Neutral Citation no. [2007] NIQB 105 | *Ref:* **STEC5849**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **27/06/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

THE QUEEN

- v -

BENEDICT MACKLE, PLUNKETT JUDE MACKLE, PATRICK MACKLE AND JAMES ANTHONY SLOAN

STEPHENS J

Introduction

[1] The prosecution have brought an application for an order under Section 44 of the Criminal Justice Act 2003 that the trial be conducted without a jury. The prosecution seek to establish:

(i) that there is evidence of a real and present danger that jury tampering would take place if the trial was conducted with a jury; and

(ii) that notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

[2] The defendants have brought applications to stay the prosecution on the basis of an alleged abuse of the process of the court. In the alternative that if I do not stay the entire prosecution then that I should stay the prosecution's application for an order under section 44 of the Criminal Justice Act 2003. The

effect of staying the prosecution's application under section 44 being that the matter would proceed to trial with a jury.

The Charges

[3] The defendants, Benedict Mackle, Plunkett Jude Mackle, Patrick Mackle and James Anthony Sloan are charged with the evasion of duty on a large quantity of cigarettes. The first three defendants are brothers. The fourth defendant, James Anthony Sloan, was an officer with HM Customs and Excise. He is in addition charged with the unlawful disclosure of information contrary to Section 4(1) of the Official Secrets Act 1989.

[4] The prosecution allege that the cigarettes upon which duty was evaded were manufactured in the United Kingdom for export outside the European Community. That they were exported and then smuggled back into the United Kingdom without duty being paid. It is alleged that on 16 January 2003 a ship known as the "MV Hyundai Fortune" sailed from Port Klang in Malaysia to Southampton in England. A container with number HDMU433561/6 was part of the cargo. The container was supposed to contain wooden flooring but an examination by Customs and Excise in Southampton revealed that, whereas the first three or four layers did contain wooden flooring, the remaining rows contained approximately 6 million cigarettes which had not been declared to Customs and Excise and in relation to which no duty had been paid. Having discovered the cigarettes there followed what is termed by Customs and Excise "a controlled delivery." This involved the container being re-packed. Thereafter it was permitted to be collected and delivered in the ordinary way as if no detection had occurred. This was carried out in an attempt to identify and prosecute those suspected of being responsible for the importation of the cigarettes. The container proceeded to Belfast and it was then delivered to a warehouse in Coalisland, County Tyrone. It is alleged that the first two defendants, namely Benedict Mackle and Plunkett Jude Mackle were seen assisting in the unloading of the container. It is alleged that the third defendant, Patrick Mackle, was the owner of the warehouse premises in Coalisland to which the cigarettes were delivered. It is alleged that he accepted in interview that he had authorised the unloading of the container. He maintained that this was not on his own behalf but rather on behalf of his tenant who had entrusted the unloading of the container to him. That it only subsequently transpired that the contents of the container were cigarettes upon which no duty had been paid.

[5] The prosecution also allege that the fourth defendant, James Anthony Sloan, was involved in the smuggling operation. He was employed as an investigator by Customs and Excise. In that position he had access to sensitive information and intelligence. In addition it is alleged that after the seizure of the container he revealed secret information in breach of the Official Secrets Act 1989.

The Previous Trial

[6] The previous trial of the defendants commenced on 8 November 2006 before Mr Justice Hart with a jury at Laganside Courts, Belfast. On Wednesday 29 November 2006 in the judge's chambers, the learned trial judge was provided with information by Mr McCollum QC, who appeared on behalf of the prosecution, in relation to a report from a member of the jury. Defence counsel had not been informed of that information, nor that the information was to be given to the trial judge. Initially defence counsel was not present in the judge's chambers. A stenographer was present and there is a full transcript of everything that occurred. That transcript has been made available to me and also to all the parties.

[7] The transcript commences with the following passage:

> "Mr McCollum: There was a report from a member of the jury to the police that on Monday evening while he was at home, there were two people who called to his door, I think he says that they were wearing dark clothing and hoods over their heads. He couldn't see who they were. They asked him if he was serving on the jury and he said 'In Belfast.' He said he was and they asked him for information and they offered him £5,000 to give information.
>
> He immediately asked them to leave and he shut the door on them, and he has indicated that he is in fear. That is really all the information that I have at the moment."

[8] The juror concerned has given evidence before me for the purposes of these applications. I accept his evidence which I summarise later in this judgment. Considerably more detail was given to me than was given to the learned trial judge. However the essential seriousness of what occurred did not change. A juror had been specifically identified as had his home. He had been approached at night at his home by two hooded men. He had been offered a financial inducement. He was afraid. This was a determined and planned approach to a juror where there was an express message from two hooded men:

> "We know you are on the jury."

