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Judgment: approved by the Court for handing down

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*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

CRAIGAVON CROWN COURT
(AT BELFAST)

THE QUEEN

-v-

ROBERT BLACK

HART J

[1] Robert Black is charged with the kidnapping and murder of Jennifer Cardy on 12 August 1981. He has been returned for trial by the Magistrates' Court on those charges, and during the committal proceedings the district judge (Magistrates' Court) granted applications made by the prosecution to admit bad character evidence relating to the defendant.

[2] The defendant now applies for the entry of a No Bill under the provisions of s. 2(3) of the Grand Jury (Abolition) Act (Northern Ireland) 1969 (the 1969 Act). Mr Berry QC (who appears for the defendant with Ms Fiona Doherty) argues that bad character is inadmissible at this stage, relying upon my ruling in R v Porter and Regan [2009] NICC 77. Mr Kerr QC (who appears with Mr Hedworth QC for the prosecution) submits that, contrary to my ruling in Porter and Regan, bad character evidence is admissible in principle at the No Bill stage; or, where, as in this case, bad character evidence has been admitted at the committal it thereby becomes part of the evidence contained in the committal papers and the court is obliged to have regard to it at the No Bill stage. He also argues that if the evidence is not admissible, there is in any event sufficient evidence to justify putting the defendant on trial on these charges.

[3] A similar issue has arisen in the case of R v Crilly where the prosecution seek to present the indictment on the basis of a voluntary bill lodged under s. 2(2)(e) of the 1969 Act, but because there has not been a committal hearing in the Magistrates' Court in that case different issues arise.

I have considered them separately, and this judgment and my judgment in R v Crilly are intended to be read together.

[4] The nature of the applications in this case and in Crilly requires the court to place the role of the Crown Court judge and the function of the No Bill procedure in their historic context. The role of the grand jury in criminal cases was to decide whether to permit a complainant to "present", that is place before the court, an indictment containing the charge(s) against a defendant. If the grand jury was satisfied that there was sufficient evidence to justify the defendant being placed on trial it recorded its decision by marking "true bill", on the indictment. The indictment was then delivered to the court and the defendant arraigned upon the indictment, and entered his plea of guilty or not guilty as the case required. If the defendant pleaded not guilty a trial followed. If the grand jury was not satisfied that there was sufficient evidence to justify the accused being placed on trial then they marked the indictment "no bill", the prosecution did not proceed and the defendant was discharged, although he could be proceeded against again on a further bill of indictment.

[5] In Ireland prior to 1816 no witnesses were heard by the grand jury before it made its decision to grant either a true bill or enter a no bill, but s. 1 of the Grand Jury (Ireland) Act 1816 introduced a requirement that at least one witness should be examined before the grand jury before it made its decision. See Huband, *The grand Jury in criminal cases* p. 179 and R v Campbell [1985] NI at p. 363. Before the grand jury retired to conduct its deliberations the assize judge (or chairman of quarter sessions and later the county court judge) would address (charge) the grand jury in open court on the bills before it, and offer advice to the grand jury on such of the bills that the judge considered required comment. After the judge had delivered his charge the grand jury retired and deliberated in private. It then sent each bill from its room to the judge in open court marked "true bill" or "no bill" as appropriate.

[6] Although grand juries were abolished in Northern Ireland for quarter sessions in 1926, and were abolished entirely in England in 1933, grand juries continued at assizes in Northern Ireland until the 1969 Act, and by that Act Parliament expressly preserved the No Bill power and transferred to it the judge of the Crown Court, although such a power was not preserved in England in 1933. The requirement to hear witnesses was, however, abolished in Northern Ireland by the 1969 Act, and thereafter it has been the invariable practice that Crown Court judges decide whether or not to enter a No Bill solely upon the basis of the evidence contained in the committal papers and nothing else. R v Ihab Shoukri and others [2007] NICC 22.

[7] It is noteworthy that in England and Wales since 1933 a defendant who wishes to mount a further challenge to the sufficiency of the evidence after committal and prior to the conclusion of the prosecution evidence at the trial

does not have the same right, although he is not without some means of doing so. He can apply for judicial review of the committal, or by applying on the grounds of abuse of process, although neither course is without its difficulties. See Lord Cooke of Thorndon in R v Bedwellty JJ ex p Williams [1997] AC 225 at p. 237. The defendant may also apply to the Crown Court under the Criminal Justice Act 1987 where the prosecution had served a notice of transfer of the case which returns an accused directly for trial to the Crown Court without the Magistrates' Court having considered whether or not there is sufficient evidence to justify putting the accused on trial, a procedure confined to serious fraud cases and certain cases involving children. Where a defendant is returned for trial in this way s. 6(1) of the 1987 Act permits the defendant to apply to the Crown Court that the case be dismissed, and the Crown Court judge:

> "… shall dismiss a charge (and accordingly quash a count relating to it in any indictment preferred against the applicant) if it appear to him that the evidence against the applicant would not be sufficient for a jury properly to convict him."

