[19] Looking at the case as a whole I consider that the connections between the categories of allegations that are the subject of the present indictment are much too tenuous to justify all of the counts against all of the present accused being joined in one indictment. I therefore rule that counts 54, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95 and 96 against Richard Thomas Fox are misjoined in this indictment.

[20] So far as Kathleen Fox is concerned she was not party to the application to have these counts upon which she appears declared as being misjoined. Mr Irvine for Kathleen Fox has since indicated that his client is neutral on this

application, and he accepts that because she is jointly charged with Richard Fox on three counts she should be tried with him. I therefore rule that counts 93, 94 and 96 against Kathleen Fox are misjoined in this indictment.

[21] In Archbold 2009 at 1-161 it is stated that a misjoined indictment, although invalid, is not a nullity because it can be cured by amendment. The learned authors state that –

“In order to proceed on the counts so removed it would be necessary for the prosecution either to obtain leave to prepare a voluntary Bill or, alternatively, to commence fresh proceedings in respect of the offences charged in any such count.”

[22] However, as Archbold points out at 1-207, in R v Follett (1989) 88 Cr. App. R. 310 it was held that it was possible for the court to give the Crown leave to prefer out of time two or more fresh indictments based upon the same committal. In terms of the relevant statutory provisions in Northern Ireland the three conditions identified by Lord Lane CJ are (i) that each new indictment is preferred in time or within such further time as the court permits; (ii) complies with the requirement that the indictments are founded on facts or evidence disclosed in the papers upon which the defendant was returned for trial as permitted by s. 2(5) of the Grand Jury (Abolition) Act (NI) 1969, and (iii) the offences charged in a single indictment must be properly joined in that indictment.

[23] I will hear from counsel for the prosecution, Richard Fox and Kathleen Fox as to what steps should now be taken in relation to the 15 counts which have been misjoined in this indictment.