It is also clear that there was another sinister message, not expressly articulated, but absolutely clear all the same:

"We know where you live."

That message also leaves open the concern that a juror who can be followed to his home can also be followed to his place of work and that his family can also be followed. It can be readily appreciated that the juror was "in fear".

[9] The transcript records the response of the learned trial judge to the information provided to him by Mr McCollum as follows:

> "Mr Justice Hart: I think in those circumstances there is really no alternative but to discharge the jury because one does not know whether there have been similar approaches to other jurors and a mere reference to that or any inquiry I think, would lead to a situation where one would have prejudiced the jury against the accused."

[10] In summary the learned trial judge decided on the basis of the information which had been given to him to discharge the jury. He had made his decision. He then turned to the question as to how that decision was to be implemented. He continued:

> "I am therefore minded, subject to what you may wish to say, to simply inform counsel that the matter has arisen involving the jury and I feel I have to discharge the jury. There may be reasons why it is not possible at the moment to explain why."

[11] Mr McCollum replied to that enquiry as to the manner in which the jury should be discharged. I set out the reply from Mr McCollum together with a number of short exchanges as follows:

> "Mr McCollum: I think that is the best course at the moment myself.
>
> Mr Justice Hart: I assume that the police will wish to …
>
> Mr McCollum: An enquiry has started as I understand.
>
> Mr Justice Hart: ….make further enquiries. Well that is what we will do. I will have defence counsel brought in. Would you like to find them and bring them in?"

I set out the entire transcript as an appendix to this judgment.

[12] The trial judge discharged the jury and the case was put back to be re-listed.

The sequence in relation to the applications

[13] On 29 January 2007 the prosecution brought an application under Section 44 of the Criminal Justice Act 2003. The application was in Form 5 and in accordance with Rule 44(AA) of the Crown Court Rules (Northern Ireland) 1979 as amended by the Crown Court (Amendment) Rules (Northern Ireland) 2006. I heard the application under this rule as I am required to do by Section 45 of the Criminal Justice Act 2003.

[14] Form 5 stated that the "application shall be based on the evidence contained in the attached statements of evidence." Those were statements from:

(a) L H. He provided two statements dated respectively 28 November 2006 and 6 December 2006. He was the juror who had been approached at his home by two hooded men on the evening of Monday 27 November 2006 and offered £5,000 cash in exchange for information about the case.

(b) N J, another juror. Her statement is dated 1 December 2006 and its sets out details of an incident that occurred involving this juror, two other jurors and the three Mackle brothers in a coffee shop in Belfast on 29 November 2006. This incident occurred after the jury had been discharged ("the coffee shop incident").

(c) P M, another juror. Her statement is dated 2 December 2006 and it also sets out details in relation to the coffee shop incident.

(d) R O, another juror. Her statement is dated 1 December 2006.

(e) T Q. She was a Detective Constable in the Police Service of Northern Ireland and was a friend of L H. He contacted her on the morning of Tuesday 28 November 2006 seeking advice from her as to what he should do in relation to what had occurred the previous evening.

[15] As I have indicated faced with the application by the prosecution under Section 44 of the Criminal Justice Act 2003 the defendants have applied to stay the entire proceedings on the basis of an abuse of process, or in the alternative they have applied to stay the application under Section 44 of the Criminal Justice Act 2003.

[16] At the previous trial and for the purposes of the applications before me:

(a) Mr McCollum QC and Mr Fowler QC appeared on behalf of the prosecution.

(b) Mr Rodgers and Mr McStay appeared on behalf of Benedict Mackle.

(c) Mr Gallagher QC and Mr Kearney appeared on behalf of Plunkett Jude Mackle.

(d) Mr John McCrudden QC and Mr Mulholland appeared on behalf of Patrick Mackle.

(e) Mr Harvey QC and Mr Barr appeared on behalf of James Anthony Sloane.

[17] On the hearing of the applications the prosecution called as witnesses L H, N J, and T Q. The statement of P M was taken as being read in evidence. No evidence was called on behalf of the defendants. I base my decision only on the evidence that I heard and on the statement of P M.

The Evidence

[18] As I have indicated I accept the evidence of L H. He presented as an entirely truthful open and honest witness. I was particularly impressed with the manner in which he gave his evidence and his demeanour in the witness box. I also accept the evidence of N J and T Q. I had an opportunity of assessing the manner in which both of these witnesses dealt with cross examination. In particular T Q faced forceful cross examination. The demeanour of both of these witnesses supported my conclusion that they were both witnesses of truth.