[8] A similar power is contained in art. 5(1) of the Criminal Justice (Serious Fraud) Order (Northern Ireland) 1988. In R v Magill and Others [2006] NICC 6 Deeny J held that the judge's function in such cases was to consider whether the evidence against a defendant "would or would not be sufficient for a jury to properly convict them". This echoed the comment by Watkins LJ on s. 6 of the 1987 Act in R v Salford Magistrates Court Ex Parte Gallagher [1994] Crim. LR 347 where he observed:

> "… that the applicant had not lost anything by being subject to Transfer Notice rather than having a committal because he was: '… as likely to persuade the judge that the Crown has no prima facie case against him as he would the stipendiary magistrate or justices if committal proceedings were to be held'".

[9] Although the function of assessing whether there was a sufficient case to justify putting a defendant on trial on indictment was originally solely that of the grand jury, the same duty was also conferred by statute upon the Magistrates' Courts in 1848 in England, and in Ireland in 1851 by the Petty Sessions (Ireland) Act 1851. Cockburn C.J. observed in R v Carden (1879) 5 Q.B.D. 1 at p. 6:

> "The duty and province of the magistrate before who a person is brought, with a view to his being committed for trial or held to bail, is to determine, on hearing the evidence for the prosecution and that for the defence, if

> there is any, whether the case is one in which the accused ought to be put on his trial. It is no part of his province to try the case."

[10] However, whilst the grand jury and the Magistrates' Court applied the same test when deciding whether a defendant ought to be put on trial before 1969, as will be apparent from the reference by Cockburn C J to the evidence for the defence, there was a crucial difference between the procedure by which this decision was made. That was because at the Magistrate's Court, but not before the grand jury, the defence could cross-examine the prosecution witnesses and call its own witnesses if it wished. As Lord Cooke pointed out in the Bedwellty Justices case

> "The right to cross-examine at a preliminary hearing finds no place in most human rights instruments, perhaps in none. It may not long survive anywhere in the United Kingdom. This case must be determined nevertheless on the footing that the right still exists here and may be of significant value, at least of a tactical kind, to the defence. Your Lordships are not entitled to prefer a changed conception of the public interest to the clear statutory law."

[11] At the Magistrates' Court the evidence was originally recorded in the form of a written deposition. At the present day in the great majority of cases the evidence is placed before the court in the form of written statements by the witnesses who do not attend, although in the not insubstantial number of cases where a "mixed committal" takes place both oral evidence and written statements are admitted. At the conclusion of the hearing the district judge decides whether or not to send the accused for trial upon the totality of the evidence placed before the Magistrates' Court. However, as I have indicated, the Crown Court judge hears no evidence and decides the issue solely upon the basis of the content of the committal papers.

[12] The position therefore remains that in Northern Ireland (except in relation to cases where there is a notice of transfer in serious fraud cases or certain children's cases) there are two distinct stages before the trial commences at the Crown Court at which a defendant is entitled to submit to a judge that there is insufficient evidence to justify his being put on trial, but there are crucial differences between the procedures at each stage. First of all, at the end of the committal hearing he may so submit to the district judge who has to make a decision based upon the evidence placed or called before him, including the evidence of any prosecution and defence witnesses who have given evidence, and that may include being cross-examined. If the defendant is sent for trial, he may make also make that application to the Crown Court judge, who applies the same test as the district judge. However,

unlike the district judge, since 1969 the Crown Court judge makes the decision solely on the basis of the evidence placed before the Magistrates' Court, and cannot hear evidence from any witnesses, whether for the prosecution or the defence, or take into account any notice of additional evidence which the prosecution wish to present at the trial. The Crown Court judge reaches his or her own conclusion as to whether or not there is sufficient evidence to put the defendant upon trial, but does so only on the basis of the totality of the evidence before the district judge.

[13] It is not the function of the Crown Court judge in Northern Ireland after 1969, nor was it the responsibility of the grand jury before 1969, to decide whether a defendant is guilty of the charge(s) against him, any more than it is the responsibility of the district judge under art. 37(1) of the Magistrates' Courts Order (Northern Ireland) 1981. That would be to usurp the function of the tribunal of fact at the trial, whether the jury or in the trial judge in a non-jury case. It is the responsibility of the tribunal of fact at the conclusion of the trial to decide whether the prosecution has proved the guilt of the accused after hearing and considering all of the evidence and the submissions of the parties and the directions of law from the judge on the case, and any observations the judge makes on the evidence. The function of the district judge, and of the Crown Court judge at the No Bill stage, is solely to consider whether there is sufficient evidence to justify putting the defendant on trial, or as it is frequently said whether there is a prima facie case, meaning in either event whether there is sufficient evidence upon which a reasonable jury properly directed could, not would, convict the defendant. R v McCartan & Skinner [2005] NICC 20.

