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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **16/10/07**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

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

Before Kerr LCJ, Campbell LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an application by Benedict Mackle, Patrick Mackle and James Anthony Sloan for leave to appeal against a ruling made under section 44 of the Criminal Justice Act 2003 by Stephens J on 27 June 2007 that their trial and that of Plunkett Jude Mackle on charges of evasion of duty on a substantial quantity of cigarettes and, in the case of Mr Sloan, unlawful disclosure of information contrary to Section 4(1) of the Official Secrets Act 1989, should be conducted without a jury. Mr Plunkett Mackle has not applied for leave to appeal the ruling.

Background

[2] On 8 November 2006 the trial of the applicants began before Hart J and a jury at Belfast Crown Court. On 29 November 2006 the judge was informed by Mr McCollum QC, who appeared for the prosecution, that a member of the jury had reported that two partly masked men had come to his home on the evening of 27 November 2006. They had offered him money for information about the case. He had refused to have any dealings with the men but

reported that he had experienced considerable fear as a result of this approach.

[3] Mr McCollum had given this information to Hart J in chambers. No legal representative of any of the defendants was present. The judge caused a record to be made of the information that he received from the prosecution. He then summoned counsel for the accused and informed them that a matter had arisen in relation to the jury which required its discharge. Subsequently, he entered court and discharged the jury without stating why he had decided to take that course. At the time that the jury was discharged, therefore, nothing had been conveyed to the accused or their legal representatives of the reasons that this was done.

[4] In advance of the hearing of the application before Stephens J for trial without a jury, counsel for the accused were provided with copies of the transcribed exchange between Mr McCollum and Hart J. In the course of that hearing the juror who had been approached by the two men gave evidence. The court also heard evidence from two other jurors about an encounter between them and the three Mackle brothers in a coffee shop in Belfast on 29 November 2006 after the jury had been discharged. A statement from a third juror who was also present in the coffee shop was received as evidence by agreement and a police officer, who had been approached by the juror to whose home the men had come, also gave evidence.

[5] On the hearing of the prosecution's application to Stephens J, the defendants applied to the judge that he should stay the proceedings as an abuse of process. Various grounds were advanced to support this application but it is only necessary to mention one. It was to the effect that Hart J "had not acted appropriately" in discharging the jury in the previous trial without telling defendants' counsel that this was his intention or informing them of the grounds on which he was minded to do so. It was claimed that section 46 of the 2003 Act required the judge to take these steps and to give the parties an opportunity to make representations.

[6] Stephens J dealt first with the application to stay the proceedings. He dismissed this, holding that section 46 was not in force at the time that Hart J discharged the jury and, in any event, even if it had been and representations had been made on behalf of the defendants, the judge was bound to have discharged the jury. Stephens J also held that, even if the decision to discharge had been wrongly taken, this did not prevent him from dealing with the application under section 44.

[7] No application was made for leave to appeal against the judge's ruling on the application to stay the proceedings although, as we shall see, it was argued on behalf of Benedict Mackle that the failure of Hart J to comply with

section 46 effectively precluded Stephens J from acceding to the application under section 44.

[8] In relation to the application under section 44, the judge concluded that there was there was evidence of a real and present danger that jury tampering would take place and that, notwithstanding any steps which might reasonably be taken to prevent this, the likelihood that it would take place was so substantial that in the interests of justice the trial should be conducted without a jury. These are the two statutory conditions that must be fulfilled before an order under section 44 may be made.

The issues on the application for leave to appeal

[9] For Benedict Mackle, Mr Rodgers of counsel, who appeared with Mr McStay, submitted that, contrary to the judge's finding, section 46 was indeed in force at the time that Hart J made his ruling. He ought to have followed the procedure outlined in that section whose terms were, Mr Rodgers claimed, mandatory. That failure, allied to the judge's omission to adopt an approach such as was suggested in *R v Putnam* [1991] 93 Cr App R 281, ought to have impelled Stephens J to refuse the application under section 44. (It should be noted that section 46 was not drawn to the attention of Hart J at any stage).