[19] A summary of the evidence of L H is that he was a juror at the previous trial. That at about 9.00 pm on Monday 27 November 2006 he was at his home with his partner and their daughter. He heard a knock at the door. It was dark. Upon opening the door he saw two men. They were both wearing coats with hoods attached and they were wearing their hoods in such a way, with the draw-strings pulled, as to obscure their faces down to the eyes and up to the mouths. In short L H could only see a very small part of their faces. One of the men said to L H "You're on jury service" and he then described the case. That it was to do with cigarette smuggling and involved the Mackle brothers. He offered to pay L H £5,000 in cash in return for information about the case. L H declined in robust and abrupt language and slammed the door.

He was understandably extremely concerned and frightened. He did not wish to alarm his young daughter but he took the precaution of not going to bed and staying awake all night in his living room. He expressed to me that this was "in case anything would have happened" that night. In short he was frightened in case these men would come back and he was concerned for his own and his family's safety.

[20] The previous trial was not due to resume until Wednesday 29 November 2006. The court was not sitting on Tuesday 28 November 2006 as another juror was to attend a funeral on that day. Accordingly on Tuesday 28 November 2006 L H went to work and he obtained the telephone number of a police woman that he knew, namely Detective Constable Q. He rang her for advice and as a consequence of that telephone call a statement was taken from him by Constable Shane McCardle.

[21] It was suggested to L H in cross examination that he should have reported what had occurred to the court's jury keeper rather than to the police. I reject any argument based on that proposition. L H was undertaking the public duty of jury service. It is a criminal offence to interfere with the jury. The police have a duty to investigate the potential commission of a criminal offence. They also have a duty to protect members of the public. It was an entirely natural and appropriate reaction to report this matter to the police and once it had been reported it was entirely appropriate for the police to investigate the matter. It also transpired that Detective Constable Q who was contacted by L H had a peripheral involvement in the trial on behalf of the prosecution. She was also married to another police officer who was or had been a member of a police unit which was involved in some aspects of the police investigation though her husband was not involved. L H was completely unaware of these facts and I find that they are and were completely coincidental. I base that finding not only on the evidence of L H but also on the evidence of Detective Constable Q.

[22] N J gave evidence that after the jury were discharged on Wednesday 29 November 2006 she along with two other jurors went to a coffee shop in Arthur Street, Belfast. That they sat at a table near the front of the shop. That the three Mackle brothers then entered the coffee shop and they went to the back of the shop. A conversation eventually took place and one of the Mackle brothers enquired, in effect, as to where "X" was. X was the fourth female on the jury. He then said that his sister lived next door to X's sister at the top of the Falls Road, Belfast. I accept this evidence. The significance of it is that one of the defendants knew the personal circumstances of a juror.

The order in which the applications should be determined.

[23] It is appropriate to determine the abuse of process applications before considering the application that the trial be conducted without a jury. If

either of the two abuse of process applications were successful then the application that the trial be conducted without a jury would no longer arise.

The initial abuse of process application on behalf of the First Defendant

[24] It was submitted by Mr Rodgers, on behalf of the first defendant, Benedict Mackle, that I should stay the present application as an abuse of the process of the court. The original ground upon which that application was made was that the prosecution had deliberately manipulated the re-listing of the case after it had been taken out of the list on 29 November 2006. That "the normal procedure would have seen the case re-entered into the list in December." It was contended that the "only" explanation for the case not being re-listed in December 2006 was that the prosecution had deliberately delayed in order to allow Section 44 of the Criminal Justice Act 2003 to be brought into force in Northern Ireland on 8 January 2007 thus enabling the prosecution to apply to have this case heard by a judge sitting without a jury. That any other explanation for the alleged delay in re-listing was inappropriate.

[25] This was a most serious allegation of a deliberate manipulation of the criminal justice system to gain a perceived tactical advantage for the prosecution. The primary fact from which I was asked to draw this serious inference was that this case, taken out of the list at the end of November 2006, would be re-listed between then and the end of December 2006. There was no evidence before me of that primary fact. Indeed every other counsel in this case, whether for the prosecution or for the defence and based on their experience, stated that a complicated and lengthy case such as this could not possibly have been re-listed in that short period of time. The primary fact from which I was invited to draw this inference of a deliberate attempt to manipulate the judicial process just did not exist. In putting forward this contention Mr Rodgers had submitted that the inference of manipulation was not an inference to be taken against any judicial figure or senior Crown counsel, but rather should be taken against some one or more unnamed individuals in the Crown Prosecution Service. As appears later from this judgment I was subsequently invited by counsel on behalf of the second and third and fourth defendants to take a wholly different adverse inference against the prosecution. That is that some one or more persons on behalf of "the State" deliberately engineered a situation in which there was tampering with the jury in the previous trial, safe in the knowledge that this would abort the previous trial with the inevitable consequence that a new trial could not take place before Section 44 of the Criminal Justice Act 2003 came into force in Northern Ireland on 8 January 2007. Accordingly the second, third and fourth named defendants were alleging that it was not possible to have a re-trial before Section 44 came into force. The first defendant was alleging that the normal procedure was that there would have been a re-trial before the legislation came into force. Faced with this fundamentally different