[14] The issue in the present case is what constitutes the evidence contained in the committal papers, because the prosecution rely upon those provisions which they argue now permit both bad character evidence and hearsay evidence to prove that evidence to be admitted at the committal proceedings. Mr Kerr QC in his written submissions relies upon these provisions in support of his argument that my ruling in R v Porter and Regan was wrong. Mr Berry QC submitted that my decision in Porter and Regan was correct.

[15] It is clear that both bad character and hearsay applications are now admissible in committal proceedings. In Re JA [2007] NIQB 64 the Divisional Court held that committal proceedings were criminal proceedings within the meaning of articles 17(1) and 37(1) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (the 2004 Order). In 2008 by SR 2008/361 the Magistrates' Courts Rules (Northern Ireland) 1984 were amended to provide that bad character and hearsay evidence could be adduced at committal proceedings. Rule 149AR (4) now provides that:

> "Subject to paragraph (5A), a prosecutor who wants to adduce evidence of a defendant's bad character or

> to cross-examine a witness with a view to eliciting such evidence, under Article 6 of the 2004 Order, shall give notice in Form 88C."

Rule 149AR (5A) is in the following terms:

> "In respect of a preliminary investigation or preliminary inquiry, notice under paragraph (4) shall be served on the clerk of petty sessions and on every other party to the proceedings not less than 14 days before the date fixed for the hearing."

Rules 149AS (4) and (5A) inserted similar provisions in respect of giving notice of intention to adduce hearsay evidence at committal proceedings.

[16] The combined effect of the decision in JA's case and the amendments to Rules 149AR and 149AS is to provide that a district judge conducting committal proceedings, whether by way of preliminary investigation or preliminary inquiry, has the power to admit bad character evidence and a related hearsay application in the course of the committal. I consider that it must inevitably follow that where such evidence is admitted it becomes part of the evidence before the district judge when he or she decides whether to commit the defendant for trial. If the defendant is committed then s. 2(3) of the 1969 Act applies. This provides:

> "The Judge presiding at the Crown Court shall, in addition to any other powers exercisable by him, have power to order an entry 'No Bill' in the Crown book in respect of any indictment presented to that court after the commencement of this Act if he is satisfied that the depositions ……. do not disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented."

[17] Whilst on one view the contents of the bad character notices, and any witness statements attached to the hearsay application to prove the contents of the bad character evidence, could be argued not to constitute "depositions", I consider that this would be an artificial and unduly narrow construction of the term, and it is not one that has been advanced by either party in the present case. If the district judge makes an order admitting the bad character evidence then that evidence is before the court and forms part of the material considered by the district judge before he or she decides whether to commit the accused for trial. That being the case, I conclude that it must inevitably follow that it is part of the depositions (that is either the

record of any oral evidence given or the written statements) which the Crown Court judge must consider when deciding whether or not to enter a No Bill.

[18] Such an order was made in the present case, and was also made in R v Porter and Regan. In Porter and Regan I was under the misapprehension that the application to admit bad character evidence was being made for the first time at the Crown Court, whereas, as counsel informed me in the present case and my own enquiries have confirmed, orders were made at the committal hearing that the bad character evidence should be admitted. I therefore accept that insofar as my decision in Porter and Regan applies to cases where bad character and hearsay evidence has been admitted at the committal proceedings the decision was wrong, and that because such evidence has already been admitted at the committal stage it forms part of the evidence which has to be taken into account when deciding whether or not to grant a No Bill. However, for the reasons I give in R v Crilly a different situation arises where there have been no committal proceedings and the application is for leave to present the indictment on foot of a voluntary bill under s. 2(2)(e) of the 1969 Act.

[19] Mr Berry QC for the defendant conceded that were I to conclude that the evidence of bad character and hearsay admitted at the committal proceedings has to be taken into account at the No Bill stage he could not argue that a No Bill should be granted. I have carefully considered the detailed analysis of the evidence and submissions contained in the written submissions put forward by Mr Kerr QC, and in view of Mr Berry's proper and realistic concession I do not consider it necessary to set them out in detail. I content myself with saying that, having considered them, even without the bad character evidence, I am satisfied there is sufficient evidence from which a jury could conclude that:

(i) the defendant had the opportunity to kidnap and murder Jennifer Cardy; and

(ii) he had the means to do so; and

(iii) from the nature of the accounts he gave to the police in relation to what Mr Kerr QC described as the accused's "fantasy", that, although no explicit admissions were made, the nature and tenor of those statements demonstrate that he had the motive to, and did, kidnap and murder Jennifer Cardy. I therefore refuse the application for No Bill and the defendant must be arraigned on these charges.