[10] Mr John McCrudden QC, who appeared with Mr Mark Mulholland for Patrick Mackle, accepted that Stephens J was correct in concluding that there was a real and present danger of jury tampering in the present case. He submitted, however, that the second statutory condition (*viz* notwithstanding any steps which might reasonably be taken to prevent this, the likelihood of tampering was so substantial that in the interests of justice the trial should take place without a jury) had not been met.

[11] Mr McCrudden argued that the judge had wrongly focused on a factor that had not featured in the submissions that had been made to him, namely, that police measures necessary to protect the jury would be perceived by the jurors as indicating that there was a paramilitary involvement in the offences, when they discovered that the defendants were charged with smuggling offences involving a large quantity of cigarettes.

[12] It was contended that the judge's emphasis on this factor was objectionable on a number of grounds. In the first place, it involved a circularity of reasoning in that the judge had concluded that the risk of tampering was such that only elaborate police protection would be effective against it. The very existence of such precautions would then lead the jury to conclude (wrongly) that there was a paramilitary background to the case which would have an impact on their capacity to try the case dispassionately. It was further contended that there was no basis on which it could properly

be concluded that such elaborate precautions were necessary. Measures falling well short of these – particularly in light of the adjustments to the manner of jury trial introduced by the Justice and Security Act (Northern Ireland) 2007 – were entirely feasible.

[13] Counsel submitted that if the combination of cigarette smuggling and a high level of police protection for the jury were deemed to require trial without a jury, this would be a charter for depriving defendants of their right to trial by jury in a vast range of cases. The judge's conclusion on this issue represented a wholly disproportionate response.

[14] Finally, Mr McCrudden submitted that Stephens J had failed to warn counsel for the defendants that the impact that the provision of police protection would have on the capacity of jurors to discharge their function was a factor that weighed with him. The defendants had not had the opportunity to present arguments against that proposition and, on that account alone, the decision should be reversed.

[15] Mr Harvey QC, who appeared with Mr Barr for Mr Sloan, did not make oral submissions but relied on the written argument that had been furnished. In this it was contended that the judge was wrong to conclude that there was a real and present danger of jury tampering solely on the evidence of what had occurred during and immediately after the trial before Hart J. It was also argued that any mistaken impression that the jury might form as a result of finding that they were being protected could easily be dispelled by an appropriately worded warning by the trial judge.

The relevant statutory provisions

[16] Section 44 of the 2003 Act 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."

[17] An interesting aspect of this provision is that subsection (6) outlines as an example where a finding might be made that there was evidence of a real and present danger of tampering, the case where a jury had already been discharged because of jury tampering. This does not, in our opinion, create a presumption that where tampering has taken place, a trial without a jury should be ordered. It does no more than express the unsurprising conclusion that where tampering has taken place previously it is to be expected that it may well recur.

[18] Section 46 provides: -

46 Discharge of jury because of jury tampering

(1) 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.

(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.

(3) Where the judge, after considering any such representations, discharges the jury, he may make an order that the trial is to continue without a jury if, but only if, he is satisfied—

(a) that jury tampering has taken place, and

(b) that to continue the trial without a jury would be fair to the defendant or defendants;

but this is subject to subsection (4).

(4) If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial.

(5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled.

(6) Subsection (5) is without prejudice to any other power that the judge may have on terminating the trial.

> (7) Subject to subsection (5), nothing in this section affects the application of section 43 or 44 in relation to any new trial which takes place following the termination of the trial."

[19] It is to be noted that subsection (7) expressly provides that nothing in the section should be taken as affecting the application of section 43 or 44. Mr Rodgers was disposed to accept that in certain circumstances this could have the effect of permitting an order under section 44 to be made where section 46 had not been complied with but he argued that this was not an available option in the present case. He submitted that, where the making of an order under section 44 would "approbate" an earlier failure to observe the requirements of section 46, it could not be made.

[20] We find this argument impossible to accept. In the first place, it runs completely counter to the manifest import of the subsection. In our judgment, the subsection clearly signifies that, even if section 46 has not been observed, the power to order trial without a jury may still be exercised. Furthermore, Mr Rodgers' argument cannot be reconciled with his concession that there are *some* circumstances in which an order under section 44 could be made where the requirements of section 46 had not been met. If subsection (7) is not to be applied where there has been an "approbation" of an earlier failure to comply with section 46, this would surely pertain to every such failure.