contention on the part of the second, third and fourth defendants, Mr Rodgers then withdrew his allegation of a deliberate manipulation of the system to keep the case out of the list and adopted the submissions made on behalf of the second, third and fourth defendants. In fairness to Mr Rodgers, I should record that, when the situation became clear, he apologised for having made that allegation.

[26] As I have indicated the primary fact from which I was invited by Mr Rodgers to draw this inference did not exist. Even if it did there would have been a multiplicity of completely innocent explanations none of which were canvassed in front of me by Mr Rodgers. Even if I had accepted the primary fact for which Mr Rodgers contended, I would not have been led to the conclusion that this was a deliberate attempt by the prosecution service to manipulate the legal system for some perceived tactical advantage to the detriment of the defendants.

The abuse of process applications on behalf of the Defendants

[27] I turn now to consider the abuse of process applications which were made on behalf of the second, third and fourth defendants which applications were then adopted by Mr Rodgers on behalf of the first defendant. The abuse of process applications by the second, third and fourth defendants, were based on two major contentions. The first was that "agents of the State" had tampered with the jury in the previous trial with a view to aborting that trial because it was not going well from the point of view of the prosecution and to allow Section 44 of the Criminal Justice Act 2003 to come into force in Northern Ireland on 8 January 2007. The second contention was that the learned trial judge had not acted appropriately in discharging the jury in the previous trial without first informing the defendant's counsel that he was minded to discharge the jury and the grounds on which he was so minded and allowing the parties an opportunity to make representations.

[28] I should at this stage record a refinement that was made to the allegation that "agents of the State" had tampered with the jury in the previous trial so as to abort that trial and to allow section 44 of the Criminal Justice Act 2003 to come into force in Northern Ireland on 8 January 2007. At the commencement of the applications before me all counsel, whether for the prosecution or for the defendants, were agreed that Section 44 of the Criminal Justice Act 2003 came into force in Northern Ireland on 8 January 2007. During the course of the hearing of the application further research was undertaken by counsel and the submission which was then made by all counsel on behalf of the defendants was that Section 44 of the Criminal Justice Act 2003 had in fact come into force in Northern Ireland on 24 July 2006 by virtue of the Criminal Justice Act 2003 (Commencement No. 13 and Transitional Provision) Order 2006. The allegation was thereafter refined so that in its new form it was that "agents of the State" had tampered with the

jury in the previous trial for the deliberate purpose of aborting that trial in the knowledge that this would mean that a re-trial could only take place after 8 January 2007, which those agents mistakenly believed was the date upon which Section 44 of the Criminal Justice Act 2003 came into force in Northern Ireland but in fact, unbeknownst to them, it was already in force in Northern Ireland.

[29] No evidence was called before me as to how the previous trial was proceeding nor was there any evidence of any particular event having occurred in the previous trial from which it might be inferred that the trial was not going well from the point of view of the prosecution. Accordingly I find no factual basis for the proposition that there was a motive for the prosecution or any "agent of the State" in aborting the previous trial on the basis that it was not going well from the point of view of the prosecution.

[30] There was tampering with the jury in the previous trial but I do not accept that this was tampering committed by "agents of the State". There was no direct evidence of that. I hold that the connections between L H and Detective Constable Q and her involvement in the trial are entirely coincidental. None of the defendants gave evidence before me and they all individually or collectively had a powerful motive to tamper with the jury in the previous trial. It is not necessary when dealing with the prosecution's application under Section 44 of the Criminal Justice Act 2003 to decide who tampered with the jury in the previous trial. However when considering the separate and distinct question as to whether there has been an abuse of the process of the court by "agents of the State" tampering with the jury in the previous trial I do take into account that there was a powerful motive for one or more of the defendants to tamper with that jury. No matter what perception a defendant has as to how a trial is progressing successful tampering with the jury would most probably ensure an acquittal.

[31] In conclusion I reject the factual basis upon which it is suggested by all the defendants that there was an abuse of the court's process in that "agents of the State" tampered with the jury in the previous trial.