[21] Section 337(5) provides that Part 7 of the Act extends to Northern Ireland. Part 7 includes sections 44 to 50. Section 337(5) came into force on 20 November 2003 pursuant to section 336(1). Sections 44 to 48 came into force on 24 July 2006 by virtue of SI 2006/1835. However, section 50 which contained the modifications necessary for the operation of Part 7 did not come into force until 8 January 2007 (see SI 2006/3422). On this basis, Stephens J held that section 46 was not in force at the time that Hart J discharged the jury.

[22] The provisions in sections 44 and 46 are to some extent interlinked. Thus section 46 (5) provides: -

> "(5) Where the judge terminates the trial under subsection (4), he may make an order that any new trial which is to take place must be conducted without a jury if he is satisfied in respect of the new trial that both of the conditions set out in section 44 are likely to be fulfilled."

[23] It is arguable, therefore, that section 46 cannot have been intended to be of practical effect until section 50 came into force. Such an argument might be

said to derive some support from the opening words of section 50 (1) which stipulates that, in its application to Northern Ireland, Part 7, including section 46, *is to have effect* subject to succeeding subsections. Thus, it may be suggested that, if the way in which Part 7 is to have effect is not in force until January 2007 (on the coming into force of section 50), the practical operation of provisions within that Part cannot begin until that date.

[24] Mr Rodgers submitted, however, that section 46 had a freestanding existence and was not dependent on section 50 and it is undeniable that section 46 was given legal force in July 2006. Therefore, although the practical working of that and the other sections in Part 7 was not statutorily prescribed until January 2007, the claim that it should have been applied by Hart J is at least tenable. For reasons that we will give later in this judgment, however, the decision in this application is not dependent on the outcome of this debate.

Was there a real and present danger that jury tampering would take place?

[25] Stephens J dealt with this in paragraph [53] of his judgment where he said: -

> "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. [this should be section 44 (4)]"

[26] The fact that jury tampering has taken place in the past will not, of itself, establish the existence of a real and present danger that it will recur. Indeed, as we said earlier, a history of jury tampering does not create a presumption in favour of trial without a jury. It is clear from an earlier passage of his judgment that Stephens J was alive to the true import of section 44 (6) (a) (which gives as an example where the real and present danger might be found the case where it had taken place in the past). Referring to this subsection at paragraph [48] of his judgment the judge was careful to note

that the examples provided in section 44 (6) were merely instances of where a clear and present danger *might* be found to exist. We do not construe paragraph [53] of his judgment, therefore, as finding that the clear and present danger had been shown to exist *solely* because of the fact that it had happened previously.

[27] Although a history of jury tampering does not give rise to the automatic conclusion that it will recur, it is clearly relevant to an assessment of whether it is likely to happen again. Here the determined nature of the approach made to the first juror, the blatant attempt at bribery and the fact that those involved were prepared to go to the juror's home are deeply ominous of future interference with any jury empanelled to try this case. When one considers the failed attempt to tamper with the original jury together with the overall circumstances of the case and the nature of the offences that the applicants face, the conclusion that there is a real and present danger that tampering with the jury would take place is irresistible. The applicants are charged with extremely serious crimes. Jurors, although they may now be anonymous in consequence of the Justice and Security Act (Northern Ireland) 2007, are likely to be drawn from areas where they could be readily traceable, as this case amply illustrates. These factors lead us unerringly to the view that the first condition in section 44 (4) is fulfilled.

Is the likelihood that tampering will take place so substantial that trial without a jury is necessary?

[28] The court is enjoined by section 44 (5) to consider what steps might reasonably be taken to prevent jury tampering before deciding whether the likelihood of it occurring is so great that a non jury trial should be ordered. What is meant by 'reasonable steps' in this context? Obviously, the feasibility of measures, the cost of providing them, the logistical difficulties that they may give rise to, and the anticipated duration of any necessary precautions are all relevant matters to be considered. But if the steps that might be taken are anticipated to have an adverse effect on the capacity of the jury to try the case, may that be taken into account in assessing their reasonableness?

[29] Stephens J concluded that the reasonableness of the steps should be judged, inter alia, on the impact that they might have on the discharge of the jury's function. At paragraph [58] he said: -

> "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."