[32] I turn to consider the second ground upon which the abuse of process application was made namely that the learned trial judge did not inform defence counsel of the information that was given to him by Mr McCollum and did not permit any representations to be made to him prior to deciding to discharge the jury in the previous trial.

[33] There is now a statutory procedure which has to be followed if a trial judge is minded to discharge a jury because jury tampering appears to have taken place. The procedure is to be found in section 46 of the Criminal Justice Act 2003. Section 46(2) provides

"(2) Before taking any steps to discharge the jury, the judge must:

'(a) inform the parties that he is minded to discharge the jury,

(b) inform the parties of the grounds on which he is so minded, and

(c) allow the parties an opportunity to make representations.'"

[34] The procedure in Section 46 of the Criminal Justice Act 2003 was not followed when the jury in the previous trial was discharged. None of the parties considered that Section 46 Criminal Justice Act 2003 was then in force. At the start of the hearing of these applications before me all counsel involved in them submitted that Section 46 of the Criminal Justice Act 2003 came to force in Northern Ireland on 8 January 2007. However as I have indicated during the course of the hearing of the application further research was undertaken by counsel and the submission which was then made by all counsel on behalf of the defendants was that Section 46 had in fact come into force in Northern Ireland on 24 July 2006. It was therefore submitted that there had been a failure by the learned trial judge to follow the procedure set out in Section 46 of the Criminal Justice Act 2003. It is accordingly necessary to determine the correct commencement date in Northern Ireland in respect of section 46 of the Criminal Justice Act 2003. This necessarily involves a consideration of the commencement dates in Northern Ireland for other sections in Part 7 of the Criminal Justice Act 2003.

[35] Sections 44 - 50 of the Criminal Justice Act 2003 are contained within Part 7 of that Act. By Section 337(3) Part 7 also extends to Northern Ireland. Section 337 came into force on the passing of the Act. The commencement provisions are to be found in Section 336 which as far as Sections 44 - 50 are concerned provides that they come into force in accordance with provision made by the Secretary of State by order. That different provision may be made for different purposes and different areas.

[36] Section 49 of the Criminal Justice Act 2003 was the first Section in Part 7 to be brought into force. Section 47 deals with making rules of court for the purposes of Part 7. It was brought into force on 29 January 2004 by the Criminal Justice Act 2003 (Commencement No. 2 and Saving Provisions) Order 2004. That Commencement Order is headed "Criminal Law, England and Wales. Criminal Law, Northern Ireland." It does not seek to differentiate between the areas of England and Wales on the one hand and Northern Ireland on the other so as to limit the coming into force of Section 49 only to England and Wales. At this stage Section 50 which is headed "Application of

Part 7 to Northern Ireland" had not been brought into force. Section 50 provides that in its application to Northern Ireland this Part (i.e. Part 7) is to have effect subject to certain modifications. Those modifications include modifications to Section 49 in so far as it applies to Northern Ireland for which see Section 50(15) and (16). Accordingly either

(a) Section 49 came into force in Northern Ireland in its unmodified form on 9 January 2004 and was then subsequently modified when Section 50 was brought into force on 8 January 2007, or

(b) despite the undifferentiated nature of the Commencement No. 2 Order, Section 49 only came into force in Northern Ireland when Section 50 was brought into force.

It appears to be clear that the intention of the Secretary of State was only to bring Part 7 of the Criminal Justice Act 2003 into force in Northern Ireland when Section 50 was brought into force. This can be demonstrated by an analysis of Section 45 which can clearly have no relevance to Northern Ireland until Section 50 is brought into force. It is only when Section 50 is brought into force that Section 45 is modified to refer to legislation that applies to Northern Ireland. Section 45 as enacted in England and Wales refers to legislation which does not extend to Northern Ireland.

[37] Section 45 of the Criminal Justice Act 2003 makes provisions for the procedure for an application under Section 44. Section 45 as it is enacted in England and Wales requires an application under Section 44 to be determined at a preparatory hearing within the meaning of the Criminal Justice Act 1987 or Part 3 of the Criminal Procedure and Investigations Act 1996. Section 9 of the Criminal Justice Act 1987 deals with preparatory hearings but that Section does not extend to Northern Ireland for which see Section 17(3). Part 3 of the Criminal Procedure and Investigations Act 1996 also deals with preparatory hearings but that part does not extend to Northern Ireland for which see Section 78(3).

[38] It was accordingly necessary to make separate provision in Northern Ireland for the procedure in respect of an application under Section 44 of the Criminal Justice Act 2003. That separate provision is to be found in Section 50 of the Criminal Justice Act 2003 which by Section 50(3) substitutes a different Section 45 in respect of the application of Part 7 of the Criminal Justice Act 2003 to Northern Ireland. In Northern Ireland an application under Section 44 must be determined at a preparatory hearing within the meaning of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 or at a hearing specified in, or for which provision is made by, Crown Court Rules. Accordingly until Section 50 of the Criminal Justice Act 2003 was brought into force on 8 January 2007 it was not possible in Northern Ireland to bring an

application under Section 44 of the Criminal Justice Act 2003. Prior to that date the application would have had to be determined at a preparatory hearing within the meaning of legislation that did not extend to Northern Ireland.

[39] In conclusion I consider that all the provisions in Part 7 can only have effect in Northern Ireland when Section 50 of the Criminal Justice Act 2003 was brought into force. Section 50 was brought into force on 8 January 2007 by the Criminal Justice Act 2003 (Commencement No. 15) Order 2006. This interpretation accords with a passage in Hansard which records that on 13 December 2006 the Secretary of State informed Parliament that:

> "The jury tampering provisions will be implemented in Northern Ireland early in January – in a few weeks."

[40] Part 7 as it applies to Northern Ireland contains the numerous amendments set out in Section 50. It may on reflection have been simpler to put Part 7 as it applies to Northern Ireland as a separate schedule to a specific Section in the Criminal Justice Act 2003. This would have had two advantages. First the commencement date for that Section and for the schedule would have been clear. Second there would have been a full text of the Sections as they applied to Northern Ireland without the difficulty of constantly referring to and checking for amendments in Section 50.

[41] In conclusion Section 46 of the Criminal Justice Act 2003 was not in force in Northern Ireland in November 2006. It only came into force on 8 January 2007. Accordingly there was no statutory obligation to follow the procedure set out in section 46. In considering what procedure to follow and what action to take the judge applied the pre existing common law and accordingly had discretion. It is not in dispute that he had discretion but what is objected to is the manner in which that discretion was exercised without informing the defendants and asking for representations. However in exercising that discretion the judge in the previous trial had also to consider:

> (a) the Article 2 rights of L H and other jurors,
>
> (b) the impact that any steps which he could have taken would have had on the proper investigation of the matter by the police,
>
> (c) the potential that other jurors may have been approached and may not have reacted in the same way as L H.

It is quite clear from the transcript that the learned judge had very much to mind the potential for prejudicing the jury against the defendants, the police investigation and the element of fear which had been drawn to his attention.

The exercise of the judge's discretion in this case was not an abuse of the court's process. I was invited to hold that the learned judge in the previous trial was in error in discharging the jury in this manner. I decline to do so.

[42] If I am wrong in that conclusion and there was error in discharging the jury in the previous trial without affording an opportunity for representations and/or evidence then I am satisfied that if the judge had gone on to hear all the representations and/or evidence that I have heard he would have come to exactly the same conclusion namely that there was clear evidence of jury tampering of a most serious nature undermining the impartiality of one juror and giving rise to a real and substantial suspicion that other jurors had been approached. That he would then have discharged the jury in the previous trial. In conclusion that if there was any failure by the learned trial judge to afford an opportunity for representations that this had no effect on what he would have done in any event.

[43] I further hold that even if the jury in the first trial was discharged in error and if the judge in the previous trial would have come to a different conclusion if he had heard representations, then the discharge was no bar to a new trial. In *R v Elia* [1968] 2 All ER 587 the Court of Appeal in England & Wales reviewed the authorities in relation to this point. I refer in particular to that part of the judgment which dealt with the decision in *R v Lewis*. It is in the following terms:-

> "*R v Lewis*, was a case where, after a trial had started, the jury were discharged owing to the absence of some of the witnesses for the prosecution. In the course of giving the judgment of the Court of Criminal Appeal, Channell J said ((1909), 2 Cr App Rep at p 181, [1908–10] All ER Rep at p 655):
>
> > '… the rule as to autrefois acquit and autrefois convict cannot be urged here because the appellant was never in peril on Apr. 20 (7 April 20 was the date of the first trial). The established law to the effect that the discharging of the jury is in the discretion of the judge, and that his exercise of the discretion is not subject to review, is not affected by the Criminal Appeal Act, 1907, and therefore we have no jurisdiction to deal with it. However, although we cannot say it judicially, we would like to intimate that the judge's discretion in this case appears, if we rightly understand the facts, to have been

> exercised in a way different from that in which it has been our individual practice to exercise it. A jury should not be discharged in order to allow the prosecution to present a stronger case on another trial. That is the rule on which judges have acted and on which we ought to act, but we have no jurisdiction to deal with this matter'."