[30] The steps which the court is required to consider are those that "might reasonably be taken to prevent jury tampering". This might at first sight suggest that the emphasis should be placed on the practicability of the measures rather than their potential impact on the jury's deliberations but we do not believe that reasonable steps in this context can be confined exclusively to the practical considerations that arise in providing the precautions necessary to protect the jury from interference. If a proposed step would compromise the jury's fair and dispassionate disposal of the case, it could not be described as reasonable.

[31] The judge was therefore right to examine whether the level of protection that he believed would be necessary might affect unfavourably the way in which the jury approached its task. If a misguided perception was created in the minds of the jury by the provision of high level protection this would plainly sound on the reasonableness of such a step. Mr McCrudden argued that the judge's reasoning on this was circular. We cannot agree. It may be that the inevitable result of concluding that the elaborate security the judge thought was necessary was that the trial would have to take place without a jury. This does not make his reasoning circular – merely the consequence from his conclusion unavoidable.

[32] We agree with the judge's conclusion that substantial security measures would have to be put in place in order to protect the jury from the likelihood of tampering. We consider that he was right to be influenced to this view by the nature of the earlier effort to suborn the juror who was approached in his home. That purposeful and deliberate attempt betokens a singular determination on the part of some persons to influence the conduct and outcome of the trial.

[33] Mr McCrudden made a number of suggestions as to how a more relaxed supervision than constant police protection would be sufficient to protect the jury. We are not surprised that these were not considered by the judge to be adequate. It appears to us that to allow jurors to return home each evening would, in the circumstances of this case, give rise to a substantial likelihood of their being approached by those who want to secure a particular outcome for this trial. We therefore agree with Stephens J that either round the clock protection of the jury or their being sequestered throughout its length were the only feasible alternatives to meet the substantial likelihood of tampering. We also agree with his conclusion that this would lead to an incurable compromise of the jury's objectivity. This could not be dispelled by an

admonition from the trial judge. The most that a judge could say was that the jury should not speculate on the reasons for the security and that this should not affect their consideration of the evidence. No means of policing such an enjoinder realistically exists and the peril in which the integrity of the trial would be placed is, in our view, unquestionable.

[34] We do not accept Mr McCrudden's claim that the decision in this case will lead to the ordering of trial without a jury in a vast range of cases. As was observed during the course of argument, the precedent value of a decision in an individual case where a non jury trial has been ordered will be very slight. The statutory structure for this type of decision focuses on the specific circumstances of the case and requires of the judge a close attention to the evidence to support the assertion that there is a real and present danger of jury tampering and that reasonable measures to guard against it will not avail. We have no reason to suppose that the circumstances arising in the present proceedings are likely to be mirrored in a significant number of future cases. We should observe, however, that, even if a considerable number of cases replicating those circumstances were to be apprehended, that could not be a reason for avoiding the result of the scrupulous application of the statutory tests.

[35] Mr McCollum disputed Mr McCrudden's claim that the applicants were not alerted to the issue in relation to the impact that substantial security measures would have on the jury. He strongly asserted that he had raised the matter in argument before Stephens J. It is not necessary to resolve this disagreement. The applicants have had full opportunity to deal with the issue before this court and we have reached the same conclusion as did the trial judge.

What is the effect of a failure to comply with section 46?

[36] We have already stated our conclusion that section 46 (7) expressly permits an order under section 44 to be made even if section 46 has not been complied with. This, in short order, deals with Mr Rodgers' argument that Stephens J was wrong to make the order under appeal because Hart J had not applied section 46. For that reason it is unnecessary to reach a final conclusion on the argument about whether section 46 was in force at the time that Hart J discharged the jury.

[37] We should also say, however, that this course would have been open to the judge in any event. Indeed, we do not consider that he could have done other than entertain the application under section 44. The trial before Hart J had terminated. There can be no question that a further trial had to take place, irrespective of whether the jury was properly discharged or not – see *R v Elia* [1968] 2 All ER 587. The suggestion that Stephens J was constrained to

order that this be by judge and jury because the original jury had been wrongly discharged is, in our view, simply unsustainable.

Conclusions

[38] For the reasons that we have given, we consider that the learned trial judge was correct to order that this trial should proceed without a jury. The application for leave to appeal is therefore dismissed.