> So there was a case where the court was of opinion that the judge was wrong to discharge the jury but nevertheless held that they could not interfere. It is suggested by counsel for the appellant that the present case is different, since he says that the discharge was in breach of the statute; but even so, the appellant was not in peril at the first trial. He could not, therefore, plead autrefois acquit or autrefois convict, and there was no ground on which he could move to quash."

In conclusion there is discretion in the trial judge as to whether to discharge a jury and if a judge wrongly discharges a jury then this does not bar a new trial.

[44] In conclusion I refuse all of the defendants applications based on abuse of the process of the court.

The prosecution's application for an order under Section 44 of the Criminal Justice Act 2003.

[45] I turn now to consider the prosecutions application for an order under section 44 of the Criminal Justice Act 2003 that the trial be conducted without a jury.

The Statutory Provisions

[46] Section 44 of the Criminal Justice Act 2003 provides:

> "**44 Application by prosecution for trial to be conducted without a jury where danger of jury tampering**
>
> (1) This Section applies where one or more defendants are to be tried on indictment for one or more offences.

(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

(3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place —

(a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial."

[47] It can be seen that there are two conditions which have to be established by the prosecution before an order is made namely:

(a) that there is evidence of a real and present danger that jury tampering would take place; and

(b) that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

[48] Examples are then provided of cases where there may (emphasis added) be evidence of a real and present danger that jury tampering would take place. One example is where the trial is a re-trial and the jury in the previous trial was discharged because jury tampering had taken place. These are examples only. The prosecution can establish a real and present danger that jury tampering would take place in whatever way is appropriate for the particular facts of each individual case.

[49] Section 45 of the Criminal Justice Act 2003 makes provision for the procedure for applications under, amongst others, Section 44.

[50] Section 46 of the Criminal Justice Act 2003 is headed "Discharge of Jury Because of Jury Tampering." This Section applies where:

> "(a) a judge is minded during a trial on indictment to discharge the jury, and
>
> (b) he is so minded because jury tampering appears to have taken place."

[51] It can be seen that Section 46 deals with the situation that arises during a trial. The trial judge must allow the parties to make representations and can if he is so minded, and subject to being satisfied as to the criteria in Section 46(3) then proceed to continue the trial without a jury.

The Rules

[52] The Crown Courts Rules (Northern Ireland) 1979 were amended by the Crown Court (Amendment) (Northern Ireland) 2006. The Crown Court (Amendment) Rules (Northern Ireland) 2006 were made on 5 December 2006 and came into operation on 8 January 2007. For the purposes of this application the amendment was the insertion of a new Rule 44(A) into the Crown Court Rules (Northern Ireland) 1979. These rules were correctly made in exercise of powers conferred by inter alia, Section 52(1) and 53(A) of the Judicature (Northern Ireland) Act 1978. This was ultimately accepted by the defendants.

Decision in relation to the Section 44 application.

[53] It was submitted before me that Mr Justice Hart had discharged the jury in the previous trial not because of any finding or conclusion that jury tampering had taken place but because there was a suspicion or an allegation that it had taken place. The learned judge did not hear any evidence. I have heard detailed evidence and had the benefit of submissions on behalf of all of the defendants. On the basis of the evidence I am satisfied that there was tampering with the jury in the previous trial and that by virtue of that jury tampering there is a real and present danger that jury tampering would take place in the re-trial. Accordingly I am satisfied as to the existence of the first condition in Section 44(5) of the Criminal Justice Act 2003.

[54] I now turn to a consideration of the second condition contained in Section 44(5) of the Criminal Justice Act 2003. That condition is in the following terms namely:

> "(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury."

[55] Accordingly Section 44(5) requires me to consider:

> "(1) What are the steps which might be taken to prevent jury tampering?
>
> (2) Are those steps reasonable?
>
> (3) Whether notwithstanding any steps the likelihood that jury tampering would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury."

[56] In considering those questions I bear in mind the particular circumstances of this case, the nature of the charges involved, the varied areas of Belfast in which the jurors are likely to live and the potential impact on this trial of any steps that could be taken. The cost of police protection to jurors is a consideration but in relation to the question of reasonableness it is of a far less significance than the potential impact of the steps on the trial and the burden that could be imposed on the potential jurors by those measures.

[57] Mr McCollum on behalf of the prosecution submitted that the steps which might be taken in this case were either to provide round the clock police protection to each member of the jury or to sequester the entire jury once sworn for the duration of the trial. He submitted that other precautions might be taken in other cases for instance if the real and present danger of jury tampering was by an accused who was on bail then bail could be revoked. If the risk of jury tampering was connected to the place where the trial was being conducted then one could move the trial venue. If the trial was of a short duration then it can, depending on the particular case, be appropriate to require the jury to stay in a hotel for the duration of the trial. Alternatively if the risk of jury tampering though real and present was a minimal risk then in a particular case one could provide civilian staff to protect the jury rather than police officers.

[58] In the circumstances of this case I do not consider that round the clock police protection or sequestering the entire jury for the duration of the trial is reasonable. This is going to be a lengthy trial. Both steps would involve an unreasonable intrusion into the lives of the jurors. Both steps run the risk of creating fear amongst the jurors who might perceive that there was paramilitary involvement in this case bearing in mind that the allegations relate to the smuggling of a container load of cigarettes. A step which would lead to such a risk is unreasonable.

[59] I turn then to consider what may be termed the lesser steps, which I have set out above, that might be taken in this case to prevent jury tampering. When considering those steps I bear in mind that this case involves an allegation of smuggling a very large number of cigarettes. In view of the determined and organised approach that was made to L H I consider that notwithstanding any of these lesser steps the likelihood of jury tampering taking place will be substantial. I also consider that the lesser step of having round the clock civilian as opposed to police protection for the entire jury would be unreasonable. Accordingly I am satisfied that it is necessary in the interests of justice that this trial be conducted without a jury. It has been accepted on behalf of the defendant that a trial without a jury is a fair trial.

[60] In arriving at the conclusion that the trial should be without a jury I have taken into account the submission made by Mr Gallagher QC on behalf of Plunkett Jude Mackle that this application is in itself a deterrent to any further jury tampering. It was submitted that whoever tampered with the original jury would now have a full appreciation of the consequences of jury tampering and that this would deter them from tampering with a new jury. It was submitted by Mr McCollum that the only person who would be deterred in this way would be a defendant. If it was one or more of the defendants who tampered with the jury in the previous trial then that defendant or those defendants would now have an appreciation of the consequences of jury tampering having listened to the entirety of this application. If the jury

tampering had been by an agent of the state then they would not be deterred by the consequences of future jury tampering because it was part of the defendants' case that their aim was to obtain a trial without a jury. I do not consider that a greater degree of knowledge of the court's powers under Sections 44 and 46 of the Criminal Justice Act 2003 would have any appreciable impact on whoever tampered with the jury in the previous trial.

[61] I order that the trial be without a jury.

APPENDIX

(In Judge's chambers)

MR McCOLLUM: There was a report from a member of the jury to the police that on Monday evening while he was at home, there were two people who called to his door, I think he says that they were wearing dark clothing and hoods over their heads. He couldn't see who they were. They asked him if he was serving on the jury and he said "In Belfast". He said he was and they asked him for information and they offered him £5,000 to give information.

He immediately asked them to leave and he shut the door on them, and he has indicated that he is in fear. That is really all the information that I have at the moment.

MR JUSTICE HART: I think in those circumstances there is really no alternative but to discharge the jury because one doesn't know whether there have been similar approaches to other jurors and the mere reference to that or any inquiry I think, would lead to a situation where one would have prejudiced the jury against the accused.

I am therefore minded, subject to what you may wish to say, to simply inform counsel that the matter has arisen involving the jury and I feel I have to discharge the jury. There maybe reasons why it is not possible at the moment to explain why.

MR McCOLLUM: I think that is the best course at the moment myself.

MR JUSTICE HART: I assume that the police will wish to...

MR McCOLLUM: An inquiry has started as I understand.

MR JUSTICE HART: ...make further inquiries. Well that is what we will do. I will have defence counsel brought in. Would you like to find them and bring them in?

(Mr McCollum left chambers to bring defence counsel)

[Mr McCollum QC, Mr Fowler QC, Mr Gallagher QC, Mr Barr BL, Mr J McCrudden QC, Mr McStay BL and Mr Rodgers BL, into Chambers]

MR JUSTICE HART: Yes, this is to tell you that a matter has been drawn to my attention concerning the jury and I consider that I have no option but to discharge the jury. That is what I propose to do. I am not at liberty at this stage to say what it is, but as you will appreciate it is not a step that I would take lightly.

So I propose to come out and simply say that the jury is being discharged and I don't propose to say anything further about it.

The matter will be put back and relisted in due course. Thank you very much.

MR McCRUDDEN: Judge, my submission would be, certainly so far as my client is concerned, that we would have, we would wish it listed, if that is the proper procedural way, to establish the basis for this discharge.

MR JUSTICE HART: The matter will be relisted in due course. I am telling

you I am making the decision to discharge the jury and at present it will not be investigated in open court. No doubt the situation will change in due course but at present that is the situation.

(Counsel leave chambers)